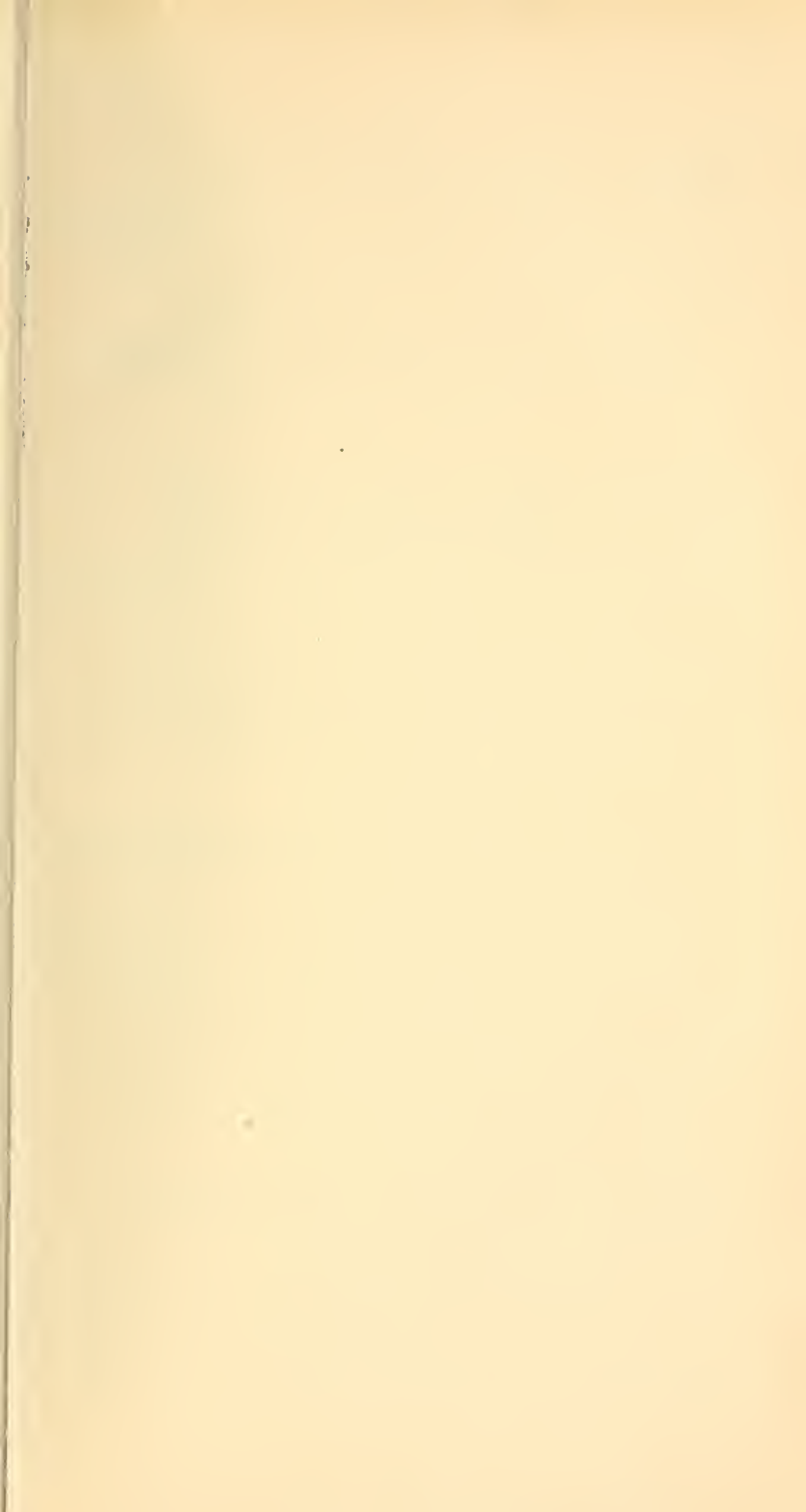


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THE
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SOUVENIR VOLUME.

A SELECTION OF
CASES AND NOTES
OF GENERAL VALUE AND AUTHORITY,
SELECTED, REPORTED AND
ANNOTATED.

BY
A. C. FREEMAN
AND HIS ASSOCIATE EDITORS.

TAKEN FROM THE FIRST THIRTY-TWO VOLUMES OF
AMERICAN STATE REPORTS TO ILLUSTRATE
THE SALIENT CHARACTERISTICS
OF THAT SERIES.

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1893.

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PREFACE

OR

STATEMENT OF FACTS.

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The principles of the law which underlie the determination of all cases have been settled in the courts of last resort in nearly all our States. There is therefore less occasion to know what any writer thinks the law ought to be. These principles have been reiterated by the courts in the language of Greenleaf, Story and Bishop, not because of any authority which those names gave the words, but because they were accurate statements, brought conveniently to hand by the advocate; and the subsequent authority of said words was derived, not from their original utterance, but from the fact that they were adopted by the courts.

The lawyer who has frequent occasion to consult the reports will be surprised to note, if he has not already discovered, the difference in regard to the contents of the earlier and the later reports. The principles were settled some time ago, and we have now for the most part applications and illustrations of them. Questions of negligence occupy very large space in our reports. Interpretation of words in contracts, wills, statutes, etc., form an unusual proportion. To such an extent is this true, that there is great need of law dictionaries con-

structed on entirely different models, and composed of entirely different material, which shall give the definition, explanation, and limitation of living, active words in our law, rather than those which were dead letters a century ago.

NATIONAL LAW.

Our law is becoming more and more national and homogeneous. Decisions of the newer States are more and more recognized and cited in the older jurisdictions; those of the mother country less and less relied upon. The time when a lawyer was familiar with all the decisions of his own State, and only those, is past; familiarity with all decisions of all the States is impossible, hence the necessity of selection.

The preservation of all determinations of our courts has its value to the jurist, as Mr. Bishop designates him, and to the historian as well, just as evil, error, and sin have their mysterious mission in human life and morals; but the student and the practitioner find life too short for endless investigation and research. Unable to wade through the entire mass, they seek eagerly the aid of those who have selected the best, and noted and estimated the value of that which is cognate.



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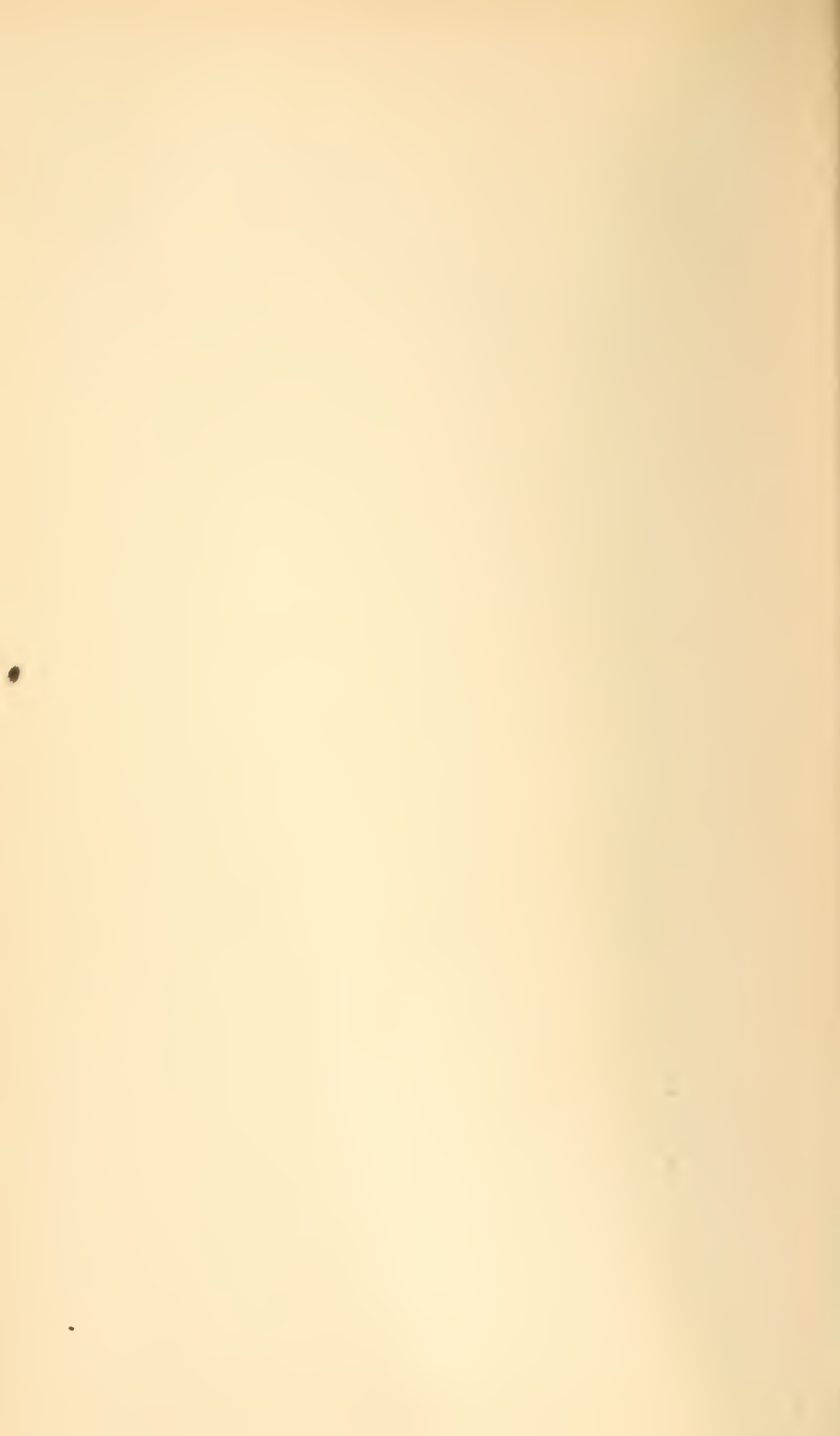
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CRAWFORD *v.* SPENCER.

[92 MISSOURI, 498.]

Sales for Future Delivery—Wagering Contracts.



CRAWFORD v. SPENCER.

[92 MISSOURI, 438.]

SALE OF GOODS TO BE DELIVERED IN FUTURE is valid, though there is an option as to the time of delivery, and the seller has no means of getting them but to go into the market and buy. But if, under guise of such contract, valid on its face, the real purpose and intention is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and the market price only paid, the transaction is a wager, and the contract void.

TO RENDER CONTRACT FOR SALE OF GOODS to be delivered in future void as a wagering contract, it is not enough that one party only intended a speculation in prices; it must be shown that both parties did not intend a delivery of the subject-matter, but contemplated and intended only a settlement of the difference between the contract and the market price.

BROKER MAY NEGOTIATE CONTRACT FOR SALE of goods to be delivered in future, without being privy to an illegal intent of the principals, rendering it void; and being innocent, he has a meritorious ground for the recovery of compensation for services and advances.

WHEN BROKER IS PRIVY TO UNLAWFUL DESIGN OF PARTIES to a contract for the sale of goods, to be delivered in future, and brings them together for the purpose of entering into the illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.

WAGERING CONTRACT FOR FUTURE SALES is not within the provisions of the Missouri criminal statutes, making gambling notes void in the hands of the holder; therefore a note based on such contract is not void in the hands of an indorsee before maturity, simply because based upon such consideration.

NOTE BASED UPON ILLEGAL WAGERING CONTRACT assigned as collateral, with an extension of time for the payment of the principal debt, constitutes the assignee a holder for value for a new consideration, and freed from the equities existing between the original parties of which he has no notice, the collateral not being due when assigned, and he can enforce his security to the extent of the debt due him from his assignor.

BILL OF EXCEPTIONS CONSISTING OF TESTIMONY of witnesses, letters, etc., as taken by the stenographer, and copied, signed by the judge, attached together, and followed by a skeleton bill of exceptions,—as, “Plaintiff was then sworn as a witness, and testified as follows [here insert his testimony],” and so as to various witnesses, depositions, etc., except that the motion for a new trial is copied in full, and all is attached together and signed by the judge,—is sufficient, under the Missouri practice, and authorizes the clerk to fill up the skeleton bill with the evidence, depositions, etc., when called for.

Campbell, for the appellants.

Reynolds, Dinning, and Byrns, and Thomas, for the respondent.

By Court, BLACK, J. The plaintiff brought this suit to enjoin the proposed sale of real estate under a deed of trust given by him to secure his note, dated the 9th of November,

1881, for five thousand dollars, due in one hundred days, and payable to the order of Harlow, Spencer, and Company. The members of this firm were made defendants by the petition, but it appearing that the note had been assigned to D. R. Francis and Brother, the members of that firm were brought in by amendment, and the suit proceeded against all these parties and the trustee to a final decree, as prayed for by the plaintiff.

The ground for relief is, that the note grew out of alleged gambling contracts, for the purchase and sale of wheat and corn. The evidence shows that the plaintiff, who resided at De Soto, in this state, had been, for some months prior to the date of the note, speculating in option deals in grain, through Harlow, Spencer, and Company, brokers, at St. Louis, and through them he became a member of the Merchants' Exchange. At the date of the note the brokers called upon the plaintiff for two thousand dollars margin, in addition to what he had before paid. At that time they were indebted to him in the sum of \$2,536, on account of closed transactions, but they were then carrying unclosed deals, upon which margins were due to them. On the entire account, it is clear that plaintiff owed them as much as two thousand dollars, and perhaps as much as five thousand dollars. Plaintiff was about to leave the state, on matters connected with his business as railroad contractor, and he states that he gave the note and deed of trust to them, that they might use it to raise money if it became necessary so to do, on account of pending or future deals. Harlow, Spencer, and Company say the note and deed of trust were given to them to secure them against loss, as the plaintiff desired to use his money in other business; and this, we conclude, was the real nature of the transaction, for it cannot be claimed but the brokers, at the date of the note, were entitled to at least two thousand dollars, on account of the face of the then past and pending transactions.

Harlow, Spencer, and Company failed on the 10th of February, 1882. They then had contracts for twenty thousand bushels of May corn, and thirty thousand bushels of May wheat, which they had bought for plaintiff. They instructed the persons from whom they had purchased the grain to close out the deals, which was done, and an account rendered for the loss, which was settled by the brokers. Harlow, Spencer, and Company then rendered an account to the

plaintiff, showing a balance due to them of \$7,128. When Harlow, Spencer, and Company failed, they owed D. R. Francis and Brother, who were also brokers, some twenty-six thousand dollars, and they turned the plaintiff's note over to the latter firm, on account of that indebtedness.

There is much conflict in the direct evidence of the plaintiff and the members of the firm of Harlow, Spencer, and Company, as to the real character of these transactions. The plaintiff says he became acquainted with a member of the firm, and after frequent conversations as to the speculations then going on, he concluded to make some deals; that it was the distinct understanding between him and the brokers that no grain would be delivered or received, but that differences only would be settled, and in this he is corroborated by the evidence of Mr. Norton, who was interested with the plaintiff in some of the early transactions. Harlow, Spencer, and Company say there was no such understanding, and that the deals were to be, and were, all made in good faith, and contemplated an actual delivery of the commodity, though delivery might be dispensed with. The brokers did buy and ship to plaintiff a small quantity of corn for use, but that was paid for at the time, and does not enter into the transactions in question; the difference between the manner in which that transaction was conducted and these in question is of some significance. It is an undisputed fact in the case that not a grain of wheat or corn was ever delivered under any of the contracts in question. They were all closed out and settled by the adjustment of differences, and in all cases before the maturity of the contracts. That they were all mere speculations is not denied. The plaintiff made, and intended to make, no arrangement for the delivery or reception of any of the grain, and this was at all times well known to the brokers. The brokers were engaged in an extensive business, many times in excess of the amount of produce handled by them. It was the especial duty of one of the firm to look after transactions like those in question. If we look to the bare assertion of the parties, on the one side and the other, we might well conclude that plaintiff has failed to make out a case; but if we look to the attending circumstances, which we must do, we can but conclude that these transactions, as between the plaintiff and the brokers, were mere speculations upon the future price of wheat and corn, with a complete understanding, on the part of both, that no grain was, in any case, to be

received or delivered. It is true the contracts were all made in the names of the brokers, the name of the real principal not appearing; that they were in writing, and, under the rules of the exchange, the purchaser had the right to call for the commodity; but they were made by the plaintiff's brokers, in compliance with their understanding with him, and it is believed with an implied understanding with the persons with whom the deals were made that no grain was to be delivered.

The law is now well settled, that a sale of goods to be delivered in the future is valid; such a contract is valid, though there is an option as to the time of delivery, and though the seller has no other means of getting them than to go into the market and buy them; but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager, and the contract is void. It is not enough to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences. The burden of showing the invalidity of the contract rests upon the party asserting it: *Irwin v. Williar*, 110 U. S. 499; *Cockrell v. Thompson*, 85 Mo. 510.

With respect to a suit by the brokers for services rendered and moneys advanced for the principal in procuring these wagering contracts, it was said, in *Irwin v. Williar*, 110 U. S. 499: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that, when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transactions." In the present case, the note was given by the plaintiff to the brokers to protect and save the latter harmless because of these illegal transactions, then pending, and thereafter to be made. The illegal ventures were carried on by the brokers in

their own names, and they were parties thereto from first to last,—parties to the agreements which made the contracts illegal. The case comes clearly within the principles asserted in the case last cited, where it is said the brokers cannot recover.

In the case of *Cockrell v. Thompson*, 85 Mo. 513, Cole Brothers were the brokers or factors. They made the ventures for Cockrell and Thompson. The deals were closed out, and Cockrell then settled with the brokers, and sued Thompson for one half of the losses thus paid to Cole Brothers. From the report of the case, it would seem that the contracts for the purchase and sale of the wheat were made in the name of Thompson and Cockrell by the factors. At all events, it was not alleged or shown that Cole Brothers did not make for Cockrell and Thompson valid contracts. There was no charge that any seller or buyer who dealt with Cockrell and Thompson through the brokers did not intend to deliver or receive the wheat. It did not, therefore, appear, nor was it alleged, that the contracts made were illegal. In the present case, we are satisfied that it was not only the understanding with plaintiff and his brokers that the deals were mere speculations on prices, but that such was also the character of the contracts, as between the brokers and the persons with whom they made the contracts. There is therefore nothing in the Cockrell-Thompson case inconsistent with the principle of law before asserted. It follows that the plaintiff is entitled to the relief demanded, as against Harlow, Spencer, and Company.

It remains to be seen whether he is entitled to the relief as against Francis and Brother. We do not agree with counsel for the plaintiff, that the note is void in the hands of a *bona fide* indorsee, because of our statute upon the subject of gambling. These statutes, section 5721–5723, Revised Statutes, 1879, make all notes “where the consideration is money or property won at any game or gambling device” void. The assignment of such a note, the statute says, shall not affect the defense. Under these statutes it was held in *Hickerson v. Benson*, 8 Mo. 9, 40 Am. Dec. 115, that a wager on the result of an election was not within their meaning. Subsequently the statute was so amended (sec. 5726) as to include bets and wagers on elections, but the amendment does not include such contracts as those here in question. The sections of the statute before noted are evidently designed to be in aid of the criminal law. This much is said in the case of *Williams v.*

Wall, 60 Mo. 320. It cannot be said that contracts like those in question come within the provisions of the criminal statutes. These wagering contracts are void, not because prohibited by statute, but because they are against public policy. The note is not void in the hands of an indorsee before maturity, simply because based upon such a consideration. This is the view taken of the statute in *Third National Bank v. Harrison*, 10 Fed. Rep. 243, and we believe it to be the correct one.

The evidence does not show that Francis and Brother had notice of the infirmity existing in the note when they took it, which was before maturity; nor is the validity of the debt due to them from Harlow, Spencer, and Company fairly impeached. But the further claim is, that they took the note as collateral security for a pre-existing debt, and therefore hold the note subject to any defense existing between the original parties. The proof is, that Harlow, Spencer, and Company owed Francis and Brother twenty-six thousand dollars, on open account. The day before Harlow, Spencer, and Company failed, they gave to Francis and Brother notes, including the one in question, amounting to twelve thousand dollars, in payment of that amount of the indebtedness; this left fourteen thousand dollars unpaid, which was settled and paid at fifty cents on the dollar, and the entire account receipted in full. Afterwards, Harlow, Spencer, and Company took up half the notes, by a cash payment; this left six thousand dollars of the notes, including the one in question, in the hands of Francis and Brother; some of the notes were small, and to avoid protest fees, Harlow, Spencer, and Company, who were indorsers, gave Francis and Brother their note, also, for six thousand dollars, the latter retaining plaintiff's note. There is still due on this note from six hundred to two thousand dollars; the evidence is not definite in this respect.

In *Goodman v. Simonds*, 19 Mo. 107, it was said: "We do not say that a bill of exchange, passed to a person in payment of a pre-existing debt, would be liable in his hands, without notice, to the equities or defenses of the original parties; but that the holder of a bill merely as collateral security for a pre-existing debt, having given no value for it,—no consideration for it,—holds it liable to such equities." This case was cited, but not mentioned in the opinion, in the subsequent case of *Boatman's Savings Institution v. Holland*, 38 Id. 51. Subsequently, it was held that one who takes a note as collateral

security for a debt then created is a holder for value: *Logan v. Smith*, 62 Id. 455. And still later it was held that if the creditor extends the time of the payment of the principal debt until the collateral shall become due, the agreement to delay constitutes the transferee of the collateral a holder for value: *Deere v. Marsden*, 88 Id. 512. Where there is a new consideration at the time the collateral is given, such as the extension of the time of the payment of the principal debt, there can be no doubt but the transferee of the collateral takes it freed from equities existing between the original parties, of which he has no notice, the collateral not being due when transferred. Where there is no such new consideration, there is much conflict in the authorities. But in this case, we are satisfied that the notes, amounting to twelve thousand dollars, were taken in actual payment of that amount of the indebtedness of Harlow, Spencer, and Company, and that being so, Francis and Brother took the note freed from the equities existing as between plaintiff and Harlow, Spencer, and Company: *Daniel on Negotiable Instruments*, 3d ed., sec. 332.

It is true that after Harlow, Spencer, and Company gave Francis and Brother their note for six thousand dollars, the plaintiff's note for five thousand dollars is spoken of as a collateral to the six-thousand-dollar note; but we do not see that the giving of the new note by Harlow, Spencer, and Company, as a substitute for their indorsement, puts Francis and Brother in any worse condition than they were when they took plaintiff's note in payment of five thousand dollars. In any possible view of the case, payment of five thousand dollars of the indebtedness of Harlow, Spencer, and Company to Francis and Brother was extended until the note in question matured, and had it been received by Francis and Brother as collateral security, and not in payment, the extension of time, under the authorities before cited, would have constituted them holders for value, for a new consideration. On the evidence as it now stands in this case, Francis and Brother are entitled to enforce this security to the extent of the amount due to them from Harlow, Spencer, and Company.

3. It is insisted by the plaintiff, respondent here, that the evidence is not preserved by the bill of exceptions, and for that reason the judgment should be affirmed. In obedience to a writ of *certiorari*, issued at the instance of the plaintiff, the clerk has sent up an exact copy of the bill of exceptions as it was when signed by the judge and filed in the court below.

It consists of 172 pages of testimony of witnesses, letters, and the like, as taken down and copied by the stenographer, attached together by means of strings. Then follows a skeleton bill of exceptions. As an example, it states: "Plaintiff was then sworn as a witness, and testified as follows [here insert testimony of Samuel W. Crawford]"; and so with the various witnesses and depositions and motions, except the motion for new trial, which is copied in full; and then follows the signature of the judge. All these papers are attached together by another fastening. The skeleton bill was made out in compliance with the practice which prevails in this state. The depositions and motions were sufficiently identified, and the evidence of the witnesses sworn in open court was written out, and actually attached to the skeleton bill before the judge signed the same. No more could be desired. The bill is sufficient in all respects. Under these circumstances, the clerk was authorized to fill up the skeleton bill with the evidence, depositions, and motions, when called for.

There is no need of a new hearing, so far as the members of the firm of Harlow, Spencer, and Company are concerned, and the judgment is, therefore, as to Corwin B. Spencer, John F. Carpenter, and Thomas H. Morgan, affirmed; but as to the other defendants the judgment is reversed, and the cause remanded for a new hearing on the issues between them and the plaintiff.

CONTRACTS FOR SALE OF PERSONAL PROPERTY TO BE DELIVERED IN FUTURE. — The question of the validity of contracts for the sale of personal property to be delivered in the future — sometimes called "futures" — is one of special importance in this country. These contracts may be entirely valid, or they may be objectionable as wagering or gaming contracts, either on general principles, or because obnoxious to some statutory provision. The purpose of this note will be to discuss the question in all its bearings.

STOCK-JOBGING ACTS, AND OTHER STATUTES. — In 1734, when speculation in public stocks or securities had become so prevalent that the whole business community was infected and demoralized by it, Parliament passed "An act to prevent the infamous practice of stock-jobbing": 7 Geo. II., c. 8; which was made perpetual in 1837: 10 Geo. II., c. 8. The object of the act was to prevent gambling in certain funds by parties who never intended to buy or sell, but merely to speculate upon the future price of stock, by making what are called "time bargains," and compounding for differences: *Dos Passos on Stockbrokers*, 383. It was directed against fictitious sales of stock; and was not intended to affect *bona fide* sales, where the stock was actually transferred, although the seller was not possessed of it at the time of making the contract: *Mortimer v. McCallan*, 6 Mees. & W. 58; nor did it apply where the seller was really possessed of the stock intended to be transferred: *Sanders v. Kentish*, 8 Term Rep. 162; *Child v. Morley*, 8 Id. 610;

although the broker who made the sale did not disclose the name of his principal when the bargain was made: *Child v. Morley*, *supra*. Again, the act only applied to "public" stocks and securities, and not to railway and joint-stock shares: *Williams v. Trye*, 18 Beav. 366; *Hewitt v. Price*, 4 Man. & G. 355; 5 Scott N. R. 227; Time bargains in foreign funds were, furthermore, not within its prohibitions: *Elsworth v. Cole*, 2 Mees. & W. 31; 2 Gale, 220; *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Oakley v. Righy*, 3 Scott, 194; 2 Bing. N. C. 732; *Morgan v. Pebrer*, 4 Scott, 230, 235; 3 Bing. N. C. 457, 463; *Henderson v. Bise*, 3 Stark. 158; nor were such agreements illegal by the common law: *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722. The statute was thus of limited operation; but nevertheless, a change of sentiment seemingly having occurred, it was considered as imposing "unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities," and it was therefore repealed in 1860: 23 & 34 Vict., c. 28.

In two of the states of this country statutes provide that every contract, written or verbal, for the sale or transfer of stocks or bonds of the United States, or of any state, or corporation, public or private, is void, unless the vendor is at the time of making the contract the owner or assignee thereof, or authorized by such owner or assignee, or his agent, to sell and transfer the same, — Massachusetts (Pub. Stats. of 1882, c. 78, sec. 6) and South Carolina (Stats. of 1883, No. 306, sec. 1). In New York a similar statute existed: 1 R. S. of 1829, p. 710, sec. 6; but it was repealed by Laws of 1858, chapter 134, which provide that no such contract shall be void or voidable for such reason, or for want or non-payment of the consideration. In the South Carolina statute there is an express saving clause, which makes the contract valid, if it was the *bona fide* intention of both the parties thereto, at the time, that the certificate, bond, or other evidence of debt should be actually delivered and received in kind at the specified period in the future. The constitution of California also says: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any court of competent jurisdiction": Art. 4, sec. 6. In conformity with the foregoing, it is held that a contract for the transfer of shares in the capital stock of a company incorporated under the statutes of another state is void, unless the contracting party was at the time of making the contract the owner or assignee thereof, or authorized to sell or transfer the same: *Barrett v. Mead*, 10 Allen, 337. So a vendor must hold the stock which he contracts to sell at a future day, free from other liabilities and obligations that have already exhausted it as the basis of a contract of sale: *Stebbins v. Leowolf*, 3 Cush. 137; but where a broker, employed to purchase stock, contracted for it in his own name with a person who owned it at the time, but had made a prior contract of sale, and the employer, for groundless reasons, repudiated the contract, but the broker, having no knowledge of or reason to suspect the prior sale by the seller, paid for the stock when tendered to him, the statute did not debar the broker from recovering from his employer the amount so paid: *Brown v. Phelps*, 103 Mass. 313. The statute avoids the contract only when the vendor does not own the shares at the time it is made. Therefore, a contract to deliver in the future one hundred shares of stock, the vendor owning them at the time, and having a right to transfer them, is good, although he sell all but forty shares intermediate the contract and the time of transfer: *Frost v. Clarkson*, 7 Cow. 24. So a promise by the holder of more than three hundred

shares of stock of a certain corporation to transfer three hundred shares, whenever he should acquire enough to do so and still retain a majority of the shares in the corporation, is not within the statute: *Price v. Minot*, 107 Mass. 49; nor is an agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties to the agreement, he having bought it through a broker on a margin: *Bullard v. Smith*, 139 Id. 492; nor an agreement by which one party was to purchase stocks for the other and sell them within a certain time, the profits to be divided but the loss to be borne by the former: *Barrett v. Hyde*, 7 Gray, 160. A party who has either bought or sold stock, which the vendor did not own, on time, and who has advanced the difference between the time of the sale and the time appointed for the delivery of the stock, may recover back the money paid, under 1 N. Y. R. S., p. 710, sec. 8: *Gram v. Stebbins*, 6 Paige, 124.

Statutes broader in their terms have been passed in several other states. These statutes differ in their details, but the following will indicate their general scope: The buying or selling or otherwise dealing in "futures" is made a misdemeanor in Arkansas (Dig. of Stats. of 1884, secs. 1848, 1849); Mississippi (Laws of 1882, c. 117); Ohio (Laws of 1885, p. 254; R. S., sec. 6934 c); Texas (Laws of 1887, c. 113); in other states the statutes say that the buying or selling of stocks, bonds, grain, cotton, petroleum, pork, or any other commodity, on margin, without any intention of future delivery, is a misdemeanor: Iowa (Laws of 1884, c. 93; Rev. Code of 1886, p. 959 a, confined to "mercantile or agricultural products"); Kentucky (Stats. of 1884, c. 1613, restricted to the city of Lexington); Michigan (Pub. Acts of 1887, c. 199, "on margins or otherwise"); Ohio (Laws of 1885, p. 254); Tennessee (Acts of 1883, c. 251); and the keeping of "bucket shops," or places where such business is transacted, is likewise made a misdemeanor: Iowa, Michigan, Texas; and such contracts are in words declared unlawful: Iowa, Kentucky, Michigan, Mississippi, Ohio, Tennessee; but in Iowa it is expressly provided that the act shall not apply to nor in any way affect any contracts for the actual buying or selling of any commodity, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract; and the South Carolina statute contains a similar proviso: Stats. of 1883, No. 306, sec. 1. In Wisconsin it is enacted that contracts for future delivery shall not be void when either party shall in good faith intend to perform the same; that an intention by either party not to perform the contract shall not vitiate it, if the other party shall in good faith intend to perform it; and that the contract shall not be void because the vendor is not at the time it is made the owner of the property contracted to be sold; and it is further provided that in any action on such contract it shall not be competent to show in defense, by extrinsic evidence, that the contract had any other intent or meaning than that expressed or stipulated, but evidence is admissible to show fraud, want of consideration, or that both parties intended a wagering contract: Laws of 1881, c. 81 (R. S., sec. 2319 a).

In Illinois it is provided that whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, shall be fined or imprisoned in the county jail, and all contracts made in violation of the section shall be considered gambling contracts, and void: R. S. of 1883, c. 38, sec. 130 (Crim. Code, sec. 130). In Ohio, it is also enacted that all agreements by which any person shall contract to sell or buy flour, grain, or meat, of

which he is not the owner, and has not the possession, or when the purchaser has not the means to pay, or does not intend actually to deliver or to receive and pay for the same, are illegal and void: Laws of 1885, p. 254 (R. S., sec. 6934 b). The statute of South Carolina further provides that every contract for the sale or transfer, at any future time, of any cotton, grain, meats, or any other product, shall be void, unless the party contracting to sell or transfer the same is at the time of making such contract the owner or assignee thereof, or authorized by the owner or assignee, or his agent, to enter into the contract, unless it is the *bona fide* intention of both parties that there shall be an actual delivery and receipt in kind, at the period in the future specified: Stats. of 1883, No. 306, sec. 1. In Georgia, the code, section 2638, says: "A contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party." In two states, notes, bills, bonds, judgments, mortgages, and other securities are expressly made void when the consideration is for money or property lost by reason of the prohibited contracts: Illinois (Rev. Stats. of 1883, c. 38, sec. 131; Crim. Code, sec. 131); South Carolina (Stats. of 1883, No. 306, sec. 5); and in Illinois no assignment thereof affects the defense of the person giving, granting, drawing, entering into, or executing such securities, or the remedies of any person interested therein: Sec. 136.

A few decisions have interpreted the foregoing statutory provisions. Thus it is held that the Arkansas act was not intended to prohibit contracts for future delivery, entered into in good faith, with an actual intention of fulfillment, but speculation upon chances where no delivery is contemplated, but the parties expect to settle differences: *Fortenbury v. State*, 1 S. W. Rep. 58 (Ark.). But contracts purporting on their face to be contracts of purchase or sale of grain, stocks, or other property, to be delivered at a future day, but under which neither of the parties intends to buy or sell, but both intend at the time of making the contracts to close them by a settlement of differences merely, are gambling or wagering contracts, and illegal both by statute of Tennessee and by public policy: *Dunn v. Bell*, 4 Id. 41 (Tenn.). So in Georgia, in the language of the code, a contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party: *Warren v. Hewitt*, 45 Ga. 501; *Branch v. Palmer*, 65 Id. 210; *Thompson v. Cummings*, 63 Id. 124; *Porter v. Massengale*, 68 Id. 296. In Illinois, it will be noticed, the statute prohibits options "to sell or buy." It is therefore the accepted doctrine that "puts," or privileges of delivering or not delivering the thing sold, and "calls," or privileges of calling for or not calling for the thing bought, are the only objectionable contracts within its terms: *Pickering v. Cease*, 79 Ill. 328, 330; *Pixley v. Boynton*, 79 Id. 331, 353; *Logan v. Musick*, 81 Id. 415; *Pearce v. Foote*, 113 Id. 228, 234; 55 Am. Rep. 414; 416; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Coffman v. Young*, 20 Id. 76; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Gaugar*, 8 Biss. 214 (C. C., N. D. of Ill.); *Jackson v. Foote*, 11 Id. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); *Melchert v. American Union Tel. Co.*, 3 McCrary, 521; 11 Fed. Rep. 193 (C. C.,

D. of Iowa, decided under the Illinois statute); although such contracts might be void, as wagering contracts, at the common law: See *Pickering v. Cease*, 79 Ill. 328; *Beveridge v. Hewitt*, 8 Ill. App. 467. "Time" contracts, or those where the thing is to be delivered, but an option is given the seller or buyer as to the time of delivery or receipt, within a limited period in the future, are not prohibited: *Walcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Id. 328, 330; *Wixley v. Boynton*, 79 Id. 351, 353; *Logan v. Musick*, 81 Id. 415; *Corbett v. Underwood*, 83 Id. 324, 330; 25 Am. Rep. 392, 397; *Cole v. Milmine*, 88 Id. 349; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Cujar*, 8 Biss. 214 (C. C., N. D. of Ill.); although if the parties do not intend a delivery, but simply contemplate a settlement of differences, such contracts will nevertheless be void, at the common law, as wagering contracts: *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.).

There has been considerable discussion as to whether, in the absence of special statutes, contracts of sale for future delivery, where no actual delivery was contemplated by the parties, but only a settlement of the difference between the contract price and the market price at the time appointed for delivery intended, fell within the general statutes as to gaming and wagering. This question has arisen in some cases from the English theory that such contracts were not illegal at the common law: *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Thacker v. Hardy*, L. R. 4 Q. B. D. 685; *Irwin v. Williar*, 110 U. S. 499, 510; and in other cases from the fact that by certain statutes negotiable paper, given on a gaming or wagering consideration, is invalidated in the hands of *bona fide* indorsees, for value, without notice, and before maturity. By the statute 8 & 9 Vict., c. 109, sec. 18, "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made"; and it is held that a colorable contract for the purchase and sale of railway shares, where neither party intends to deliver or accept the shares, but merely to pay differences, according to the rise or fall of the market, is gaming and wagering within the statute: *Grizewood v. Blane*, 11 Com. B. 536; *Barry v. Croskey*, 2 Johns. & H. 1; and of course this doctrine is general: See 2 Addison on Contracts, Abbott's ed., *1157; Benjamin on Sales, Bennett's 4th ed., sec. 542. A similar view has been taken by a few cases in this country, in which it has been held that such contracts were within the acts to prevent gaming and wagering, or at least were opposed to the public policy thereby established: *Cassard v. Hinman*, 1 Bosw. 207; *Bigelow v. Benedict*, 70 N. Y. 202, 206; 26 Am. Rep. 573, 576; *Barnard v. Backhaus*, 52 Wis. 593, 599, approved in *Everingham v. Meighan*, 55 Id. 354; *Lourey v. Dillman*, 59 Id. 197; *Wall v. Schneider*, 59 Id. 352, 354; 48 Am. Rep. 520, 521; *In re Green*, 7 Biss. 338, 339; 15 Nat. Bank. Reg. 198 (D. C., W. D. of Wis.); *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *In re Hunt*, 26 Fed. Rep. 739 (D. C., D. of N. J.); *McGrew v. City Produce Exchange*, 4 S. W. Rep. 38 (Tenn.); *Dunn v. Bell*, 4 Id. 41, 44 (Tenn.); but it must be admitted that a considerable straining of language is generally required to reach this result. It has also been held that a promissory note, the consideration of which grows out of a speculating transaction, is void in the hands of a *bona fide* indorsee,

for value, without notice, and before maturity, under a general statutory provision that all evidences of debt, "executed upon a gaming consideration," are void in the hands of any person: *Cunningham v. National Bank of Augusta*, 71 Ga. 400; 51 Am. Rep. 266; see also *Hawley v. Bibb*, 69 Ala. 52; *Barnard v. Buckhaus*, 52 Wis. 593; but other cases, with more reason, reach the opposite conclusion under similar statutes, although recognizing that on general considerations of public policy the notes could not be enforced between the immediate parties: The principal case; *Third National Bank v. Tinsley*, 11 Mo. App. 498; *Third National Bank v. Harrison*, 3 McCrary, 316; 10 Fed. Rep. 243 (D. C., E. D. of Mo.); *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; in Michigan *bona fide* holders, without notice, are expressly excepted: *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474.

VENDOR NEED NOT OWN PROPERTY. — It is a well-settled rule that a contract for the sale of personal property to be delivered in the future is not invalid merely because the vendor, at the time the contract was made, has not the property, nor has entered into any contract to buy it, nor has any other means of getting it than to go into the market and buy it: Benjamin on Sales, Bennett's 4th ed., sec. 542; Newmark on Sales, sec. 369; 2 Addison on Contracts, Abbott's ed., *1157; Bishop on Contracts, sec. 534; 1 Wharton on Contracts, sec. 453; Biddle on Stockbrokers, 185, 302, 309; Dos Passos on Stockbrokers, 410, 452; note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 258, by Judge Bennett; *Hibblewhite v. McMorine*, 5 Mees. & W. 462; *Mortimer v. McCallan*, 6 Id. 58; *Porter v. Viets*, 1 Biss. 177; *Clarke v. Foss*, 7 Id. 540; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 524; 11 Fed. Rep. 193, 195, and note, pages 536 and 204, respectively, by Dr. Francis Wharton; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Irvin v. Williar*, 110 U. S. 499; *Hawley v. Bibb*, 69 Ala. 52; *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154, 155; *Whitesides v. Hunt*, 97 Ind. 191, 195, 202; 49 Am. Rep. 441, 444, 448; *Sawyer v. Taggart*, 14 Bush, 727, 733; 18 Am. Law Reg., N. S., 222, 224, and note, page 230, by Charles H. Wood; *Beadles v. McElrath*, 3 S. W. Rep. 152, 154 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Rumsey v. Berry*, 65 Me. 570, 573; *Gregory v. Wendell*, 39 Mich. 337, 340; 33 Am. Rep. 390, 392; *Gregory v. Wendell*, 40 Mich. 432; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510, 519; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Kent v. Miltenberger*, 13 Id. 503; *Stanton v. Small*, 3 Sand. 230; *Cassard v. Hinman*, 1 Bosw. 207; *McLiraine v. Egerston*, 2 Robt. 422; *Tyler v. Barrows*, 6 Id. 104; *Peabody v. Speyers*, 56 N. Y. 230, 234; *Bigelow v. Benedict*, 70 Id. 202, 206; 26 Am. Rep. 573, 576; *Maxton v. Gheen*, 75 Pa. St. 166, 168; *Marshall v. Thurston*, 3 Lea, 740; *Seeleyson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 596; *Barnard v. Buckhaus*, 52 Wis. 593, 597, 599; *Wall v. Schneider*, 59 Id. 352, 354; 48 Am. Rep. 520, 521. The contrary doctrine announced in *Lorymer v. Smith*, 1 Barn. & C. 1, and *Bryan v. Lewis*, Ryan & M. 386, was overruled in the leading case of *Hibblewhite v. McMorine*, *supra*. It may be stated that such future contracts may be made for the sale of gold: *Appleman v. Fisher*, 34 Md. 540; *Peabody v. Speyers*, 56 N. Y. 230, 234; *Bigelow v. Benedict*, 9 Hun, 429, 432, affirmed in 70 N. Y. 202; 26 Am. Rep. 573; *Brown v. Speyers*, 20 Gratt. 296; a contract for the purchase or sale of gold not being opposed to public policy.

In *Gregory v. Wendell*, 39 Mich. 337, 340, 33 Am. Rep. 390, 392, Marston, J., says: "Some nice distinctions have heretofore been drawn as to the right of

a person to sell personal property not at the time owned by him, but which he intended to go into the market and buy, or as was said, that which he hath neither actually nor potentially. Courts must, however, from necessity, recognize the methods of conducting and carrying on business at the present day, and applying well-settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on, if merchants and dealers were unable to purchase or sell that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by delivery of warehouse receipts, according to custom, is also beyond dispute." "Present ownership is of less consequence than the intention of the contracting parties": *Cockrell v. Thompson*, 85 Mo. 510, 519. The fact that the particular goods are not identified is of no consequence, because, from the very nature of the contract, the sale is not of ascertained articles, but of articles of a designated kind to be selected at the time of performance, and may be discharged by the delivery of any articles answering to the general description given in the contract: *Sawyer v. Taggart*, 14 Bush, 727, 736; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 526. A note payable in the future in cotton is not illegal because the maker did not at the time have the cotton on hand ready to be delivered: *Phillips v. Ocmulgee Mills*, 55 Ga. 633. "Such a principle would make illegal every loan of corn by one neighbor to another, to be returned at the end of the season when the new crop came in": *Id.* Of course, if one has the property under his control, as a growing crop, he has the right to sell it, to be delivered at a future time: *Sanborn v. Benedict*, 78 Ill. 309; and, necessarily, a contract for the sale and transfer at a future day of a certain number of shares of stock which the vendor has at the time of delivery, and of which an actual transfer is intended, is not a stock-jobbing or wagering contract: *Noyes v. Spaulding*, 27 Vt. 420.

WAGERING CONTRACTS FOR SALE ARE VOID. — While it is thus seen that a contract for the sale of personal property, to be delivered in the future, may be valid, although the vendor has not the property at the time the contract is made, but is obliged to procure it to meet the contract, yet such a contract is only valid where the parties really intend that the property is to be delivered by the seller, and the price paid by the buyer. If the intent of the parties be merely to speculate in the rise and fall of prices, and the property is not to be delivered, but one party is to pay to the other the difference between the contract price and the market price at the time specified for executing the contract, then the transaction, whatever be its form, is a wager, and void. It has been shown above that this is the conclusion reached by *Grizewood v. Blane*, 11 Com. B. 536, and other cases under the gaming act of 8 & 9 Vict., c. 109, sec. 18, such contracts not being obnoxious to the common law of England; and that several courts of this country, in states which have not adopted the special statutes already noticed invalidating these transactions, have also been disposed to adopt the rule as a result of general acts against gaming and wagering. But in a great majority of the states the rule is adopted as a part of the American common law, and the contracts pronounced void as wagering or gambling transactions for

reasons of public policy: Benjamin on Sales, Bennett's 4th ed., American note to sec. 542; Newmark on Sales, sec. 369; Bishop on Contracts, sec. 534; 1 Wharton on Contracts, sec. 453; Biddle on Stockbrokers, 313; Dos Passos on Stockbrokers, 410; *In re Chandler*, 13 Am. Law Reg., N. S., 310; 9 Nat. Bank. Reg. 514; *sub nom. Ex parte Young*, 6 Biss. 53, and note thereto in 13 Am. Law Reg., N. S., 318, by Judge Redfield; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609, and note thereto in 5 McCrary, 89; 22 Am. Law Reg., N. S., 615, by Adelbert Hamilton; *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825; *Kirkpatrick v. Adams*, 20 Id. 287; *Bangs v. Hornick*, 30 Id. 97, 98; *Mutual Life Ins. Co. v. Watson*, 30 Id. 653; *Ward v. Vosburgh*, 31 Id. 12, 13; *Irwin v. Williar*, 110 U. S. 499; *Justh v. Holliday*, 2 Mackey, 346; *Hawley v. Bibb*, 69 Ala. 52; *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154; *Whitesides v. Hunt*, 97 Ind. 191, 195, 202; 49 Am. Rep. 441, 445, 449; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Lowce v. Young*, 59 Iowa, 364; *First National Bank v. Oskaloosa Packing Co.*, 66 Id. 41; *Tomblin v. Callen*, 69 Id. 229; *Beadles v. McElrath*, 3 S. W. Rep. 152, 154 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 524; *Rumsey v. Berry*, 65 Me. 570; *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390, 395; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510; the principal case; *Waterman v. Buckland*, 1 Mo. App. 45; *Williams v. Tiedemann*, 6 Id. 269; *Kent v. Miltenberger*, 13 Id. 503; *Third National Bank v. Tinsley*, Cir. Ct. of Mo., MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; *Rudolf v. Winters*, 7 Neb. 125; *Kingsbury v. Kirwan*, 77 N. Y. 612, affirming 11 Jones & S. 451; *Yerkes v. Salomon*, 11 Hun, 471; *Nichols v. Lumpkin*, 19 Jones & S. 88; *Brua's Appeal*, 55 Pa. St. 294; *Swartz's Appeal*, 3 Brewst. 131; *Thompson's Estate*, 15 Phila. 532; *Maxton v. Gheen*, 75 Pa. St. 166, 168; *North v. Phillips*, 89 Id. 250, 256; *Ruchizky v. De Haven*, 97 Id. 202, 209; *Griffiths v. Sears*, 112 Id. 523; *Waugh v. Beck*, 114 Id. 422; *Marshall v. Thruston*, 3 Lea, 740; *Beadles v. Ownby*, 16 Id. 424; *Dunn v. Bell*, 4 S. W. Rep. 41 (Tenn.); *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 596. Of course an agreement to make a "corner" in stock, by buying it up so as to control the market, and then purchasing for future deliveries, would be invalid: *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327.

The doctrine is well stated by Franklin, C., after a review of cases, in *Whitesides v. Hunt*, 97 Ind. 191, 202, 49 Am. Rep. 441, 448: "We conclude from the foregoing authorities that in this class of cases the correct rule is, that where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance, and not the shadow, and if the parties mutually understood and intended that the purchaser should pay for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin, and increase the same, like the purchaser, in order to secure the delivery at maturity, does not vitiate the contract. But if, at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price, — if the price should decline the purchaser paying the difference, if it should rise the seller paying the advance, the contract price being the basis upon which to

calculate differences, — in such case, it would be a gambling contract, and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time."

If "margins" are deposited upon such an illegal transaction, they cannot be recovered back: *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390; *Thompson v. Cummings*, 68 Ga. 124; compare *In re Chandler*, 13 Am. Law Reg., N. S., 310; 2 Nat. Bank. Reg. 514; *sub nom. Ex parte Young*, 6 Biss. 53; but in *Norton v. Blinn*, 39 Ohio St. 145, it was decided that while the policy of the law is to leave the parties to such a transaction where it finds them, yet an agent who receives money of his principal to invest in illegal options was bound to account therefor.

Money loaned to pay losses incurred in stock-jobbing transactions, it has been held, could be recovered back: *Faikney v. Reynolds*, 1 W. Black. 633; 4 Burr. 2069; *Petrie v. Hannay*, 3 Term Rep. 418; *Steers v. Lashley*, 6 Id. 61, 62; but it was more recently decided that if the money be knowingly lent for the express purpose of enabling the borrower to settle such losses, it cannot be so recovered: *Cannon v. Bryce*, 3 Barn. & Ald. 179, 185; and one who, knowingly, and with the purpose of furthering a gambling transaction in purchasing commodities on margin, lends money to another, cannot recover it; but it is not enough to defeat the recovery that the lender knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction: *Waugh v. Beck*, 114 Pa. St. 422.

A promissory note given for a debt arising in whole or in part out of an illegal transaction is, as between the parties, void: *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593; and where some of the transactions which enter into the consideration of a note and mortgage are merely gaming transactions, they render the whole security void: *Barnard v. Backhaus*, 52 Wis. 593. Nor can negotiable paper tainted with the illegality be recovered upon by an indorsee thereof with notice: *Steers v. Lashley*, 6 Term Rep. 61; nor when the paper was indorsed after maturity: *Brown v. Turner*, 7 Id. 650; and of course the assignee of a bond who takes with notice cannot recover: *Amory v. Meryweather*, 4 Dowl. & R. 86; 2 Barn. & C. 573; *Griffiths v. Sears*, 112 Pa. St. 523; but negotiable paper which could not be enforced between the immediate parties because of illegality is good in the hands of a bona fide indorsee, without notice, for value, and before maturity: *Greenland v. Dyer*, 2 Man. & R. 422; *Day v. Stuart*, 6 Bing. 109; 3 Moore & P. 334; the principal case; *Third National Bank v. Tinsley*, 11 Mo. App. 498; *Third National Bank v. Harrison*, 3 McCrary, 316; 10 Fed. Rep. 243 (D. C., E. D. of Mo.); *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249 (Mo. Cir. Ct.); *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474; unless, as in Illinois, it is expressly made void by statute: *Root v. Merriam*, 27 Fed. Rep. 909 (C. C., D. of Neb., decided under the Illinois statute); *Tenney v. Foote*, 4 Ill. App. 594, affirmed in 95 Ill. 99; compare *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); or held to be void under general statutes against gaming and wagering: *Cunningham v. National Bank of Augusta*, 71 Ga. 400; 51 Am. Rep. 266; *Hawley v. Bibb*, 69 Ala. 52; *Barnard v. Backhaus*, 52 Wis. 593.

INTENTION OF PARTIES THE CRITERION. — As above intimated, it is the real intention of the parties to a contract for sale for future delivery which makes it valid or invalid: Note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Hentz v. Jewell*, 4 Woods, 656; 20 Fed. Rep. 592; *Bennett v. Covington*, 22 Id. 816; *Justh v. Holliday*, 2 Mackey, 346;

Gregory v. Wendell, 39 Mich. 337, 343; 33 Am. Rep. 390, 395; 40 Mich. 432. "The real intention of the parties," says Adams, C. J., in *Tomblin v. Callen*, 69 Iowa, 229, 231, "of course, must determine the character of the transaction; and in arriving at the intention, we must be governed by the evidence, and not by conjectures based upon our knowledge of other contracts." "The actual intention may be difficult to prove or disprove; but when once the fact is established one way or the other, there is no difficulty in applying the law": *Hatch v. Douglas*, 48 Conn. 116, 127; 40 Am. Rep. 154, 155.

In order, moreover, to render the contract invalid, the illegal intent must have been participated in by both the parties. If one of the parties intends an actual purchase and sale, the contract as to him will not be affected by an illegal intent or purpose of the other not communicated or concurred in: Newmark on Sales, sec. 369; Benjamin on Sales, Bennett's 4th ed., American note to sec. 542; 1 Wharton on Contracts, sec. 453; note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Lehman v. Strassberger*, 2 Woods, 554, 564; *Clarke v. Foss*, 7 Biss. 540; *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263; *Bangs v. Hornick*, 30 Fed. Rep. 97, 98; *Ward v. Vosburgh*, 31 Id. 12, 13; *Pizley v. Boynton*, 79 Ill. 351, 354; *McCormick v. Nichols*, 19 Ill. App. 334; *Whitesides v. Hunt*, 97 Ind. 191, 210; *Murry v. Ocheltree*, 59 Iowa, 435; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Gregory v. Wendell*, 40 Mich. 432; *Clay v. Allen*, 63 Miss. 426, 439; *Cockrell v. Thompson*, 85 Mo. 510; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Teasdale v. McPike*, 25 Id. 341; *Williams v. Carr*, 80 N. C. 294, 298; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520. "If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property which is the subject of the sale, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon": *Murry v. Ocheltree*, *supra*. "In order to make a wager, both parties must intend it to be such. If one intends a *bona fide* sale or purchase, while the other means only a gambling risk upon prospective differences, there will be no propriety in depriving the former of the benefit of his contract because of a secret reservation in the mind of the latter": *Williams v. Tiedemann*, *supra*. But the effect of the Tennessee act of 1883, chapter 251, is to declare the dealing in futures, where either party intends a mere speculation on the rise and fall of prices, gaming: *McGrew v. City Produce Exchange*, 4 S. W. Rep. 38 (Tenn.).

The validity of the contract, furthermore, depends upon the intent of the parties at the time it is made. It is therefore perfectly competent for the parties, after having entered into a valid contract for sale for future delivery, to agree upon a settlement thereof by payment of differences between the contract price and the market price, instead of by actual delivery: Newmark on Sales, sec. 369; *Clarke v. Foss*, 7 Biss. 540; *Gilbert v. Gaugar*, 8 Id. 214; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Ward v. Vosburgh*, 31 Id. 12, 13, 15; *Sawyer v. Taggart*, 14 Bush, 727; 18 Am. Law Reg., N. S., 222; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Kent v. Miltenberger*, 13 Mo. App. 503, 508, 510; *Wall v. Schneider*, 59 Wis. 352, 359; 48 Am. Rep. 520, 526; for, as is tersely observed by Thompson, J., in *Kent v. Miltenberger*, *supra*, "it has never been held that a lawful contract may not be discharged by the voluntary act of the obligee in accepting a pecuniary equivalent for its performance." And if delivery is in fact intended, the contract is valid, it is held, although the parties may at the same time contemplate the possibility of a settlement by a payment of differences: *Tomblin v. Callen*, 69 Iowa, 227. It may here be noticed that parties, after having

made an illegal contract, are at liberty to enter into another contract in relation to the same subject-matter as though no former contract existed, but the new contract must be in no sense a continuation of the old; the old contract must be utterly abandoned, so that neither its terms nor its consideration, nor any claim or right springing out of it, shall enter into the new: *Webster v. Sturges*, 7 Ill. App. 560.

The fact that speculation was the object is not material, if the parties in good faith intend an actual purchase and sale: *Gregory v. Wendell*, 40 Mich. 432, 437; *Sawyer v. Taggart*, 14 Bush, 727; 18 Am. Law Reg., N. S., 222; *Smith v. Bouvier*, 70 Pa. St. 325. "The right to buy grain in the open market in the hope to profit by a rise in the market value," says Cooley, J., in *Gregory v. Wendell*, *supra*, "is as plain as the right to buy wild lands or any other property."

The question whether the contract is a wagering one or not is a question of fact for the jury: *Ferreira v. Gabell*, 89 Pa. St. 89; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Gregory v. Wendell*, 39 Mich. 337, 343; 33 Am. Rep. 390, 395; 40 Mich. 432.

FORM OF CONTRACT DOES NOT CONTROL. — As observed above, the intent of the parties controls. The form of the contract is consequently not conclusive as to the true nature of the transaction, nor, indeed, should much stress be placed thereon: *In re Green*, 7 Biss. 338, 339; 15 Nat. Bank. Reg. 198; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 526; 11 Fed. Rep. 193, 196; *Bartlett v. Smith*, 4 Id. 388, 395; 13 Fed. Rep. 263, 268; *Justh v. Holliday*, 2 Mackey, 346; *Tenny v. Foote*, 4 Ill. App. 594, 599, affirmed in 95 Ill. 99, 109; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Colderwood v. McCrea*, 11 Id. 543; *Coffman v. Young*, 20 Id. 76; *Whitesides v. Hunt*, 97 Ind. 191, 202; 49 Am. Rep. 441, 448; *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390, 395; *Barnard v. Backhaus*, 52 Wis. 593, 600; *Fortenbury v. State*, 1 S. W. Rep. 58 (Ark.). "It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intention, and the real nature of the transaction, if it be illegal": *Barnard v. Backhaus*, *supra*, *per* Cole, C. J.

A sale "short," or in other words, a sale of that which the seller does not own or possess, but which he expects to buy in at a lower price than that for which he sells, is not *ipso facto* a wager: Note to *Thacker v. Hardy*, 18 Am. Law Reg., N. S., 259, by Judge Bennett; *Maxton v. Gheen*, 75 Pa. St. 166, 168; and see the authorities cited *supra*, "Vendor need not Own Property." Nor does the fact that one of the parties, generally the vendor, is given an option as to the time of delivery, render the transaction objectionable: Note to *Sawyer v. Taggart*, 18 Am. Law Reg., N. S., 230, by Charles H. Wood; *Melchert v. American Union Tel. Co.*, 3 McCrary, 521, 524; 11 Fed. Rep. 193, 195; *Union National Bank v. Carr*, 5 McCrary, 71; 15 Fed. Rep. 438; *Gregory v. Wattowa*, 58 Iowa, 711, 713; *Williams v. Tiedemann*, 6 Mo. App. 269, 273; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520. "The option as to the time of delivery of merchandise purchased is not illegal, if there be an agreement to make actual delivery. The optional contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered": *Gregory v. Wattowa*, *supra*. These "time" contracts, where a delivery is actually contemplated, are not, as seen above, within the Illinois statute prohibiting "options to sell or buy": *Wolcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Id. 328, 330; *Pixley v. Boynton*, 79 Id. 351, 353; *Logan v. Musick*, 81 Id. 415;

Corbett v. Underwood, 83 Ill. 324, 330; 25 Am. Rep. 392, 397; *Cole v. Milmine*, 88 Id. 349; *Tenney v. Foote*, 4 Ill. App. 594, 598, affirmed in 95 Ill. 99, 109; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Id. 467; *Colderwood v. McCrea*, 11 Id. 543; *Miller v. Bensley*, 20 Id. 528; *Gilbert v. Gaugar*, 8 Biss. 214 (C. C., N. D. of Ill.); although in Illinois, as elsewhere, if the parties do not intend a delivery, but simply contemplate a settlement of differences, such contracts are void as wagering or gaming contracts: *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.). "Puts," or privileges on the part of sellers of delivering or not delivering, and "calls," or privileges of buyers of calling or not calling for the thing sold, at their option, are not necessarily invalid: *Note to Thacker v. Hardy*, 18 Am. Law Reg., N. S., 258; *In re Chandler*, 13 Id. 310, 316; 9 Nat. Bank. Reg. 514, 521; *sub nom. Ex parte Young*, 6 Biss. 53, 66; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *Williams v. Tiedemann*, 6 Mo. App. 269, 274; although it seems they would be under the statute of Illinois; but see *In re Chandler, supra*. "That there is an element of hazard in the contract is plain. But the same hazard is incurred in every optional contract for the sale of any marketable commodity, when, for a consideration paid, one of the parties binds himself to sell or receive the property at a future time, at a specified price, at the election of the other. Mercantile contracts of this character are not infrequent, and they are consistent with a bona fide intention on the part of both parties to perform them": *Bigelow v. Benedict, supra*. And a "straddle," even, or the double privilege of a "put" and a "call," securing to the holder the right to buy or or sell to another something within a certain time, at a certain price, is not necessarily void: *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Story v. Salomon*, 71 N. Y. 420, affirming 6 Daly, 531. "We may guess that the parties were speculating upon the fluctuations in the price of the stock, and that the defendant was not required to take or deliver any stock in any case, but simply to pay differences. But a contract which can have legal interpretation and effect should not be condemned without any proof, in that way": *Story v. Salomon, supra*. But in *Kirkpatrick v. Bonsall*, 72 Pa. St. 155, 158, Agnew, J., gives the following observations, which may appropriately apply to all these optional contracts, although referring to but one kind: "It is evident such agreements can be readily prostituted to the worst kind of gambling ventures, and therefore its character may be weighed by a jury, in connection with other facts, in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, when aided by evidence, may clearly indicate a purpose to wager upon a rise or fall in the price of oil at a future day, and not to deal in the article as men usually do in that business. We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed 'speculation.'"

The mere fact, furthermore, that a margin is required to be deposited as security does not make the contract illegal: *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520; *Whitesides v. Hunt*, 97 Ind. 191, 202; 49 Am. Rep. 441, 448; *Earl v. Howell*, 14 Abb. N. C. 474, 476; *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154; nor that delivery is to be made in warehouse receipts: *Wall v. Schneider, supra*; *Gregory v. Wendell*, 39 Mich. 337, 340; 33 Am. Rep. 390, 392; nor because the contract provides that the measure of damages in case of a breach shall be the difference between the contract price and the market price on the chamber of commerce where the contract is made: *Wall v. Schneider, supra*.

EVIDENCE OF ILLEGALITY — BURDEN OF PROOF. — There is no doubt that although a contract is regular and legal on its face, it is competent to show that it was intended as a mere gambling transaction: *Clarke v. Foss*, 7 Biss. 540, 551; *Stewart v. Schall*, 65 Md. 289; 57 Am. Rep. 327; *Kent v. Miltenberger*, 13 Mo. App. 503; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); *contra: Porter v. Viets*, 1 Biss. 177; and in order to ascertain the intention of the parties, it may be shown how they were in the habit of dealing together in respect to like transactions prior to the one in controversy: *Colderwood v. McCrea*, 11 Ill. App. 543; but the illegality of a contract cannot be established by proving the usual custom of persons making such contracts, or a general expectation or understanding that such contracts were to be settled without an actual delivery: *Bennett v. Covington*, 22 Fed. Rep. 816. But contracts for future delivery are presumptively valid: Note to *Cobb v. Prell*, 5 McCrary, 90; 22 Am. Law Reg., N. S., 617; *Kent v. Miltenberger*, 13 Mo. App. 503; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); compare *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; and "in construing a contract, that construction is to be preferred which will support it, rather than one which will avoid it": *Bigelow v. Benedict*, 70 N. Y. 202, 204; 26 Am. Rep. 573, 575; *Clay v. Allen*, 63 Miss. 426. The burden of proof of establishing the illegality rests therefore upon the party who asserts it: *Newmark on Sales*, sec. 369; *Clarke v. Foss*, 7 Biss. 540, 550; *Bennett v. Covington*, 22 Fed. Rep. 816; *Bangs v. Hornick*, 30 Id. 97, 99; *Ward v. Vosburgh*, 31 Id. 12; *Pixley v. Boynton*, 79 Ill. 351, 352; *Whitesides v. Hunt*, 97 Ind. 191, 210; *Gregory v. Wattowa*, 58 Iowa, 711; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Id. 41, 46; *Beadles v. McElrath*, 3 S. W. Rep. 152 (Ky.); *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, 525; *Rumsey v. Berry*, 65 Me. 570; *Wyman v. Fiske*, 3 Allen, 238; *Clay v. Allen*, 63 Miss. 426; the principal case; *Williams v. Tiedemann*, 6 Mo. App. 269; *Kent v. Miltenberger*, 13 Id. 503; *Teasdale v. McPike*, 25 Id. 341; *McIlvaine v. Egerton*, 2 Robt. 422; *Dykens v. Townsend*, 24 N. Y. 57; *Bigelow v. Benedict*, 70 Id. 202, 206, 207; 26 Am. Rep. 573, 576, 577; *Williams v. Carr*, 80 N. C. 294, 298, although there are some expressions to the contrary: *Barnard v. Backhaus*, 52 Wis. 593, 599; *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 699; *Stebbins v. Leowolf*, 3 Cush. 137; and see *First Nat. Bank v. Oskaloosa Packing Co.*, *supra*. "We cannot assume," says Danforth, J., in *Rumsey v. Berry*, *supra*, "that any one has violated the law, and been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself for the purpose of being relieved from the obligation of a losing contract." Yet, upon the well-settled doctrine concerning negotiable instruments, if the illegality in the inception of a promissory note be shown by the maker in an action against him thereon by an indorsee, the burden is on the plaintiff to show that he acquired the paper in good faith, for value, in the usual course of business, and before maturity: *Third Nat. Bank v. Tinsley*, 11 Mo. App. 498, 502.

BROKER'S RIGHT TO COMMISSIONS AND ADVANCES. — The right of a broker who negotiates a contract for future delivery to recover commissions and advances from his principal is of course unquestionable if the contract is held to be valid: See *Roundtree v. Smith*, 108 U. S. 269; *Whitesides v. Hunt*, 97 Ind. 191, 203; *Teasdale v. McPike*, 25 Mo. App. 341; *Smith v. Bouvier*, 70 Pa. St. 325; *Maston v. Gheen*, 45 Id. 166; *Powell v. McCord*, 12 N. E. Rep. 262 (Ill.). But there is considerable difficulty and conflict of decision where the contract negotiated is invalid. In England it is well settled that neither the statute 7 Geo. II., c. 8, nor the statute 7 & 8 Vict., c. 109, sec. 18, heretofore

referred to, applies to claims by a stock-broker or share-broker against his principal so as to defeat his recovery: 2 Addison on Contracts, Abbott's ed., *1157; *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *Jessopp v. Lutwyche*, 10 Ex. 614; *Knight v. Cambers*, 15 Com. B. 562; *Knight v. Fitch*, 15 Id. 566; *Ashton v. Dakin*, 4 Hurl. & N. 869; *Rosewarne v. Billing*, 15 Com. B., N. S., 316; *Thacker v. Hardy*, L. R. 4 Q. B. D. 685; *Cooper v. Neil*, 27 Week. Rep. 159, note; and to the same effect, under the stock-jobbing act of Massachusetts, see *Wyman v. Fiske*, 3 Allen, 238; *Durant v. Bell*, 98 Mass. 161; but see *Stebbins v. Leowolf*, 3 Cush. 137. In a few cases in this country the broker's right to recover has turned upon the fact that the principal subsequently executed his note to the broker for advances and commissions in the illegal transaction: *Lehman v. Strassberger*, 2 Woods, 554 (C. C., N. D. of Ala.); *Hentz v. Jewell*, 4 Id. 656; 20 Fed. Rep. 592 (C. C., S. D. of Miss.); and see *Clarke v. Foss*, 7 Biss. 540, 553 (D. C., W. D. of Wis.); *Hawley v. Bibb*, 69 Ala. 52. "The contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract": *Lehman v. Strassberger*, *supra*; but see the language in *Seeliyson v. Lewis*, 65 Tex. 215, 222; 57 Am. Rep. 593, 599. So in Georgia it is held that where the contract is executed, an agent or broker employed by the principal to make it can recover any money advanced in the transaction by the previous authority or subsequent ratification of the principal: *Warren v. Hewitt*, 45 Ga. 501; *Heard v. Russell*, 59 Id. 25; *Champion v. Wilson*, 64 Id. 184, 188; *Thompson v. Cummings*, 68 Id. 124; and this ruling has been approved in *Williams v. Carr*, 80 N. C. 294; but in *Cunningham v. National Bank of Augusta*, 71 Ga. 400, 405, 51 Am. Rep. 266, 269, the court "are not prepared to say that we will be bound in the future by the decisions last referred to." On the other hand, in Wisconsin and New Jersey, the right of a broker to recover for advances made and services rendered concerning a gambling transaction is stringently denied: *In re Green*, 7 Biss. 338; 15 Nat. Bank. Reg. 198 (D. C., W. D. of Wis.); *Barnard v. Backhaus*, 52 Wis. 593; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *In re Hunt*, 26 Fed. Rep. 739 (D. C., D. of N. J.); upon the ground that contracts for sale for future delivery, where the parties contemplate simply a settlement of differences, are, under the general statutes relating to gaming and wagering, not simply void, but illegal, and the collateral contracts between brokers and principals are consequently affected. In New Jersey the further reason is given that one who enters into such a speculative contract with a broker is to be considered as dealing with him as a principal, and not as an agent; and this view is supported by certain other, principally Pennsylvania, cases: *North v. Phillips*, 89 Pa. St. 250; *Ruchizky v. De Haven*, 97 Id. 202; *Dickson's Ex'r v. Thomas*, 97 Id. 278; *Justh v. Holliday*, 2 Mackey, 346; but compare *Smith v. Bowler*, 70 Pa. St. 325; *Maxton v. Gheen*, 75 Id. 166; *Ferreira v. Gabel*, 89 Id. 89; but these Pennsylvania cases are much criticised: Dos Passos on Stockbrokers, 423-434; Biddle on Stockbrokers, 305, 317. In Illinois, also, a broker who deals for his principal in contravention of section 130 of the Criminal Code cannot recover his disbursements or commissions: *Coffman v. Young*, 20 Ill. App. 76; *Tenney v. Foote*, 4 Id. 594, affirmed in 95 Ill. 93; *Pearce v. Foote*, 113 Id. 228; 55 Am. Rep. 414; compare *Jackson v. Foote*, 11 Biss. 223; 12 Fed. Rep. 37 (C. C., N. D. of Ill.); and the broker is a "winner" within the meaning of section 132 of the same code, which permits an action to recover back from the winner any money or property paid on account of a gambling transaction: *Pearce v. Foote*, *supra*; *McCormick v. Nichols*, 19 Ill. App. 334, 339.

The most satisfactory doctrine on this question, however, and the one

which best accords with principle, and is sustained by the weight of authority, in the absence of some such statute as that of Illinois, is that announced by Mr. Justice Matthews, in *Irwin v. Williar*, 110 U. S. 499, 510. "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." See also *Bartlett v. Smith*, 4 McCrary, 388; 13 Fed. Rep. 263 (C. C., D. of Minn.); *Cobb v. Prell*, 5 McCrary, 80; 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609 (C. C., D. of Kan.); *Kirkpatrick v. Adams*, 20 Fed. Rep. 287 (C. C., W. D. of Tenn.); *Bangs v. Hornick*, 30 Id. 97 (C. C., D. of Minn.); *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154; *First National Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41, 48; *Stewart v. Schall*, 65 Md. 289; 57 Am. Rep. 327; the principal case; *Crane v. Whittemore*, 4 Mo. App. 510; *Kent v. Miltenberger*, 13 Id. 503; *Third National Bank v. Tinsley*, MS. opinion, quoted 3 McCrary, 323; 10 Fed. Rep. 249; *Marshall v. Thruston*, 3 Lea, 740; *Beadles v. Ownby*, 16 Id. 424; *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593, 599; *Brown v. Speyers*, 20 Gratt. 296, 309.

If the transaction between broker and principal is a gambling one, it would seem clear that it could not be validated by any form of authorization or ratification: *McCormick v. Nichols*, 19 Ill. App. 334. So where the defendant employed the plaintiff to buy and sell grain for him in form for future delivery, but in fact no grain was intended to be or ever was received or delivered, and a dispute having arisen between the parties as to who should bear the losses incurred in the speculation, and paid by the plaintiff, it was agreed that part of the losses should be borne by the plaintiff, and the balance thereof should be paid to him by the defendant, it was held that there could be no recovery upon such agreement or compromise: *Everingham v. Meighan*, 55 Wis. 354. But where a broker claimed a balance due him by his principal on account of certain stock transactions, and a third party assumed and paid the same, the principal cannot repudiate a note which he executed to the third person therefor, on the ground that the balance claimed by the broker was due on a gambling transaction: *Bangs v. Hornick*, 30 Fed. Rep. 97. Where the transactions between broker and principal are of a gambling nature, the question whether or not third persons dealing with the broker participated in the illegal intention is, it seems, immaterial: *Beveridge v. Hewitt*, 8 Ill. App. 467.

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BELL *v.* HUDSON.

[73 CALIFORNIA, 285.]

State Claims.

The COURT. For the reasons given in the foregoing opinion, the order is affirmed.

HOLDER OF NOTE CANNOT RECOVER against indorser, unless he shows due diligence in making demand upon the maker, and notice to the indorser of non-payment: *Tate v. Sullivan*, 96 Am. Dec. 597, and note 612.

BELL v. HUDSON.

[73 CALIFORNIA, 285.]

- IN ACTION FOR PARTNERSHIP ACCOUNTING, equity will refuse to interfere on the ground that the claim is stale, where plaintiff has allowed twenty-five years to elapse before attempting to enforce his rights, during all of which time he had knowledge of all the facts, and there was no impediment to the prosecution of his claim, nor had he made any demand upon defendant, nor in any way asserted his claim.
- IN ACTION FOR PARTNERSHIP ACCOUNTING, objection that the claim is stale may be raised by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.
- IN ACTION FOR PARTNERSHIP ACCOUNTING between an administrator of one partner and the representatives of the other, if the complaint is insufficient in other respects it is not cured nor made sufficient by an allegation that the real property "has at all times since the same was acquired and still does stand in the names of said partners," for the action cannot be considered as for partition, ejectment, or mesne profits, as the necessary allegations to support either are not made.

Hundley and Gale, and A. F. Jones, for the appellant.

W. C. Belcher and William G. Murphy, for the respondents.

By Court, HAYNE, C. According to the complaint, the material facts are as follows: In 1849 John A. Bell and William M. Bell became partners "in the business of buying and selling stock, and the purchase of real and personal property." The business was carried on until the death of John A. Bell in 1859, at which time there was on hand, belonging to the firm, "a large amount of personal property, consisting of stock cattle, beef cattle, horses, and mares, of the estimated value, as plaintiff is informed and believes to be true, of fifty thousand dollars; real estate situated in the county of Sutter and state of California, and in the county of Westmoreland, state of Pennsylvania, of the estimated value, as plaintiff is informed and believes to be true, of ten thousand dollars; which said real estate has at all times since the same was acquired and still does stand in the names of said partners, John A. and William M. Bell; together with notes and other demands

of the estimated value of over ten thousand dollars, as plaintiff is likewise informed and believes to be true, besides other property to the plaintiff unknown."

No administration was had upon the estate of John A. Bell until June 3, 1885, when the plaintiff was appointed administrator. In the mean time, "and up to the third day of June, A. D. 1885, the said William M. Bell has continued and did continue individually in the possession of the whole of said real and personal property, and to manage and carry on said business, and dispose of said property, and to collect the debts and things in action, and to manage and control all the property in any wise belonging to said partnership, and during the time aforesaid used the said property in any manner he saw fit, and has sold and disposed of said property, and changed it into other property, and realized thereon large sums of money, the amount of which plaintiff does not know and cannot ascertain."

It is not alleged that the heirs of John A. Bell were ignorant of these proceedings on the part of William M. Bell, or that there were any impediments to the prosecution of their claims, or that they made any demand upon him, or in any way asserted their claims, during his lifetime. He died on June 3, 1885, and the defendants were appointed executors of his will. The complaint goes on to allege that "the said plaintiff has requested and demanded of the said defendants a statement and account of said copartnership transactions, which the said defendants have neglected and refused to give; and that he demanded of the said defendants that they deliver over all property due and owing, belonging or coming, to him as administrator of the estate of John A. Bell, deceased; and that they pay over to him as such administrator all sums of money as were due to the estate of John A. Bell, deceased, as his part of said partnership assets and property, which they have likewise failed to do." The prayer is for an accounting, and for general relief.

The court below sustained a demurrer to the complaint, and the plaintiff not amending, final judgment was entered in favor of the defendants. Two grounds are urged in support of the judgment. It is argued, in the first place, that the claim is barred by the statute of limitations; and in the second place, that the claim is so stale that a court of equity will refuse to enforce it.

1. In the view we take of the case, it is unnecessary to pass

upon the first question. Assuming in favor of the plaintiff what we are inclined to think is true,—viz., that the trust is not one of those implied trusts against which the statute runs,—we think that, so far as the claim for relief is founded upon the partnership transaction, it is stale, and that a court of equity will not aid its enforcement.

This is a defense peculiar to courts of equity, and applies, although no statute of limitations governs the case: *Harwood v. Railroad Co.*, 17 Wall. 81; *Sullivan v. Portland etc.*, 94 U. S. 811; *Godden v. Kimmell*, 99 Id. 201; *Sheldon v. Rockwell*, 9 Wis. 181; 76 Am. Dec. 265; *Harrison v. Gibson*, 23 Gratt. 212; *Stout v. Seabrook*, 30 N. J. Eq. 189, 190; *Matter of Neilley*, 95 N. Y. 390; *Groenendyke v. Coffeen*, 109 Ill. 329; 2 Story's Eq. Jur., sec. 1520. It is not the same thing as equitable estoppel, although it has been termed a *quasi* estoppel: 2 Pomeroy's Eq. Jur., secs. 816, 817; and hence the rules governing equitable estoppel (see *Boggs v. Merced Mining Co.*, 14 Cal. 279) do not apply. The ground of the doctrine was stated by Taney, C. J., delivering the opinion of the supreme court of the United States in *McKnight v. Taylor*, 1 How. 168, as follows: "We do not found our judgment upon the presumption of payment; for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost."

The principal foundations of the doctrine are acquiescence and lapse of time. But other circumstances will be taken into consideration. Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction: See *Mooers v. White*, 6 Johns. Ch. 360; *Barnes v. Taylor*, 27 N. J. Eq. 259; *German-American Seminary v. Kiefer*, 43 Mich. 111; *Bolton v. Dickens*, 4 Lea, 577; *Hatcher v. Hall*, 77 Va. 578. So it has been held that a change in the value and character of the property may be material: *Bliss v. Prichard*, 67 Mo. 187; *Allen v. Allen*, 47 Mich. 79. But, as stated by Davis, J., in *McQuiddy v. Ware*, 20 Wall. 19, "there is no artificial rule on such a subject, but

each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case: *Brown v. County of Buena Vista*, 95 U. S. 160; *Rayner v. Pearsall*, 3 Johns. Ch. *586; *Landrum v. Union Bank*, 63 Mo. 56.

The following decisions are instances of the application of the rule to facts similar to the facts of the case under consideration: In *Groenendyke v. Coffeen*, 109 Ill. 339, which was a suit by the heirs of the deceased partner for an accounting, it was held that a delay of sixteen years rendered the claim stale. In *Codman v. Rodgers*, 10 Pick. 119, which was a suit for an accounting brought by the representatives of the deceased partner against the representatives of the surviving partner, it was held that a delay of seventeen years rendered the claim stale. In *Harris v. Hillegas*, 66 Cal. 79, which was a similar case, it was held that a delay of somewhat over twenty years rendered the claim stale. And like decisions were made in *Ray v. Bogart*, 2 Johns. Cas. 432, and *Harlow v. Lake Superior Co.*, 41 Mich. 584. And in *McEwin v. Gillespie*, 3 Lea, 205, which was a similar case, it was held that a delay of twenty-one years rendered the claim stale.

Now, in the present case, the complaint does not allege that the heirs of John A. Bell had not knowledge of the proceedings of William M. Bell, or that there was any impediment to their action, and consequently it must be presumed that they had such knowledge, and that there were no such impediments: *Marsh v. Whitmore*, 21 Wall. 184, 185; *McQuiddy v. Ware*, 20 Id. 19; *Harwood v. Railroad Co.*, 17 Id. 81. Such being the case, we think that the fact that they delayed the assertion of their claim until the death of the surviving partner, a period of twenty-five years, is sufficient to make their claim stale.

It is contended, however, that this question cannot be raised on demurrer. But the preponderance of authority (and we think the better reason) is to the effect that it can: *Landsdale v. Smith*, 106 U. S. 392; *Bliss v. Prichard*, 67 Mo. 189, 190; *Shorter v. Smith*, 56 Ala. 210. The defense is, in substance, that the bill does not show equity; or in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. This is a ground of demurrer under our system.

We think, therefore, that so far as the claim for relief is founded on the partnership transactions, a court of equity will not enforce it.

2. But the complaint alleges that the real property "has at all times since the same was acquired, and still does stand in the names of said partners, John A. and William M. Bell." Does this, in connection with the other allegations, state a cause of action of any kind? We think not. The action cannot be considered as for partition between co-tenants because the administrator is not a co-tenant, and cannot bring such an action: Freeman on Cotenancy and Partition, sec. 454. It cannot be treated as an action of ejectment between co-tenants, because what is alleged does not amount to an averment of ouster: *Carpentier v. Webster*, 27 Cal. 561; *Carpentier v. Mendenhall*, 28 Id. 487; 87 Am. Dec. 135; and it cannot be treated as an action for mesne profits, because (if for no other reason) there is no averment that the use of the land was of any value.

We see no aspect in which the complaint states a cause of action; and we therefore advise that the judgment be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

STALE CLAIMS. — The general principles which govern courts of equity in permitting a defendant to avail himself of the laches of the plaintiff in prosecuting his claim are exhaustively considered in the note to *Smith v. Thompson*, 54 Am. Dec. 130, so that it becomes unnecessary to discuss here the right which courts of chancery have to act in cases where there has been gross laches or unreasonable delay: See also 1 Pomeroy's Eq. Jur., secs. 418, 419; *Stearns v. Page*, 7 How. 819, 829; *Wagner v. Baird*, 7 Id. 258; *Speidell v. Heinrici*, 15 Fed. Rep. 757. We would add here, however, that "what constitutes a stale equity is a vexed question hardly susceptible of an accurate definition. Length of time alone is not a test of staleness"; the question must be determined by the facts and circumstances of each case, and according to right and justice: *Paschall v. Hinderer*, 20 Ohio St. 568, 580; *Brown v. County of Buena Vista*, 95 U. S. 159; *Jeffery v. Fitch*, 46 Conn. 601, 605; 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹. The court is not confined to the statutory period of time in determining whether or not the demand is stale, but may refuse relief in cases where the delay is less or greater than that named in the statute: Wood on Limitations of Actions, ed. 1883, sec. 60, p. 122; 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹; 1 Perry on Trusts, 3d ed., sec. 230.

LACHES AND ACQUIESCENCE DISTINGUISHED. — An important distinction is made by some of the authorities between lapse of time or laches and lying by or acquiescence: *Leeds v. Amherst*, 2 Phill. C. C. 123; *Fisher v. Boody*, 1 Curt. 206, 219; *Archbold v. Scully*, 9 H. L. Cas. 383; *Clark v. Potter*, 32 Ohio St. 61. So it is said in Wood on Limitations of Actions, ed. 1883, sec. 62, p. 126, that "while the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches

imports a merely passive, while acquiescence implies active, assent; and while, where there is no statutory limitation applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet where there is such a statutory limitation, they will not anticipate it as they may where acquiescence has existed." It was held, however, in *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 72, that the two propositions of a bar from length of time or laches and by acquiescence were not distinct, but constituted only one proposition.

Now, while lying by and acquiescence would in many cases by analogy to the doctrine of estoppel preclude a party from asserting claimed rights in equity to the detriment of others who had relied in good faith upon such acts, yet lying by and acquiescence are of necessity an important factor in determining whether there have been such laches as to constitute a bar to relief in equity. So it was declared by the court in *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 72, that length of time, where it does not operate as a statutory or positive bar, operates as evidence of assent or acquiescence, and to the same effect are the words of the court in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 239, where it is held that "the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy."

DISTINCTION BETWEEN EXECUTORY AND EXECUTED INTERESTS. — A further distinction is also made by the courts between executory and executed interests in passing upon the question whether there have been laches or acquiescence, greater laches being required in the latter than in the former case, since in executed interests mere laches will not alone disentitle a party to relief; something more, such as waiver or abandonment, being required: *Clarke v. Hart*, 6 Il. L. Cas. 632, 654.

SPECIFIC PERFORMANCE GENERALLY. — As to when specific performance is barred by staleness of the claim, see note to 54 Am. Dec. 132; *Hilliard on Vendors*, 2d ed., 181, and note.

In Cases of Partnership Agreements, delay or laches may furnish a ground for the court to refuse to decree specific performance of the contract, especially in cases of mining partnerships or others, which are speculative in their nature: *Bell v. Hudson*, 73 Cal. 285; *Harris v. Hillegass*, 54 Id. 463; *Clegg v. Edmonson*, 8 De Gex, M. & G. 787; *Walker v. Jeffreys*, 1 Hare, 341. There are exceptions, however, to this rule, where the courts have granted the relief sought, although the claim has become stale: *McGuire v. Ramsey*, 9 Ark. 518; *Coleman v. Marble*, 9 La. Ann. 476; *Ludlow v. Cooper*, 4 Ohio St. 1; *Ray v. Bogart*, 2 Johns. Cas. 432.

AGENTS. — In cases where an agent has sought to avail himself of an advantageous transaction by reason of his confidential relation as employee, and such transaction is endeavored to be set aside after a lapse of time, or the transaction has become a stale demand, the rule seems to be that it is very difficult for a confidential agent to set up as an available defense the laches of his employer, since it is his duty, so long as the relation continues, to guard against his employer's negligence in all his transactions, and more particularly those in which he, as agent, is concerned. "Length of time weighs less in this case than any other": Note 4 to *Crowe v. Ballard*, 1 Ves. Jr., Sumner's ed., citing *Beaumont v. Boulthée*, 5 Ves. 492, 494; 7 Id. 609; *Hardwicke v. Vernon*, 14 Id. 511; see further, as to fiduciary and confidential relations, *McDonald v. McDonald*, 1 Bligh, 336; *Lewes v. Morgan*, 5 Price, 42; *Berkmeyer v. Kellerman*, 32 Ohio St. 257. But where an attorney sold his client's bonds at a public sale, and bought them himself, giving their full value at the time for them, it was held that it was too late for the client to obtain any relief in equity, he having acquiesced in the purchase for twelve years: *Marsh v. Whitmore*, 21 Wall. 178.

PARENT AND CHILD. — Where a child made a voluntary settlement upon his father while under his influence, but thereafter was emancipated from parental control, and for nine years was in a position to assert his rights, but neglected to do so during that time, and then filed a bill asking that the deed might be set aside, the relief asked was refused, and the court observed that "if it be shown that the influence is gone, the court expects steps to be taken especially in regard to these family matters, in order that persons may know what line of conduct they are to adopt where there is a transaction which may be subject to be impugned. . . . The court requires a person to be prompt in asserting his right in a case of this description, where the whole conduct and life of the father is framed upon the supposition that the property is in the state in which it is until it is disputed": *Turner v. Collins*, 20 Week. Rep. 305; 41 L. J. 558; L. R. 7 Ch. 329. In the following case, a daughter, for a nominal consideration, very soon after attaining her majority, gave to her father, who was also her guardian, a life interest in part of her real estate. Sixteen months thereafter she married, and seven years after the execution of the indenture she died. Three years after her decease, her husband, on whom her rights had devolved, brought a bill in equity, asking to have the father declared a trustee of the life estate, and an account of the rents and profits which accrued prior to the daughter's minority and afterwards. It was held, that if the bill had been filed shortly after the transaction, or even near the time of the marriage, it might have been set aside, since courts look with great jealousy upon all transactions of such a character between parent and child, but that a delay of ten years was such laches that the bill could not be sustained, and it was accordingly dismissed on that ground: *Wright v. Vanderplank*, 2 Kay & J. 1; 1 Perry on Trusts, 3d ed., sec. 201.

MEMBERS OF THE SAME FAMILY. — As a rule, the delay is not so prejudicial where all the parties are members of the same family as in case of strangers: *Paschall v. Hinderer*, 28 Ohio St. 568, 582, citing *Laver v. Fielder*, 9 Jur., N. S., 190.

GUARDIAN AND WARD. — A bill in equity for an accounting, and for setting aside a release given by the ward in ignorance of her rights, will lie against the guardian and against his sureties on his bond, who had notice of the fraudulent character of the release, although the action is brought within eight years after the ward arrives at majority, it appearing that she had no

knowledge of her rights until about a year before bringing suit: *Carter v. Tice*, 120 Ill. 277.

JUDGMENTS. — A court of equity will open a judgment upon a petition brought within a reasonable time after the fact that such judgment exists comes to the party's knowledge, he having had no notice of the pendency of the suit, and it makes no difference that the time fixed by the statute of limitations has expired: *Jeffery v. Fitch*, 46 Conn. 601, 605. But relief will be refused where it is sought to set aside a judgment obtained by fraud, if it appears that the complainant has not exercised proper diligence, and that the petition was not brought until seven years after the judgment was obtained: *Brown v. County of Buena Vista*, 95 U. S. 157; and a party who seeks the aid of a court of equity for relief against a judgment, on account of a matter which would have been a good defense at law, must show that his failure to make his defense was not owing to his own neglect or want of diligence, since in no case will a court of equity relieve a person against the consequences of his own laches: *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250. Although mere irregularities may be cured by lapse of time, yet such is not the case if the proceedings are void: *Shaefer v. Gates*, 2 B. Mon. 457; 38 Am. Dec. 164; and in favor of a judgment, it is held that facts which are indispensable to its validity may be presumed after a lapse of time, although they are not apparent on the record: *Id.* So in case of a delay of forty-three years everything is presumed in favor of a judicial act not shown to have been unauthorized: *Shackelford v. Miller*, 9 Dana, 278. In *Sullivan v. Andre*, 4 Hughes, 290, 6 Fed. Rep. 641, the facts were these: A bill was filed in 1879 to set aside a distribution of personal estate made in 1869, and it appeared that the complainants were aliens; that they first learned of the intestate's death in 1874, and had instituted a suit in 1876 to set aside the distribution, which suit they were obliged to discontinue; and that they had used every endeavor to ascertain the parties to whom the money had been distributed, and upon finding one of them, had brought this action. It was held, in view of the facts, that lapse of time was not a bar.

A Judicial Sale. — The court refused to set aside a judicial sale where there had been laches in delaying to bring a suit for five years: *Harwood v. Railroad Co.*, 17 Wall. 78.

Execution Sale. — Equity will not interfere to set aside a sale of real estate made under an execution, where the party seeking relief has, without excuse, failed to avail himself of his rights at the proper time, since justice requires that one must suffer for his own laches in such a case, although a large estate be sacrificed for a small sum of money: *Stone v. Gardner*, 20 Ill. 304; 71 Am. Dec. 268.

THAT DEMAND IS STALE CANNOT BE AVAILED OF AGAINST THE GOVERNMENT, nor is laches imputable to it on account of negligence of its public officers or its agents. This doctrine is well settled: *United States v. City of Alexandria*, 4 Hughes, 545; 22 Myer's Fed. Dec., sec. 327. The court said in this case that "the general principle is, that laches are not imputable to the government; the utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions"; but the exception is made as to third parties, who are strangers to transactions as to which the negligence may occur: *Haehulen v. Commonwealth*, 13 Pa. St. 617; 53 Am. Dec. 502, and note 503; *United States v. Williams*, 4 McLean, 567; Sedgwick and Wait's Trial of Title to Land, 2d ed., sec. 753 a; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Little Miami etc. R. C.*, 1 Fed. Rep. 701; *United States v. Van Zandt*, 11 Wheat. 184; *United*

States v. Barrowcliff, 3 Ben. 519; *McIntyre v. Thompson*, 4 Hughes, 562. But see 7 Opin. Att'y-Gen. 614, where it is said that rights of action in favor of the United States are not barred in the absence of a special provision by act of Congress, and citing *United States v. Knight*, 14 Pet. 311, 315; *United States v. Hoar*, 2 Mason, 311; though laches may be availed of by the government as against the claimant of a grant: *United States v. Moore*, 12 How. 223. As to claims, however, which are presented against the United States, it is said that "the presumption and inference" arising from staleness of a demand "may be rebutted by other evidence accounting for the delay, and explaining that it arose from other causes": 2 Opin. Att'y-Gen. 464.

THE RULE GOVERNING TRUSTS. — Laches does not operate as a bar to purely equitable trusts which are direct, continuing, or express: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; and see notes 24 Id. 569; 12 Id. 372. Although "time does not bar a direct trust where the relation of trustee and *cestui que trust* is admitted to exist, yet diligence must be used to establish a constructive trust on the ground of fraud. . . . A constructive trust will be barred by long acquiescence, although the fraud was evident, and the relief was originally clear": 1 Perry on Trusts, 3d ed., secs. 228 et seq.; see *Speidel v. Henrici*, 15 Fed. Rep. 753, and note 758; *Godden v. Kimmel*, 99 U. S. 201, 212; 22 Myer's Fed. Dec., sec. 315; *Etting v. Marx*, 4 Hughes, 312; 4 Fed. Rep. 673; 22 Myer's Fed. Dec., sec. 325. A very concise rule and clear statement of the law on this question, of what trusts are and what trusts are not barred, is given by Judge Story. He says: "It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account, or other proper relief, for the *cestui que trust*. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, — in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust; and *a fortiori* it will apply with increased strength to cases of implied or constructive trusts": 2 Story's Eq. Jur., 13th ed., sec. 1520 a; Pomeroy's Eq. Jur., secs. 418, 419, 1080; Angell on Limitations, 6th ed., secs. 166–169, 171, 174–178, 468–472; *Prevost v. Gratz*, 6 Wheat. 497. In consideration of this question, the words of the court in *Michoud v. Girod*, 4 How. 503, 561, are important. It is said in that case that the time within which a constructive "trust will be barred must depend upon the circumstances of the case: *Boone v. Chiles*, 10 Pet. 177. There is no rule in equity which excludes the consideration of circumstances; and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it": See also Tiffany and Bullard's Law of Trusts and Trustees, ed. 1862, 718, 719; 1 Perry on Trusts, 3d ed., sec. 229.

Instances of Trusts Barred and not Barred. — A *cestui que trust* cannot be bound by acquiescence, except when he has been fully informed of his rights and all the material facts and circumstances of the case: *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 74. A delay of twelve years after the expiration of a trust, or ten years after the death of the trustee, does not

constitute such laches as to bar the representatives of a *cestui que trust* from the right to a trust account: *Dickenson v. Holland*, 2 Beav. 310. Although in regard to express trusts, lapse of time is not as a rule considered, yet where the *cestui que trust* was guilty of gross laches, it was held that the rule did not apply: *De Busche v. Alt*, L. R. 8 Ch. D. 286. But equity will not enforce a trust in behalf of creditors who have slept on their rights for twenty years, such delay being unreasonable: *McKnight v. Taylor*, 1 How. 161. Where there has been a great lapse of time or laches on the part of the *cestui que trust*, a resulting trust will not be enforced, especially not against occupation under a deed or against an adverse holding: 1 Perry on Trusts, 3d ed., sec. 141. In a recent case in Massachusetts the following facts appeared: The plaintiff's testator became a surety on the probate bond of a trustee in 1855. An account was rendered by the trustee in 1856, but no other was rendered, except one occasionally to the *cestuis que trust*. The trustee in 1864 pledged certain stock of the trust estate to a bank as security for indebtedness to it from his firm. The bank had notice that the stock belonged to the trust estate, but thereafter, in 1867, sold the same at the trustee's request, and the amount realized therefrom was applied on the debt. No benefit was received by the trust estate from such disposal of the stock. The surety was secured by the trustee in 1858, but in 1869, upon being released by the court from the bond, gave up his security. The *cestuis que trust* first learned of the breach of trust in August, 1877. A suit was commenced upon the bond in November, 1877. Thereafter, in 1878, the original trustee was removed, and another trustee appointed. A judgment for the penal sum of the bond was rendered, although the full amount due on the execution was not at that time determined. Before filing their bill in equity, the plaintiffs paid the amount due, so far as ascertainable, and subsequently thereto they paid the balance in full on the execution. In 1884 they brought this petition against the bank to recover the sum paid on the judgment and execution. It was held that there was no such laches on the part of the *cestuis que trust* in failing to call for an account as would prevent them from following the funds into the bank, since they had no knowledge of the breach of trust until 1877, and that the pendency of the suit on the bond justified the delay necessary to defend it, that the delay was not unreasonable, and was, therefore, no sufficient ground of defense, and that it would be inequitable to deprive the plaintiffs of their remedy on account of it: *Blake v. Traders National Bank*, 145 Mass. 13.

But a direct trust not cognizable at law, though falling exclusively within the jurisdiction of courts of equity, is not subject to the doctrine of stale demand as a defense, where the bill seeking relief is filed in five years after the liability accrues: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412. In the last case the remedy was sought against the stockholders of a banking corporation, the legal assets of which were exhausted. So lapse of time is no bar to relief for the enforcement of a resulting trust, when it appears that the trust has been acknowledged, and there have been no laches or adverse possession: *Dow v. Jewell*, 18 N. H. 341, 357; 45 Am. Dec. 371. In *Barwell v. Barwell*, 34 Beav. 371, a trustee bought up a charge on the share of one of the *cestuis que trust* to certain trust property for the benefit of his representatives; they were unable to purchase it at the price paid, and he subsequently sold it to others of the *cestuis que trust*, all the transactions were openly entered into, and there was no concealment of the facts. It was held that such purchase would not be set aside after the lapse of twenty years, although the property had very greatly enhanced in value. Again: the plaintiff's ancestor

conveyed real and personal estate to trustees for the purpose of paying certain debts, and to hold the balance in trust for himself; twenty-two years thereafter he died, and two years after his decease a bill was filed for discovery and account against the survivors of the trustees. At no time during his life had the grantor made any attempt to annul the transaction or obtain a settlement. It was held that the long delay and acquiescence was a proper objection to the bill: *West v. Randall*, 2 Mason, 181. So a presumption that a trust has been satisfied or extinguished may arise after a lapse of forty years: *Prevost v. Gratz*, 6 Wheat. 481. And where there has been a possession under absolute deeds for a long time without question, and evidence relied on to establish a resulting trust, such evidence must be clear and explicit, so as to leave no doubt as to the character of the transaction: *Miller v. Blose*, 30 Gratt. 744, 751. Although purely equitable trusts which are direct, express, and subsisting are not barred by lapse of time, yet where the suit is brought for redress for an injury caused by a violation of the trust, a different rule prevails, and the suit is barred: *Wickliffe v. City of Lexington*, 11 B. Mon. 161.

FRAUD. — In cases where it is sought to impeach a transaction on the ground of fraud, lapse of time is a question of much importance, owing to the fact that much evidence originally available and necessary to a full knowledge of the equities of the transaction may be lost: *Prevost v. Gratz*, 6 Wheat. 481, 498. And the plaintiff in equitable proceedings in cases of asserted fraud can have no relief if he has been guilty of gross laches: *Gould v. Gould*, 3 Story, 516; *Charter v. Trevelyan*, 11 Clark & F. 714.

In an action on a note based upon the conveyance of certain land as a consideration, the defense of fraud in making the conveyance was set up, and an offer was made to reconvey. The fraud was discovered in 1877; the deed was given in 1873; the action was commenced in 1877; and in 1879 the answer averring fraud was filed. It also appeared that "the delay of the defendant in electing to rescind, after he suspected the fraud, was the natural consequence of, or at least might have been caused by, the acts of the plaintiff"; and it was held, therefore, that he had not, under the peculiar circumstances of the case, "lost his right to rescind by his delay to elect so to do beyond a reasonable time after he had full knowledge of the fraud": *Nealon v. Henry*, 131 Mass. 153. It is said, however, in *James v. Atlantic Delaine Co.*, 3 Cliff. 614, 620, that the rule that staleness of a claim is a good defense "should seldom or never be applied in cases of trust where the means of knowledge are wholly or even chiefly on one side. When the fraud charged and proved consists of misrepresentations and concealments, courts of equity are reluctant to apply the rule at all, unless it appear that the rights of innocent third parties will be injuriously affected if that defense be overruled." But in cases of fraud, the time when the fraud was discovered, or when by the exercise of reasonable diligence it might or ought to have been discovered, is material: 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 389; and the remedy is not barred by lapse of time, where the party has never with a knowledge of the facts done anything which amounts to acquiescence: *Charter v. Trevelyan*, 11 Clark & F. 714, 740. Relief was granted in the last case, where the fraud was first discovered after a lapse of thirty-seven years: *Id.* So laches will not avail as a defense in cases of secret fraud, if the action is brought within a reasonable time after its discovery: *Meador v. Norton*, 11 Wall. 442; and a suit brought in one year after the discovery of the fraud, the action being to rescind a sale of land, is instituted within a reasonable time: *Smith v. Babcock*, 2 Wood. & M. 246.

KNOWLEDGE IS MATERIAL. — Acquiescence imports full knowledge: *Life Ass'n of Scotland v. Siddel*, 4 De Gex, F. & J. 74. Therefore a party will not be held to acquiesce in acts which he did not know he had any right to dispute: *Cholmondeley v. Clinton*, 2 Mer. 171, 362. Nor is the rule confined to cases of acquiescence merely; for it is said that where one is ignorant of the facts, there can be neither laches nor acquiescence: *Charter v. Traveleyan*, 11 Clark & F. 714, 740; *Bennet v. Colley*, 1 Mylne & K. 225, 232; Wood on Limitations of Actions, ed. 1883, sec. 61, p. 125; and where fraud is relied on in cases of trust, there can be no laches by reason of anything done or neglected, where the party seeking relief has, without any fault of his own, remained in ignorance of his rights: *Rolfe v. Gregory*, 13 Week. Rep. 355; *Savery v. King*, 5 H. L. Cas. 626, 665. In brief, time does not commence to run, except there is full information and knowledge by a party of his rights and the injury done, and he has such notice thereof as that he ought to have made inquiry, or where there is undue influence, and the disability is removed, or where he himself possesses the means of knowledge: 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹. So the time when a party first seeks to impeach an agreement which he had hitherto treated as fair is material in determining the question of laches: *Morony v. O'Dea*, 1 Ball & B. 118; and see cases under title "Fraud," *supra*; 2 Pomeroy's Eq. Jur., sec. 917.

Where a party with knowledge of the facts neglects for nineteen years to assert his claim, with no sufficient excuse for delay, his laches will bar relief in equity: *Castner v. Walrod*, 25 Am. Rep. 369; see also *Smith v. Thompson*, 54 Am. Dec. 126, note 130-134; *De Cardova v. Smith*, 58 Id. 136; *Strimpfler v. Roberts*, 57 Id. 606, and notes to these cases.

ACCOUNTS. — Long acquiescence in an account makes it a settled one; *Baker v. Biddle*, 1 Bald. 394, 418; for this reason the court will refuse to order an accounting where several years have elapsed since the transactions in question were had, although the statute of limitations does not apply: *Sherman v. Sherman*, 2 Vern. 276. So where a bill was filed against a son to account to his father's estate for money given him by his father twenty years before, upon the ground that the sum was a debt due the estate, it not being claimed as an advancement. It was held that the equities after such a lapse of time raised the presumption of payment when the same was averred in the answer: *Blackerby v. Holton*, 5 Dana, 525; and where a tenant for life in remainder brought a bill against the representatives of a prior tenant for life twenty years after his death for an account of timber improperly cut, the bill was dismissed: *Harcourt v. White*, 28 Beav. 303.

INJUNCTIONS. — Delay, laches, or acquiescence may prevent a party from obtaining relief where an injunction is sought. So held where it was sought to enjoin making an award: *Dulin v. Caldwell & Co.*, 28 Ga. 117; and laches may be a defense to an application for an injunction, by way of information, equally with that of proceeding by a bill: *Attorney-General v. Sheffield etc. Co.*, 3 De Gex, M. & G. 304. So laches may be set up in defense to a motion for an interlocutory injunction in cases of patents: *Hockholzer v. Enger*, 2 Saw. 361; and see Walker on Patents, 2d ed., sec. 684; and where one has been guilty of unreasonable delay and laches in prosecuting his rights, equity will not aid such a person by injunction in the collection of purchase-money from a vendor: 1 High on Injunctions, 2d ed., sec. 383. So a delay of three and a half years was held to be sufficient laches to warrant the refusal of an injunction against a claimed nuisance: *Tichenor v. Wilson*, 8 N. J. Eq. 197; and where the plaintiff, after a delay of nineteen years, sought for an injunction to prohibit an injury arising from the setting back of water by reason of a mill-

dam, it was held, in the absence of fraud, misrepresentation, unfair dealing, or mistake, excusing his delay, that it was such laches as not to entitle him to relief: *Sheldon v. Rockwell*, 9 Wis. 167; 76 Am. Dec. 265. Nor need the delay amount to proof of acquiescence in the wrong sought to be remedied: *High on Injunctions*, 2d ed., sec. 7. As to delay and acquiescence affecting the granting of injunctions, see also *Kerr on Injunctions*, ed. 1871, pp. 205, 206, 228, 238, 349, 406, 551.

PATENTS. — In cases of patent rights, it is said that "delay to sue is not always laches, because it may have resulted from the fact that the complainant did not know of the infringement till long after it began, or from the fact that he was litigating a test case under his patent against another infringer during the time of the delay. . . . Where neither of these excuses can be invoked by a complainant, he may perhaps avail himself of some excuse arising out of grievous poverty or protracted sickness": *Walker on Patents*, ed. 1883, sec. 596. As to when laches is fatal to any claim of continuity between withdrawn and rejected applications for the same patent, or as to when it constitutes proof of an abandonment of both application and invention, see *Walker on Patents*, 2d ed., secs. 91, 145. That reasonable diligence is necessary in prosecuting rights under patent claims, see *Goodyear v. Honsinger*, 2 Biss. 1; *Sawyer v. Massey*, 25 Fed. Rep. 144; *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109; *McLean v. Fleming*, 96 U. S. 245.

STALE DEMANDS IN REGARD TO LAND. — "Long acquiescence and laches by a party out of possession [of land], productive of much hardship and injustice to others, cannot be excused except by showing some actual impediment or hindrance caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor": *Johnson v. Toulmin*, 18 Ala. 50; 52 Am. Dec. 212, 220, citing from *Wagner v. Baird*, 7 How. 234. Nor can the party guilty of such laches "screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability": *Wagner v. Baird*, 7 Id. 258. So adverse possession of land, continued for thirty years, is an equitable bar, in the absence of any excusable or explanatory circumstances: *Piatt v. Vattier*, 9 Pet. 405; *Scott v. Evans*, 1 McLean, 486. And if parties setting up a claim of title to land have slept upon their rights for forty-nine years, such fact constitutes a good defense: *Copen v. Fletcher*, 1 Bond, 440. So the court will refuse to enforce a bond for the conveyance of an interest in lands dependent upon certain payments, when twenty years have elapsed since the obligation became due: *Wright v. Fullerton*, 2 Biss. 336. In *Wagner v. Baird*, 7 How. 234, a petition was brought to obtain the possession of certain land. It appeared that the defendants or their immediate grantors had paid a valuable consideration for the land, and had entered upon and occupied it for twenty-seven years, and had, by their industry, and by a large expenditure of money thereon, greatly enhanced its value, and that no bad faith, concealment, or fraud could be imputed to them. It also appeared that the complainants had taken no measures during such occupancy by the defendants, or those under whom they claimed, to secure or protect their rights. The court decided that these facts brought the case within the rule that lapse of time and staleness of a claim were a good defense in equity, and ordered the bill dismissed. But where a charge is created upon land by will, and there is a delay of three years in bringing a suit to enforce such charge, this is not such laches as to constitute a sufficient reason for rejecting the bill, especially where it appears that no change had been made by the defendant in his position by reason of such quiescence of the plaintiffs, or if it had, that it was not attributable to that

cause: *Mudd v. Powers*, 136 Mass. 273. And lapse of time is no bar to relief in equity against one who holds the legal title to land as trustee under a decree which has been reversed: *Talbot's Ex'rs v. Bell's Heirs*, 5 B. Mon. 320; 43 Am. Dec. 126. In this connection, it may be well to note the proposition that inasmuch as the various improvement statutes are in effect a punishment against the real owner of land for his laches in remaining quiet and failing to assert his title against the adverse possessor, they are for this reason founded upon equitable principles, and are therefore constitutional: *Sedgwick and Wait's Trial of Title to Land*, 2d ed., sec. 712.

DEEDS AND AGREEMENTS. — The court will refuse to rescind a deed or conveyance, when the delay and acquiescence of the plaintiff are such that the parties cannot be restored to their original position: *Fisher v. Boddy*, 1 Curt. 200. So thirty years' delay after the execution of a deed, which acknowledges the receipt of the purchase-money, is a bar, if unaccounted for: *Smith v. Kincaid*, 4 J. J. Marsh. 240; and acquiescence for twenty-three years under an agreement will preclude the parties from impeaching it on the ground of claimed illegality: *Westby v. Westby*, 1 Con. & L. 537. So stale and antiquated demands in respect to the purchase of lands are discouraged by courts of equity: *Johnson v. Toulmin*, 18 Ala. 50; 52 Am. Dec. 212, 220; and where there was an unexplained delay of fifteen months in conveying a patent right under a contract of sale providing for a conveyance "as soon as practicable," it was held that the vendor had lost the right to enforce the contract: *Bellas v. Huys*, 5 Serg. & R. 427; 9 Am. Dec. 385.

MISCELLANEOUS CASES. — Where the bonds of a railroad corporation were appropriated by its officers for an illegal and void purpose, and it was not attempted to enforce the payment of such bonds, it was held that the stockholders might interpose by a suit, after a delay of eleven and a half years, to cancel the bonds and the deed of trust given as security for their payment, and that such delay did not constitute such laches or acquiescence as to bar maintenance of the bill: *City of Chicago v. Cameron*, 120 Ill. 447, 462. But a suit for a legacy charged upon land is barred by the lapse of thirty years without any demand for its payment, either by the legatee or her husband: *Perkins v. Cartmell*, 4 Harr. (Del.) 270; 42 Am. Dec. 753; and it was held in *Hunt v. Hamilton*, 9 Dana, 91, that a will could not be established after thirty years' time unaccounted for. So where a mortgagee or his alienee were in possession under a mortgage, and the mortgagor died insolvent before the debt became due, and his alienee also became insolvent and left the state, it was held that no presumption of payment of the mortgage could arise under the circumstances from lapse of time: *Brobst v. Brock*, 10 Wall. 519, 535; and if mistake is relied on as a ground of relief, there must be due and reasonable diligence after the discovery of the mistake, since delay will be fatal: *Sugden on Vendors*, 8th Am. ed., *Perkins's notes*, 171.

ADMIRALTY. — Stale claims will not be entertained in a court of admiralty any more than in a court of equity; "and to determine what is stale, resort is sometimes had to the limitation in common-law actions established by statute, but the statutes themselves are not binding. The court is emphatically a commercial court, and requires reasonable promptness on the part of its suitors": *Ocean Ins. Co. v. Sun Mutual Ins. Co.*, 15 Blatchf. 249. But where it was sought, three years and a half subsequent to the time when the cause of action accrued, to have a lien enforced against a vessel by reason of its alleged failure to fulfill a contract of affreightment, and in the mean time the ownership of the vessel had changed hands, it was held that the lien was

not barred by laches. The court said in this case: "1. That while courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense; 2. That no arbitrary or fixed period of time has been or will be established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case; 3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time and a more rigid scrutiny of the circumstances of the delay than when the claimant is the owner at the time the lien accrued": *The Key City*, 14 Wall. 653. 660. Though a lien not sought to be enforced by a material-man within three years, when a third person had in the mean while become the owner of the vessel, is barred by reason of laches: *The Buckeye State*, 1 Newb. Adm. 111; and a suit brought for wages three years after the right thereto had accrued, and in the mean time the ownership of the vessel had changed and one of the owners had become insolvent, was declared to be such a delay as to bar any relief: *The Louisa*, 2 Wood. & M. 48; see also *Willard v. Dorr*, 3 Mason, 161; *Pitman v. Hooper*, 3 Sum. 286; *Joy v. Allen*, 2 Wood. & M. 304. In *Smith v. Sturgis*, 3 Ben. 330, a suit was brought for damages arising from a collision between a steam-tug and another vessel, and it appeared that the owners of the vessel against whom the libel was filed had been in the district for a period of six years after the collision, and up to the time of bringing the suit, and that the vessel itself had been kept there for over a year subsequent to the collision. It was held that a delay from December, 1859, to March, 1866, before bringing suit was, without any reasonable excuse for delay, such laches that the action was barred.

EXCUSES. — It is a rule founded in justice and reason that equity will not refuse relief where there has been a reasonable excuse for the delay: Wood on Limitations of Actions, ed. 1883, sec. 63, p. 124. But if no active steps are taken to enforce one's rights, it will not avail such party that he constantly asserted them, or made a continual claim thereto: *Clegg v. Clegg*, 3 Jur., N. S., 299. The court said in this case: "I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded": *Id.* 303; see also *Lehmann v. McArthur*, L. R. 3 Ch. 496. So laches or lapse of time may be excused where the plaintiff was unable, from the obscurity of the transaction, to obtain full information in regard to his rights: *Murray v. Palmer*, 2 Schoales & L. 474, 486.

Circumstances of Embarrassment or Continuing Influence are material as an excuse. So where a person in distressed circumstances, by reason of undue influence brought to bear upon him, executes a conveyance, or enters into a contract, acquiescence will not be imputed so long as the same conditions continue to exist; it is only when the distressed party is relieved from the oppression which controlled in the first instance that he can be expected to act: Note 4 to *Crowe v. Bullard*, 1 Ves. Jr., Sumner's ed., 221, citing *Purcell v. Macnamara*, 14 Ves. 106, 121; *Gowland v. De Faria*, 17 Id. 25; *Aylward v. Kearney*, 2 Ball & B. 477; *Wood v. Downes*, 18 Ves. 128. It was held in *Roberts v. Tunstall*, 4 Hare, 257, that the poverty of the *cestui que trust* was not sufficient to excuse delay in prosecuting his claim to relief. The case was one where it was sought, after a period of nearly eighteen years, to set aside a sale and purchase by a trustee claimed to have been made at an undervalue; the trustee was also a tenant for life, and died two and a half years after the execution

of the deed. It was also decided that the time which might elapse during such tenancy would not alone be considered as amounting to laches. Inasmuch as this case is frequently cited as an authority upon the main question as to poverty not being an excuse, we cite from the opinion of the court as showing that no general rule to such effect was intended to be laid down. The court declares that "where a transaction of this kind has been brought about by misrepresentation, concealment, or undue influence, or where the vendor is dependent on the bounty of the purchaser, the court considers that the right of the vendor to rescind the sale exists, without the importation of laches, until such time as it was shown that he was released from the position in which he was placed by these circumstances. The poverty of the vendor, added to the other circumstances, is also a material ingredient in such a case. But where none of the special grounds of complaint exist,—where there is no misrepresentation, concealment, or undue influence, and no dependency of the seller on the purchaser, where the right to rescind the transaction is an equity arising out of the transaction itself, as in the case of a sale of the reversionary interest, is it to be said that waiver will not apply, or that no time will be a bar merely because the seller was poor? . . . In *Roche v. O'Brien*, 1 Ball & B. 330, a fraud was committed upon a distressed man in the situation of an expectant heir, by the purchase from him of his expected reversion by the defendant, an experienced attorney; and that fraud was continued in a second transaction, intended to confirm the first, and entered into some years afterwards while the distress of the vendor continued. Upon a bill filed to set aside the transaction twenty-seven years after it took place, Lord Manners did not say that mere pecuniary distress would excuse the delay; on the contrary, his language was against such a conclusion." But the court (after saying that it found nothing in the authorities to the effect that poverty was an excuse in the absence of the existence of the special grounds of complaint above stated, and that it thought that the reasoning was the other way) added: "I do not mean to lay down any general rule; but in the circumstances of this case, . . . my opinion is, that the consequences of unexplained delay must prevail. It is contrary to all experience to suppose that because a party is poor he is therefore unable to obtain professional advice": See 1 Perry on Trusts, 3d ed., sec. 230, cases in note 4; and the case of *Hovenden v. Annesley*, 2 Schoales & L. 639, decides that the fact that the complainants were embarrassed and reduced by the fraud of others is no excuse for laches. But it is said in note 4 to *Crowe v. Ballard*, 1 Ves. Jr., Sumner's ed., 221, that "a mere general embarrassment, having no reference to any fraud with respect to the particular contract complained of, is not a circumstance upon which the court will act to set aside, after a long lapse of time, conveyances deliberately executed. If this were the practice, there would be an end of all limitations of suits in the cases of distressed persons, and all property would be thrown into confusion": See also *Gregory v. Gregory*, Coop. 205; and that poverty may be a defense, see *Mason v. Crosby*, Dav. 303; and see title "Patents," *ante*.

Infancy and Coverture constitute, with few exceptions, a valid excuse for laches: *Whaley v. Elliott's Heirs*, 1 A. K. Marsh. 345; *Steele v. McKnight*, 1 Bay, 65; *Blandford v. Marlborough*, 2 Atk. 545; *Bennett v. Colley*, 1 Mylne & K. 225, 233; *Copen v. Flesher*, 1 Bond, 440; *Chew v. Hyman*, 7 Fed. Rep. 7. See, however, *Havens v. Patterson*, 43 N. Y. 218; *Kemp v. Cook*, 18 Md. 130; and on the point of coverture, see *Bedilian v. Seaton*, 3 Wall. Jr. 279, 287; *Elling v. Marx*, 4 Hughes, 312; 4 Fed. Rep. 673; 22 Myer's Fed. Dec., sec. 326; *Harrison v. Gibson*, 23 Gratt. 212. In the case of minors, this rule was

held especially applicable, where the minors had no knowledge of their rights, and their residence was in a different state: *Heirs of Ware v. Brush*, 1 McLean, 533. But voluntary disabilities, such as absence from the state, are no defense against the charge of staleness: *Bedilian v. Seaton*, 3 Wall. Jr. 279, 287. And that the defendant is an infant is no excuse for laches on the part of the plaintiff: *Jones v. Turberville*, 2 Ves. Jr. 11.

Pendency of Suit. — As a rule, a party's right is not prejudiced by lapse of time while a suit is pending: *Darby and Bosanquet on Limitations*, ed. 1867, 199; nor is a party prejudiced by lapse of time when a court of equity has prevented him from pursuing his remedy: *Id.* But the pendency of an action was held no excuse, where it appeared upon a bill brought against several parties for an account of profits for infringement of a patent right that the plaintiffs had, prior thereto, instituted a suit against only one party for violating the patent, but had not notified the others of the claimed infringement, nor taken any steps against them until after that suit was determined. The patent expired in 1849, and the test suit was brought in 1852, and decided in 1853: *Smith v. London etc. R. R. Co.*, 1 Kay, 408. But see title "Patents" herein, *ante*. And the fact that a party has been compelled to bring a bill of discovery against persons who have in their possession the papers necessary to enable him to obtain his rights, is an excuse for what might otherwise be delay sufficient to constitute laches: *Bond v. Hopkins*, 1 Schoales & L. 413.

Creditors. — Equity will not aid a creditor who waits forty-six years to collect a claim, although he believed that his debtor was insolvent during all that time, where it appears that he might, by the exercise of reasonable diligence, have recovered his money by a suit at law: *Maxwell v. Kennedy*, 8 How. 181. Nor does laches apply to a large body of creditors: *Whicote v. Lawrence*, 3 Ves. Jr. 740.

PLEADING. — The complainant "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill": *Marsh v. Whitmore*, 21 Wall. 178, 181, citing from *Badger v. Badger*, 2 Id. 95. So the time and means of the discovery of a secret fraud must be particularly alleged: *Badger v. Badger*, 2 Cliff. 137. "And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made; for if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity on account of the laches": *Stearns v. Page*, 1 Story, 204, 215. So in cases where it is sought to open an account on the ground of fraud, mistake, etc., the exercise of ordinary diligence in making the discovery of the same is an important factor; and for this reason, the time when the discovery was made, as well as what the discovery is, must be distinctly averred: *Stearns v. Page*, 7 How. 819, 829.

Demurrer. — The objection to a stale demand, lapse of time, or laches, may be taken by demurrer when apparent on the face of the pleadings: *Maxwell v. Kennedy*, 8 How. 210; *Sullivan v. Railroad Co.*, 94 U. S. 811; *Copen v. Flesher*, 1 Bond, 440. Courts of equity as a rule, however, are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and

a case at law on which a statute of limitation would operate: The court in *Putnam v. New Albany*, 4 Biss. 365, 372. But it is not necessary, in order to avail himself of the defense of staleness of the demand, that a party should rely upon a plea, answer, or demurrer; since such defense may be suggested at the hearing: *Baker v. Biddle*, 1 Bald. 394, 418; *Fisher v. Boody*, 1 Curt. 206, 218; *Sullivan v. Railroad Co.*, *supra*.

THE DEFENSE OF THE STATUTE OF LIMITATIONS may be raised by demurrer: *Smith v. Fly*, 76 Am. Dec. 109, and note 114.

EVIDENCE. — If laches are set up as a defense by a party against whom fraud is established, the burden is upon him to prove the time when knowledge of such fraud was obtained by the other party, and that he was guilty of laches in prosecuting his rights thereafter: *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221. So the burden of proving laches or acquiescence is on the party setting it up: *Wall v. Cockrell*, 1 H. L. Cas. 229, 243; and every presumption that can fairly be made against a stale demand may be made: *Pickering v. Stamford*, 2 Ves. Jr. 581.

LAPSE OF TIME WHEN A BAR in matters of summary jurisdiction over attorneys, see note to *Burns v. Allen*, *post*, p. 860, subtitle "Lapse of Time a Bar."

CROSS v. EUREKA LAKE AND YUBA CANAL CO.

[73 CALIFORNIA, 302.]

PLEDGEE OF CORPORATE STOCK has right to retain it until the debt for which it was pledged is fully satisfied, but during such time he cannot assert that he holds it adversely, and thereby acquire title under the statute of limitations.

AS BETWEEN PLEDGEE AND PLEDGOR of corporate stock, the general property remains in the latter, and when the debt to secure which the pledge was given is paid, the lien is extinguished.

WHERE IN SUIT BY PLEDGEE OF CORPORATE STOCK to recover dividends against the corporation the latter deposits the money in court, and has the pledgor and his assignee made defendants, and it appears that the debt for which the stock was pledged is liquidated, whereupon judgment is rendered by consent of the pledgor for the assignee for the entire amount sued for, as the pledgee has no interest in the money he cannot complain of the judgment awarding the assignee the dividends accruing prior to its rendition.

Freeman, Bates, and Rankin, and H. V. Reardan, for the appellant.

R. H. Taylor, E. H. Gaylord, T. M. Osment, and Taylor and Craig, for the respondents.

By Court, BELCHER, C. C. The plaintiff, as administrator of the estate of T. W. Sigourney, deceased, brought this action against the Eureka Lake and Yuba Canal Company, a corporation, to recover the sum of fifteen thousand dollars for dividends alleged to have been declared by the company after

AMERICAN STATE REPORTS.

VOL. III, PAGES 725-745.

WHITWORTH *v.* THOMAS.

[88 ALABAMA, 308.]

Rescission of Contracts.

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THOMPSON *v.* RENO SAVINGS BANK.

[19 NEVADA, 103.]

Corporations—Stockholders.

WHITWORTH v. THOMAS.

[83 ALABAMA, 808.]

SELLER OF HORSE WHO REPRESENTS HIM TO BE SOUND, knowing him to be unsound, and thereby misleading the purchaser, who is unable to discover the defect by ordinary observation, perpetrates a fraud which will entitle the purchaser to rescind on demand made within a reasonable time after the discovery of the fraud.

IN ACTION FOR RESCISSION OF CONTRACT FOR EXCHANGE OF HORSES on the ground of defendant's fraud, the defendant cannot set up the fraud of the plaintiff as a defense.

IN STATUTORY ACTION CORRESPONDING TO DETINUE, there can be no set-off or recoupment of damages.

ON QUESTION OF SOUNDNESS OF HORSE, it is relevant and competent to prove what kind of and how much work was done by the animal while in the purchaser's hands.

ACTION for recovery of a mule, with damages for its detention. The opinion states the facts.

R. C. Hunt and W. L. Martin, for the appellants.

J. E. Brown, for the respondents.

By Court, **STONE, C. J.** The present suit is a statutory action for the recovery of a chattel in specie, corresponding to the common-law action of detinue in every respect material to the decision of this appeal. Thomas exchanged with Whitworth a mule for a mare, giving and paying a small difference. About two weeks after the exchange, he tendered the mare back, and demanded a rescission, claiming that the mare was unsound when traded to him, and that he had been defrauded in the trade. Whitworth refused to receive the mare, and refused to rescind. Thomas thereupon brought this action to recover the mule. There is no contrariety of testimony bearing on the points stated above.

There is no pretense in this case that there was any warranty of the soundness of the mare. The scope of the contention is, that the mare was unsound; that the fact was known to Whitworth, but unknown to Thomas; and that, in negotiating the trade, Whitworth represented that she was sound, so far as he knew, and by means thereof induced Thomas to make the trade. If these were the facts, they armed Thomas with the right to rescind, if seasonably and properly demanded. The demand would be seasonable and proper, if he tendered the mare back with no undue delay, after discovering the deceit practiced upon him: 3 Brickell's Digest, 736, secs. 78-80; *Perry v. Johnson*, 59 Ala. 648; 2 Par-

sons on Contracts, bottom page, 920; 3 Wait's Actions and Defenses, 432, 455, 453. If a seller knows the horse to be unsound, and informs the buyer that he is sound so far as he knows; and the buyer, not knowing the contrary, nor able to discover it by ordinary observation, relies on such representation, and consummates the trade, this, if injury result from it, constitutes a fraud; and the buyer is authorized to rescind, if he demand it within a reasonable time after discovering the fraud.

The maxim, *In pari delicto, potior est conditio possidentis*, has no application to a case like this. That maxim applies, and only applies, where two or more are jointly concerned in the perpetration of one and the same fraud,—a conspiracy or combination to accomplish an illegal object, through fraud, by which some third person is to be the sufferer. It does not permit one independent deceit or fraud to be set off against another deceit or fraud, so as, on that account, to estop the latter from maintaining his suit. It may confer a right to a cross-action. It does not deny to either party all right to sue.

The plaintiff's right of action in this case depends on his ability to show that Whitworth had defrauded him in the exchange of the mare for the mule. The issue raised the inquiries whether the mare was unsound when the trade was made; whether Whitworth knew it; and whether he used any expression, or resorted to any artifice, with a view of concealing that fact, or of throwing Thomas off his guard. If these inquiries be answered in the affirmative, and if Thomas trusted them, and suffered injury as a consequence, this part of his complaint is made good. In the present action,—statutory detinue,—no question of recoupment or set-off could have been considered, even if it had been attempted. It was not offered to be raised by the pleadings: Code 1886, sec. 2683.

It follows, from what is said above, that any and all testimony tending to show legitimately that the mare was unsound when traded, that Whitworth knew it, and that he made any false representations in regard to it, or practiced any deceit or artifice to mislead Thomas, should have been received; and any legal testimony tending to disprove either of these propositions was also admissible. On the other hand, any proof of misrepresentation of the qualities of the mule, alleged to have been made by Thomas, was wholly immaterial. The value of the mule, and of his hire, was pertinent only as tending to furnish a basis of recovery.

All the testimony in regard to the working qualities of the mule, and in reference to Thomas's representations in relation thereto, was properly ruled out by the court; and we will not make further reference to rulings on that question.

The circuit court erred in refusing to allow the defendant to ask the plaintiff, on cross-examination as a witness, to state what work the mare had done since he traded for her. An answer to this question would have tended to prove the mare's capacity for work, and would have shed some light on the question of her soundness.

In rebuttal, plaintiff was asked by his counsel, "Did you treat the mare well or ill?" In form, the question was, perhaps, objectionable, but that furnishes no ground of reversal. In substance, the answer was but a short-hand rendering of the facts, subject to having the details called out on cross-examination, if requested. The court did not err in allowing this question to be answered.

A witness for defendant was asked, "What character of work and service is the mare performing for plaintiff at this time?" This, on motion of plaintiff, was excluded. In this the circuit court erred, for reasons stated above.

Lisle, a witness for plaintiff, was asked if he heard Mrs. Latham, one of the defendants, say anything about trading the mare. There was exception to the ruling of the court, permitting this question to be asked. The question was proper, but the answer was too remote to shed any proper light on the question at issue.

Reversed and remanded.

RESCISSION OF CONTRACTS GENERALLY: See notes to *Johnson v. Evans*, 50 Am. Dec. 672-681; and *Bryant v. Isburch*, 74 Id. 657-662.

EFFECT OF FRAUD OR CONCEALMENT IN SALE: See notes to *Hughes v. Robertson*, 15 Am. Dec. 106-108; and *Barnard v. Duncan*, 90 Id. 425-431.

SET-OFF AND COUNTERCLAIM GENERALLY: See the notes to *Gregg v. James*, 12 Am. Dec. 152-157; and *Woodruff v. Garner*, 89 Id. 842.

RECRIMINATORY FRAUD. — The question of how far the fraud of the plaintiff may be availed of as a recriminatory defense is one which has been the subject of much discussion in the several states. The class of cases in which the question has been most frequently considered are those where deeds, conveyances, sales, and other contracts relating to the transfer of real and personal estate, have been made and entered into for the purpose of defrauding creditors, and thereafter one of the parties has sought to rescind such fraudulent executed contracts, or to enforce them when executory. As preliminary to the consideration of this question, it may be stated that although there are some exceptions, yet it is a conclusive rule of law, adjudicated by a great weight of authorities, that deeds, conveyances, contracts, and transac-

tions entered into in fraud of creditors are valid between the parties: *Jackson v. Cadwell*, 1 Cow. 622; *Owen v. Dixon*, 17 Conn. 496; *Kinnemon v. Miller*, 2 Md. Ch. 407; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578; *Sherk v. Endress*, 3 Watts & S. 255; *White v. Brocaw*, 14 Ohio St. 339; *Worth v. Northam*, 4 Ired. 102; *Jackson v. Marshall*, 1 Id. 323; 3 Am. Dec. 695; *Trenper v. Barton*, 18 Ohio, 418; *Crocker v. Crocker*, 17 How. Pr. 504; *Moore v. Livingston*, 14 Id. 1; *Henriques v. Hone*, 2 Edw. Ch. 119; *Waterbury v. Westervelt*, 9 N. Y. 598; *Trimble v. Doty*, 16 Ohio St. 118, 129; *Brown v. Webb*, 20 Ohio, 389; *Cushman v. Cushman's Lessee*, 5 Md. 44; *Atkinson v. Phillips*, 1 Md. Ch. 507, 515; *Dunnock v. Dunnock*, 3 Id. 140; *Douglass's Lessee v. Dunlap*, 10 Ohio, 162, 163; *Lessee of Simon v. Gibson*, 1 Yeates, 291; *Walton v. Tusten*, 49 Miss. 569, 575; *Snodgrass v. Andrews*, 30 Id. 472, 488; 64 Am. Dec. 169; *Skinner v. Oakes*, 10 Mo. App. 45, 50; *Jacobs v. Smith*, 89 Mo. 673; *Schenck v. Hart*, 32 N. J. Eq. 774, 781; *McMaster v. Campbell*, 41 Mich. 513, 516; *Gutly v. Hull*, 31 Miss. 20; *Davis v. Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Crawford v. Lyle*, 30 Mo. App. 585; *Holt v. Creamer*, 34 N. J. Eq. 181, 182; *Armstrong v. Stovall*, 26 Miss. 275, 277; *Bush v. Rogan*, 65 Ga. 320; 38 Am. Rep. 785; *George v. Williamson*, 26 Mo. 190; 72 Am. Dec. 203; *Frink v. Roe*, 70 Cal. 296, 308; *Parkhurst v. McGraw*, 24 Miss. 134; *Gardner v. Short*, 19 N. J. Eq. 341; *Lokerson v. Stillwell*, 13 Id. 357; *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note; *Jackson v. Garnsey*, 16 Johns. 189, 192; *Thomas v. Soper*, 5 Munf. 28; *Cutler v. Tuttle*, 19 N. J. Eq. 549, 562; *Ogden v. Prentice*, 33 Barb. 160; *Finley v. McConnell*, 60 Ill. 259; *Isaacs v. Gearheart*, 12 B. Mon. 235; *Tolin v. Helm*, 4 J. J. Marsh. 288, 291; *Gilpin v. Davis*, 2 Bibb, 416, 418; 5 Am. Dec. 622; *Lemay v. Bibeau*, 2 Minn. 291; *Jones v. Rahilly*, 16 Id. 320; *Edwards v. Haverstick*, 53 Ind. 348; *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Anderson v. Dunn*, 19 Ark. 650, 659; *Piper v. Johnston*, 12 Minn. 60, 66; *Shealey v. Edwards*, 75 Ala. 411; *Coon v. Rigden*, 4 Col. 275, 281; *Rochelle v. Harrison*, 8 Port. 351; *Henry v. Stevens*, 108 Ind. 280; *Kelley v. Karsner*, 72 Ala. 106; *Anderson v. Brown*, 72 Ga. 713, 722; *Edwards v. Kilpatrick*, 70 Id. 328; *Pickett v. Pipkin*, 64 Ala. 520; *Eldins v. Wilson*, 1 Id. 237; *Lessee of Hartley v. McAnulty*, 4 Yeates, 95; 2 Am. Dec. 396; *Lessee of Church v. Church*, 4 Yeates, 280; *Tiernay v. Clafin*, 15 R. I. 220, 222; *Pemberton v. Smith*, 3 Head, 18; *Battle v. Street*, 85 Tenn. 282, 293; *Murphy v. Hubert*, 16 Pa. St. 50; *Hoeser v. Kraeka*, 29 Tex. 450, 453; *Kid v. Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; *Reichart v. Castator*, 5 Binn. 109; 6 Am. Dec. 402, and note 406; note 14 Am. Dec. 703; *Hubbs v. Brockwell*, 3 Sneed, 574; *Smith v. Grim*, 28 Pa. St. 95; 65 Am. Dec. 400, and note 401; *Abbey v. Commercial Bank of New Orleans*, 34 Miss. 571; 69 Am. Dec. 401, and note 405; *Williams v. Lowe*, 4 Humph. 62; *Jackson v. Marshall*, 1 Murph. 323; 3 Am. Dec. 695; *Worth v. Northam*, 4 Ired. 102; *Vick v. Flowers*, 1 Murph. 32; *Epperson v. Young*, 8 Tex. 135; *Stewart v. Iglehart*, 7 Gill & J. 132; 28 Am. Dec. 202, and note 206; *Sides v. McCullough*, 7 Mart. (La.) 654; 12 Am. Dec. 519; *Banks v. Thomas*, Meigs, 28; *Seligman v. Wilson*, 1 Tex. App. 896; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460, and note 469; *Britt v. Aylett*, 11 Ark. 475; 52 Am. Dec. 282, and note 285; *Mason v. Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Byrd v. Curlin*, 1 Humph. 466; *Lynch v. Sanders*, 9 Dana, 59; *Dale v. Harrison*, 1 Bibb, 65; *Davy v. Kelley*, 66 Wis. 452; notes 31 Am. Dec. 484; 42 Id. 169; *Butler v. Moore*, 73 Me. 151; 40 Am. Rep. 348; *Clemens v. Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Zuver v. Clark*, 104 Pa. St. 222; *Sill v. Swackhammer*, 103 Id. 7; *Jacobi v. Schloss*, 7 Cold. 385; *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169, and note 175; *Telford v. Adams*, 6 Watts, 429.

So it is an undoubted doctrine of law and equity that such fraudulent deed vests the title absolutely in the grantee, and gives to him a legal and perfect estate, except as to those persons actually defrauded by the transaction, since such conveyance passes as valid a title as if it were *bona fide* and for a full and adequate consideration: *Zuver v. Clark*, 104 Pa. St. 222; *Sill v. Swackhammer*, 103 Id. 7; *Lynch v. Sanders*, 9 Dana, 59; *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Jackson v. Garnsey*, 16 Johns. 189, 192; *Parkhurst v. McGraw*, 24 Miss. 134; *Skinner v. Oakes*, 10 Mo. App. 45, 50; *Jacobs v. Smith*, 89 Mo. 673; *McMaster v. Campbell*, 41 Mich. 513, 516; *Lemay v. Bibeau*, 2 Minn. 291; *Moore v. Livingston*, 14 How. Pr. 1; *Waterbury v. Westervelt*, 9 N. Y. 598; *Henriques v. Hone*, 2 Edw. Ch. 119; *Crocker v. Crocker*, 17 How. Pr. 504; and this rule is said to hold true although no consideration was paid or possession given: *Hoeser v. Kraeka*, 29 Tex. 450, 453; *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; in this last case the conveyance was voluntary. But in *Tierney v. Claflin*, 15 R. I. 220, the rule was qualified and there limited to innocent grantees, though the case was not argued so far as the limitation was concerned: See also *Newell v. Newell*, 34 Miss. 385; and it was said in *Hess v. Final*, 32 Mich. 516, that such a conveyance may be good between the parties when based on a valid consideration. The court, however, although not directly making the distinction there between those cases where a consideration exists and those where the conveyance is voluntary, impliedly intimates that such a distinction exists. So a similar distinction is made in Georgia between those cases where the conveyance is voluntary and where the whole consideration was paid: *Bush v. Rogan*, 65 Ga. 320; 38 Am. Rep. 785. The illustration of this in *Goodwyn v. Goodwyn*, 20 Ga. 600, being that if A sells property to B to defeat a third party, and such property is paid for by B, this entitles B to sue for and recover it from A; not so, however, if B paid nothing as a consideration. If B obtained possession he can hold it as against A and those holding as volunteers under him, although if he failed to get possession the court will refuse its aid to compel the execution of the evinuous contract.

HEIRS, PRIVIES, ASSIGNS, ETC., HOW FAR BOUND. — Such fraudulent deed is equally binding upon the grantor, his heirs, privies, assigns, and those claiming under him: *Reichart v. Castator*, 5 Binn. 109; 6 Am. Dec. 402, and note 406; *Mason v. Baker*, 1 A. K. Marsh. 65; 10 Am. Dec. 724; *Skinner v. Oakes*, 10 Mo. App. 45, 50; *Jacobs v. Smith*, 89 Mo. 673; *Dale v. Harrison*, 4 Bibb, 65; *Crawford v. Lyle*, 3 Mo. App. 585; *Finley v. McConnell*, 60 Ill. 259; *Horner v. Zimmerman*, 45 Id. 14; *Lyons v. Robbins*, 46 Id. 276; *Fitzgerald v. Forristal*, 48 Id. 228; *Bush v. Rogan*, 65 Ga. 320; 38 Am. Rep. 785; *Anderson v. Brown*, 72 Ga. 713, 722; *Edward v. Kilpatrick*, 70 Id. 328; *Battle v. Street*, 85 Tenn. 282, 293; *Murphy v. Hubert*, 16 Pa. St. 50; note 14 Am. Dec. 703; *Kid v. Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; *Smith v. Grim*, 28 Pa. St. 95; 67 Am. Dec. 400; *Tremper v. Barton*, 18 Ohio, 418; *Terrel's Heirs v. Cropper*, 9 Mart. (La.) 350; 13 Am. Dec. 309; *Cushwa v. Cushwa's Lessee*, 5 Md. 44.

EXECUTED AND EXECUTORY CONTRACTS. — Although the courts with few exceptions have decided that conveyances and contracts made and entered into in fraud of creditors are valid and binding between the parties, yet an examination of the cases discovers that the application of this principle has been the real source of controversy, especially in regard to executory contracts. As elucidating this point, and arriving at a determination of the governing rule, it will be eminently proper to consider some of the several cases wherein the question has been discussed. The case of *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520, is a leading case in Wisconsin.

There the plaintiff and the defendant entered into an arrangement whereby the former, for the purpose of defrauding his creditors, was to convey to the defendant, without consideration, a certain tract of land, the defendant agreeing to reconvey the same on request. In considering the question, the court refers to the cases of *Dyer v. Homer*, 22 Pick. 253, and *Harvey v. Varney*, 98 Mass. 118, and also to the earlier Massachusetts cases as determining the principle which should govern it in its conclusions, and says: "In that state, a conveyance or sale of property made with intent to hinder or defraud the creditors of the grantor or seller, if executed in due form of law, is good and effectual to pass the title to the grantee or vendee, because, as between the parties to it, it was fairly, deliberately, and intentionally executed and delivered. The grantor or seller may not claim relief, or the right to rescind or set aside the conveyance or transfer, on the ground that no consideration was paid or agreed to be. He may be concluded from doing this by reason of his fraud, but more likely for other sufficient reasons. All other remedies, however, are open to him as against the grantee or purchaser, subject, of course, to such defenses as may have arisen in favor of the latter by the action of creditors or purchasers, who may at any time avoid the conveyance or transfer. If the grantee or vendee has given his promissory note in consideration of the conveyance or transfer, or entered into any other promise or obligation, in other respects sufficient to pay for the property, the grantor or seller may enforce the same, or recover damages for the breach by his appropriate action at law, or if the nature of the complaint or cause of action be such as remediable only in equity, he may file his bill in that court, and relief will be granted in the same manner and to the same extent as between other parties to contracts or agreements not affected by the element of fraud or delay with respect to the claims of creditors or others. The doctrine of *par delictum* has no application between the contracting parties, the conveyance or contract being considered illegal or void, only so far as it is declared so by the statute"; and the court cites also, as sustaining the doctrine advocated by it, *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713; *Andrews v. Marshall*, 43 Me. 472; 48 Id. 26; *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252; *Jackson v. Garnsey*, 16 Johns. 189; *Findley v. Cooley*, 1 Blackf. 262; *Scott v. Purcell*, 7 Id. 66, 68; 39 Am. Dec. 453; *Moore v. Meek*, 20 Ind. 484; *Springer v. Drosch*, 32 Id. 486; 2 Am. Rep. 356; *Hoesser v. Kraeka*, 29 Tex. 450; *Davis v. Ransom*, 26 Ill. 105; *Lawton v. Gordon*, 34 Cal. 36; 91 Am. Dec. 670. The later cases in Wisconsin, — *Davy v. Kelley*, 66 Wis. 452, 457; *Melhop v. Pettibone*, 54 Id. 652, 657; *Dietrich v. Koch*, 35 Id. 618; *Hardy v. Stonebreaker*, 31 Id. 647; and *Sutton v. Wauwatosa*, 29 Id. 21, 32; 9 Am. Rep. 534, — although citing *Clemens v. Clemens*, *supra*, to the extent that the contract is valid between the parties, do not seem to agree upon the application of that doctrine. The case in 29 Wis. 32, declares that for consistency the ruling in *Clemens v. Clemens*, *supra*, should be followed. But the court in 31 Wis. 647, while citing that case, says the maxim is too well established in law to admit of controversy, that a court of justice will not, as a rule, "interfere between parties equally guilty, to adjust their controversies and apportion the shares to which they are respectively entitled, accruing from a fraudulent, illegal, or immoral enterprise." *Dietrich v. Koch*, *supra*, simply holds that such fraudulent contracts are valid and binding between the parties; while *Melhop v. Pettibone*, *supra*, holds that a fraudulent grantor may not reclaim lands from his fraudulent grantee, relying upon the same doctrine stated in *Clemens v. Clemens*, *supra*; viz., that such conveyance is valid between them, although it will be observed that a

different application of the rule is there made. But the case of *Davey v. Kelley*, *supra*, sustains that of *Clemens v. Clemens*, *supra*, by a direct application of the doctrines therein considered.

The oft-cited case of *Nellis v. Clark*, 20 Wend. 24, decides that no recovery can be had upon a note given as a part consideration for a fraudulent conveyance of land; that a promise to pay for property purchased with the intention to defraud creditors will not be enforced. The court, *arguendo*, says: "I lay out of view the failure of consideration, because I agree that such a purchaser would never be protected on his own account. He would be esteemed guilty of a crime against social policy; and though he had paid the most ample consideration, he could not recover it back"; and the rule was declared to be the same "whether the act be declared fraudulent at the common law or by statute, and the same at law as in equity," fraud of this character being there declared to be so both at common law and by the statute; and that, whether the contract be executed or executory, no aid will be given either party, — an executed contract being binding between the parties, and an executory one being in effect a nullity, so that the contractor may not be compelled to perform his agreements or pay damages for its non-performance. The dissenting opinion of the chief justice in this case has, however, been followed in some of the cases, as will be seen in this note. In this dissenting opinion, a distinction is made between executed and executory contracts; and it is argued that a recovery could be had upon the note in suit upon the ground that such a contract is valid and legal as between the parties themselves. In *Chamberlain v. Barnes*, 26 Barb. 160, 162, the decision in *Nellis v. Clark*, *supra*, is affirmed, and the doctrine applied to the effect that a bond and mortgage executed for the purchase-money for a fraudulent conveyance could not be enforced, although the plaintiff obtained them from the party to the original covinous transaction. The claim was made in this case "that the plaintiff, in respect to his mortgage, [stood] in the position of a grantee of the premises; and even if the mortgage [was] fraudulent, the defendants" could not dispute its validity. The court ruled, however, that "this would be so if the mortgage conveyed the title to the land, and it became vested in the plaintiff by the assignment. The law would then, as to the parties and privies, and all claiming under them or either of them by grant or assignment, leave the title where the fraudulent act had placed it. But a mortgage upon real estate has no such effect; it is a mere lien upon the land, and is security for the debt, and carries no title. . . . The bond, which is the debt, is clearly an executory contract, and the mortgage, being but a security for the debt, partakes of the same character."

Again, the application of the doctrine that such a conveyance is valid between the parties is limited to executed contracts, in *Moseley v. Moseley*, 15 N. Y. 334, 335, where the court says: "It was formerly understood to be the law that contracts and conveyances made with a view to delay, hinder, or defraud creditors were, nevertheless, valid and binding between the parties to such contracts and conveyances. . . . In *Nellis v. Clark*, 20 Wend. 24, the rule was departed from by a decision which restricted the doctrine to executed conveyances, the court holding that an executory agreement entered into in fraud of creditors could not be enforced between the parties; conceding, however, that the principle which I have stated applied universally to grants and conveyances, and all executed contracts. The court applied to transactions fraudulent against creditors the rule which prevails as to other illegal contracts, namely, that whatever the parties have illegally contracted to execute, neither can by law compel the other to execute, or to pay dam-

ages for not executing; and that, as to conveyances and executed contracts, it refuses to aid either party, but leaves them where it finds them. This modification of the law as it was finally held, having received the sanction of the court of errors, should now be considered as established."

Briggs v. Merrill, 58 Barb. 389, 399, was another case where it was sought to enforce the payment of a promissory note given in part performance of such fraudulent transaction, and the court refused to aid the plaintiff in its collection, relying upon *Nellis v. Clark*, *supra*. And it also held, in *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477, that the parties to such fraudulent conveyance will not be permitted to deny its validity. Nor may such fraudulent grantor maintain a suit to set aside such a conveyance, although the conveyance was made by the advice of the grantee, with whom the plaintiff was very intimate, and in whom he reposed great confidence, although a distinction was made between such a case and one where the grantee was a legal adviser: *Renfrew v. McDonald*, 11 Hun, 254. And where there has been a fraudulent transfer of personal property, the law cannot be invoked to aid either, because the title by such act is vested absolutely in the transferee, even though he was a party to the fraud: *Crocker v. Crocker*, 17 How. Pr. 504. So in *Henriques v. Hone*, 2 Edw. Ch. 119, it is said that the grantor may not impeach such fraudulent grant of land since the court will refuse to set it aside as a nullity between the parties. But in *Sweet v. Finslar*, 52 Barb. 271, it was held that an action to compel an accounting by the defendant, and a reconveyance by him of real estate so fraudulently conveyed to him under a trust agreement entered into for the plaintiff's benefit, could not be sustained, it being there said that the doctrine is well settled that a court of equity will not set aside such an agreement, and that, being *particeps criminis*, neither party will be relieved as against the other from the consequences of such covinous acts. Although it was declared that "if there had been a promise on the part of the defendant to render an account, or to pay the plaintiff for moneys received, or an agreement subsequently made for a valuable consideration to reconvey the lands, then perhaps the action might be maintainable."

And in *Jackson v. Garnsey*, 16 Johns. 189, 192, it was decided that where property was so fraudulently conveyed under an agreement for a reconveyance, although voluntary and without any consideration, that the parties were as much bound as though a *bona fide* and valuable consideration had been paid, and that neither at law or in equity would such conveyance be set aside.

In Maine, the case of *Butler v. Moore*, 73 Me. 151, 40 Am. Rep. 348, holds that in an action on a note against the maker thereof, and which was given as the consideration of a conveyance made in fraud of creditors, the fraud may not be availed of as a defense. The court there says: "It is generally true that the law will not aid parties violating its express or implied rules in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases, the old maxims, *ex turpi* and *in pari delicto*, stand like walls against the parties." It then declares that such fraudulent conveyance is valid between the parties, and adds: "If valid, we fail to see why the note given in payment is not also valid. The transaction is not a *turpis causa*, and neither do the parties stand *in pari delicto*. . . . The decisions in Massachusetts sustain actions like this"; and it relies upon the cases of *Dyer v. Homer*, *Harvey v. Varney*, cited *ante*; *Butler v. Hildreth*, 5 Met. 49, 50; *Bailey v. Foster*, 9 Pick. 139; *Clemens v. Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Carpenter v. McClure*, 39 Vt. 9; 91 Am. Dec. 370. Finally, however, the court, without directly overruling the prior cases in its own state

which are *contra*, argues as follows: "We are aware that the early decisions in our own state are somewhat inconsistent: *Smith v. Hubbs*, 10 Me. 71; *Nichols v. Patten*, 18 Id. 231; 36 Am. Dec. 713; *Ellis v. Higgins*, 32 Me. 34; *Andrews v. Marshall*, 48 Id. 26. But in none of these cases was this precise question presented, although it was discussed. We think, however, the better doctrine is the one held by the cases above cited."

In another leading case, *Drinkwater v. Drinkwater*, 4 Mass. 355, 360, it was ruled that where land is so fraudulently conveyed, that only for the benefit of creditors can the covinous transaction be shown, and that neither the grantor nor his heirs can impeach for fraud a conveyance to which he was a party. The case of *Dyer v. Homer*, 22 Pick. 253, is, if not *contra*, certainly not consistent with the reasoning in this case, since it was there held that there was no reason why a non-negotiable promissory note given as the consideration of a fraudulent sale of personal property should not be enforced in the name of the promisee for the benefit of the assignee. It will be observed that in this case a distinction is apparently made between notes given without and those which are supported by a consideration; and in *Harvey v. Varney*, 98 Mass. 118, it was held that it made no difference whether the contract was executed or executory; it was good and valid between the parties, although the parties were *in pari delicto*, and judgment was given in that case for the plaintiff, the action being a bill in equity for the settlement of partnership accounts; and the court argued that the defendants could not be permitted to set up in defense that the purpose of forming the partnership was to defraud creditors, and cites *Dyer v. Homer*, *supra*, as a precedent, although it is said that such fraudulent conveyance is good, and stands between the parties: Id. 120. The case of *Nellis v. Clark*, 20 Wend. 24, is referred to as sustaining an adverse doctrine, but the court, notwithstanding, adopts the dissenting opinion in that case of Chief Justice Nelson, "the reasoning and conclusions of which," it says, "commend themselves to our judgment in preference to the opinion of the majority of that court." The case of *Canton v. Dorchester*, 8 Cush. 525, is criticised at length, and it was declared that "the question whether a contract to reconvey an estate could be avoided by proving that it and the deed were both given to cover up the property from attachment, was not distinctly presented to the court nor involved in the case under examination. We cannot suppose that it was intended in an incidental and summary manner to overrule the entire current of authorities"; and the court adds that although in that case it was decided that no court of law or equity would, upon the application of the grantor, enforce an executory contract founded on a fraudulent transaction, yet the gist of the ruling was merely a statement of the "general doctrine that the discretionary power of a court of chancery to enforce specific performance will not be exercised where the plaintiff has been guilty of fraud"; that the position that a court of law would not sustain an action on such a contract was not upheld by any authorities there cited, and was a remark not necessary to the decision in that action. The case of *Harvey v. Varney*, *supra*, and *Dyer v. Homer*, *supra*, being the latest cases, may—however questionable—undoubtedly be held as the decisive ones in Massachusetts.

So in *Walton v. Tusten*, 49 Miss. 569, 576, it is determined that "there is a distinction between an executed and an executory fraudulent contract. As to the latter, the court, where the parties are equally participants in the fraud, — *in pari delicto*, — will leave them in the predicament where they place themselves, by denying any relief or interference. But where the contract is

executed, . . . the court acts upon the same principle, declining altogether to cancel the deed, and restore the title to [the grantor]. But the effect is very different: in the former case, specific performance will be refused; in the latter, the fraudulent grantee remains owner of the estate against the grantor and his heirs, and against all other persons except the creditors of the grantor. . . . The estate in the fraudulent grantee is complete, and fully vested, so that it is subject to sale and conveyance, or to descent; the title cannot be impugned by covin and collusion, in which it was contrived and transferred, by any other person except those injured by the deceit and fraud; no other person can assail the conveyance except the creditors (of the grantor). . . . The rights of the immediate parties are left to be dealt with by the common law. *Ex turpi causa non actio oritur*, — a party applying to a court of equity for relief must have an honest and just claim. To extend aid to either party engaged in a conspiracy to cheat and defraud would be to sanction the wrong, and carry it to a successful consummation; therefore equity will not decree a specific performance of an agreement by the fraudulent grantee to reconvey the property to the debtor." So the fraudulent grantor cannot maintain a suit to set aside such fraudulent conveyance, nor may he recover on the ground of fraud the property so conveyed: *Snodgrass v. Andrews*, 30 Miss. 472, 488, 64 Am. Dec. 169; since he will not be permitted to impeach his deed: *Newell v. Newell*, 34 Miss. 385; nor will the courts interfere between parties *in pari delicto*: *Watt v. Conger*, 13 Smedes & M. 412, 421. But in *Gary v. Jackson*, 55 Miss. 204, 30 Am. Dec. 514, and note 517, we find the doctrine that in an action for the price of goods sold and delivered, the defendant cannot avoid payment on the ground that the sale was in fraud of the seller's creditors.

Again, it is decided, in Pennsylvania, that an agreement that a judgment note should be held until the maker became embarrassed, and then be entered, and his real estate sold for the benefit of his wife, was a contract intended to hinder, delay, and defraud creditors, and that such agreement could not be enforced, and that neither one party nor the other could set up the fraud, as between themselves, to defeat the other party of any claim under it. "A party to such a transaction cannot give in evidence his own fraud in defense against his own act, whether it be an absolute deed or a mortgage, or a confession of judgment, no matter how it may be mingled with other arrangements or agreements between the parties." And the court also says that such fraudulent deed "is valid as against the grantor and those for whose benefit it is designed. . . . That a trust cannot be enforced where it is designed to effect a fraud on creditors, is settled by authority. The cases, without exception, decide that such a trust is void in itself, and therefore incapable of being made the foundation of a right in others": *Shank v. Simpson*, 114 Pa. St. 208, 212, relying on *Serfross v. Fisher*, 10 Id. 185; *Williams's Adm'r v. Williams*, 34 Id. 312; *Murphy v. Hubert*, 16 Id. 57; *Blystone v. Blystone*, 51 Id. 273.

In another case in Pennsylvania, — that of *Bonesteel v. Sullivan*, 104 Pa. St. 9, 14, — it was determined that if a mortgagee who seeks to recover on a mortgage made with intent to defraud the creditors of the mortgagor can make out his case without resorting to the fraudulent transaction, he is not precluded from recovering in a suit upon the mortgage, since in such action the defendant cannot set up the fraud as a defense, the mortgage having *prima facie* been executed in good faith and for a valuable consideration. The court said that the plaintiff, "though a participant in the fraud, has this advantage over the defendant, — he is not obliged to resort to the fraudulent

transaction to make out his case"; that the mortgagor, "as the very first step in his defense, is obliged to exhibit his own fraud, hence he cannot gain the ear of the court, for, on all authority, the court will not aid or abet a party who comes into it with a dishonest case"; and it adds that such a mortgage is good as between the parties to it.

So in *Dannels v. Fitch*, *Hale v. Fitch*, 8 Pa. St. 495, the rule is declared to be that a defendant in replevin may not avail himself of the defense of fraud in an action to recover personal property, or its value, since such transaction is valid between the parties and may be enforced. It is also decided that such fraudulent contract for the sale of goods is valid between parties, although void as to creditors, and the court will enforce the same: *Telford v. Adams*, 6 Watts, 429.

And again, that trover will not lie to recover the possession of personal property which the plaintiff has parted with for the purpose of defrauding his creditors: *Stewart v. Kearney*, 6 Watts, 453; 31 Am. Dec. 482, and note 484.

So upon the ground that such fraudulent transaction is valid between the parties, it is determined in *Winton v. Freeman*, 102 Pa. St. 366, 369, that the maker of a note fraudulent in its inception cannot set up his fraud as a defense against the payee to prevent its collection, the court saying that "it is settled by numerous authorities that there is no more binding consideration known to the law than the mutual fraud of the parties. The books are full of cases where a party to the fraud has sought relief in the courts from the consequences of his unlawful act, but the decisions have been uniformly adverse to such applications. It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them, giving no relief and no countenance to contracts made in violation of statutes." "A person cannot profit by his fraud. He cannot use it to acquire any rights, or to protect himself against any claim": *Brown v. Scott*, 51 Pa. St. 357, 365.

In keeping with the above decisions in this state, to the effect that a party cannot set up his own fraud to avoid any instrument or contract executed or entered into by him, and that equity will refuse relief to one who, in seeking its aid, discloses his own turpitude in the very contracts on which his action depends, we find the following additional cases: *Kunkle's Appeal*, 107 Pa. St. 368; *Pringle v. Pringle*, 59 Id. 281, 286; *Lessee of Simon v. Gibson*, 1 Yeates, 291; *Reichart v. Castator*, 5 Binn. 109, 112; 6 Am. Dec. 402; *Sickman v. Lapsley*, 13 Serg. & R. 224; 15 Am. Dec. 596, and note 599; *French v. Mehan*, 56 Pa. St. 286; *Stewart v. Kearney*, 6 Watts, 453; 31 Am. Dec. 482. The reasons given in *Sherk v. Endress*, 3 Watts & S. 255, for sustaining the doctrine above stated, in regard to executory contracts, are, that "the statute does not operate in a contest betwixt the actors themselves on what it declares to be fraud only in its relation to third persons; for in any other aspect there is no fraud whatever, and it is unimportant whether the contract is used to found a claim betwixt the parties to it, or to rebut one; it is free from taint in regard to them, and the one may use it against the other for any purpose whatever. The reason why a contract void against creditors may be set up against either of the parties to it is not because he shall not be allowed to defeat it by showing his own criminality, but because there is no criminality to be shown. It is a trite remark that though a contract within the purview of the statute is no contract at all against the interests intended to be defrauded, yet it is a contract in respect to everything else, and consequently it must have all the effect of one betwixt the parties to it. . . . The principle I have indicated arises from no provision of the statute, for a contract

infected with actual fraud against a third person not a creditor is, by the policy of the law, enforceable even in equity between those who intended to perpetrate the act."

In Iowa, it is decided, in the case of *Jones v. Farris*, 70 Iowa, 739, that neither a grantor nor his fraudulent creditor can have relief in a court of equity to set aside a deed made for the purpose of defrauding creditors, although there was a secret agreement to reconvey. The question was not discussed, however, the case being only a mere *dictum* to the above effect. This case is in keeping with those of *Kerrick v. Mitchell*, 68 Id. 273; *Weir v. Day*, 57 Id. 84, 86; *Mellen v. Ames*, 39 Id. 283; *Wright v. Howell*, 35 Id. 288; *Harlin v. Stevenson*, 30 Id. 371; *Holliday v. Holliday*, 10 Id. 200. Nor will a court of chancery compel a reconveyance for the purpose of enforcing a trust between the parties: *Stephens v. Heirs of Harrow*, 26 Id. 458, 465; and "while equity will not interfere to set aside such a deed between the parties or their heirs, it is also true that it will not lend its aid to enable parties to consummate their dishonest purposes. . . . Equity will not rectify or in any manner recognize a voluntary instrument which does not complete the transfer of the property. . . . As equity abhors fraud, there are still stronger reasons why it should not interfere to correct a deed executed without consideration and for a fraudulent purpose": *Gebhard v. Sattler*, 40 Id. 152, 154. In this last case, it was sought to correct a mistake in a deed made in fraud of creditors; but there were no creditors in fact. Here, although the grantor believed that an old claim might be prosecuted against him, and the grantee had encouraged such belief, and the conveyance had been made, it was held that a recovery might be had against the grantee of the property itself or of its value: See *Kerrick v. Mitchell*, 68 Id. 273.

In Illinois, the doctrine is laid down that courts will not aid parties to regain property fraudulently conveyed, but will leave them where they find them: *Songer v. Partridge*, 107 Ill. 529, 533. But in the case of *Second National Bank v. Brady*, 96 Ind. 498, it is said that "there is an important difference between setting aside a conveyance made to defraud creditors at the suit of the fraudulent grantor and the enforcement of notes or mortgages executed in the course of the fraudulent transaction. The cases of *Garner v. Graves*, 54 Ind. 188, *Edwards v. Haverstick*, 53 Id. 348, and *Laney v. Laney*, 2 Id. 196, decide that a fraudulent conveyance cannot be avoided by the grantor. *Van Wy v. Clark*, 50 Id. 259, and *O'Neil v. Chandler*, 42 Id. 371, following without investigation the case of *Springer v. Drosch*, 32 Id. 486, 2 Am. Rep. 356, decide that notes and mortgages executed by the fraudulent grantor to his fraudulent grantee may be enforced, while *Welby v. Armstrong*, 21 Ind. 489, decides the question exactly the other way. It seems that *Springer v. Drosch*, *supra*, is opposed to the familiar rule that courts will not aid either party to enforce a contract founded in fraud, but it will leave them where it found them; it certainly is in conflict with the great weight of authority; and the court relies upon the cases of *Nellis v. Clark*, 4 Hill, 424; *Moseley v. Moseley*, 15 N. Y. 334; *Mason v. Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Norris v. Norris*, 9 Dana, 317; 35 Am. Dec. 138; *Randall v. Howard*, 2 Black, 585; *Fox v. Gardner*, 21 Wall. 475; *Hamilton v. Scull*, 25 Mo. 165; 69 Am. Dec. 460; *McCausland v. Ralston*, 12 Nev. 195; 28 Am. Rep. 781; *Miller v. Marckle*, 21 Ill. 152; *Heineman v. Newman*, 55 Ga. 262; 21 Am. Rep. 279; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Wearse v. Peirce*, 24 Pick 140." Further than this statement, however, the court does not go, and does not directly overrule *Springer v. Drosch*, *supra*. The decision of *Seivors v. Dickover*, 101 Ind. 495, follows the case of *Second National Bank v. Brady*, *supra*. But

unless these last two decisions may be held to impliedly overrule *Springer v. Drosch*, *supra*, that case stands as law in Indiana, since it directly overrules *Welby v. Armstrong*, 21 Ind. 489, and is followed, as above stated, by *Van Wy v. Clark*, *supra*, and *O'Neil v. Chandler*, *supra*. The cases of *Nellis v. Clark*, 4 Hill, 424; *Mason v. Baker*, 1 A. K. Marsh. 208, 10 Am. Dec. 724, and *Norris v. Norris*, 9 Dana, 317, 35 Am. Dec. 138, directly relied on in *Second National Bank v. Brady*, *supra*, are declared in *Springer v. Drosch* to find no support in the principles of the common law, and are said not to be sustained by a single authority. This last case relies upon *Drinkwater v. Drinkwater*, 4 Mass. 354; *Taylor v. Weld*, 5 Id. 109; *Reichart v. Castator*, 5 Binn. 109; 6 Am. Dec. 402; *Gillespie v. Gillespie*, 2 Bibb, 89; *Dale v. Harrison*, 4 Id. 65; *Clapp v. Tirrill*, 20 Pick. 247; *Dyer v. Homer*, 22 Id. 253; *Sherk v. Endress*, 3 Watts & S. 255; *Randall v. Phillips*, 3 Mason, 378; *Byrd v. Curlin*, 1 Humph. 466; *Thompson v. Moore*, 36 Me. 47; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Burgett v. Burgett*, 1 Ohio, 469; 13 Am. Dec. 634; *Worth v. Northam*, 4 Ired. 102; *Hendricks v. Mount*, 5 N. J. L. 738; 8 Am. Dec. 623; *Robinson v. Monjoy*, 5 N. J. L. 173; *Sumner v. Murphy*, 2 Hill (S. C.), 488; 32 Am. Dec. 397; *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Dearman v. Radcliffe*, 5 Ala. 192; *McGuire v. Miller*, 15 Id. 394; *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713; *Fairbanks v. Blackington*, 9 Pick. 93.

The case of *Seivors v. Dickover*, 101 Ind. 495, 498, holds that the court will refuse to refund to such fraudulent grantee the amount paid by him in the transaction, although it has gone to the creditors of the failing debtor, since the law uniformly leaves the parties to such fraudulent transactions exactly where it finds them. And in *Edwards v. Haverstick*, 53 Id. 348, it is said that an execution against a grantee can be levied on land so fraudulently conveyed to him.

In California, the decisions seem to conflict, since in *Davis v. Mitchell*, 34 Cal. 82, it was held, in an action on a note given in fraud of creditors, and which was bought at an execution sale of the property of the payee, that he could neither allege nor prove that the transaction upon which such note was based was fraudulent; that the courts would listen neither to such a defense nor to an action to recover back property so fraudulently transferred, citing *Abbe v. Marr*, 14 Cal. 210; *Valentine v. Stewart*, 15 Id. 387; *Gregory v. Haworth*, 25 Id. 653.

But in *Ayer v. Duncan*, 50 Cal. 325, 327, where the contract was executory, and a suit was brought to enforce the payment of a note given with a fraudulent intent of concealing the actual ownership of property from creditors, and it appeared that the parties were *in pari delicto*, the court said: "In such cases it is immaterial by which of the parties the fraudulent nature of the contract is disclosed to the court; as soon as the fraud is made to appear by either of the parties, the court will refuse to interfere, and will leave them as they were. It will not enforce a contract founded on the mutual turpitude of the parties to it; and for the same reason, if the contract has been executed the court will not aid either party to escape its consequences."

Courts will enforce, in Texas, a fraudulent conveyance of real or personal estate against the grantor, as where chattels or land have been sold and granted, but the vendor or grantor has remained in possession; in such cases a suit may be maintained by the fraudulent grantee for recovery of the same, nor can the grantor of such fraudulent deed impeach it. "It has universally been held that wherever the conveyance was completed, either by the actual or constructive delivery of the property, the grantee was entitled to recover, though the grantor was in possession of the property at the commencement

of the suit, and had been continuously so from the date of the conveyance": *Hoesser v. Kraeka*, 29 Tex. 450, 454; see also *Seawell v. Lowery*, 16 Id. 47, 50. A distinction is impliedly made in *Hoesser v. Kraeka*, *supra*, between executed and executory contracts.

In *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370, it is determined that a note having its inception under a contract fraudulent as to creditors may be enforced against the makers, notwithstanding the fraud. The case of *Nellis v. Clark*, 20 Wend. 24, is considered, and the distinction there made between executory and executed contracts is held not in keeping with the decisions of the Vermont courts: *Martin v. Martin*, 1 Vt. 91; 18 Am. Dec. 675; *Gifford v. Ford*, 5 Vt. 532; *Conner v. Carpenter*, 28 Id. 240; *Boutwell v. McClure*, 30 Id. 676; *Seaver v. Price*, 42 Id. 325; *Roberts v. Lund*, 45 Id. 82. In the last case, it was said that the law will not permit a party to allege his own fraud to avoid his contract or the legal consequences of his own acts: 45 Id. 87; and see *Peaslee v. Barney*, 1 D. Chip. 331; 6 Am. Dec. 743.

In Tennessee, the courts equally refuse to aid either party to such fraudulent agreements, deeds, and transfers of property, and refuse to rescind such fraudulent conveyance, or to enforce such convinous agreements, as where a note is given for real property where a pretended sale is made to defraud creditors, no recovery can be had: *Parkes v. McKaney*, 3 Head. 297; *Hamilton v. Gilbert*, 2 Heisk. 680; *Walker v. McConico*, 10 Yerg. 228. In this last case the note was without consideration; *Battle v. Street*, 85 Tenn. 282, 293; *Shaw v. Carlile*, 9 Heisk. 594; *Swan v. Castleman*, 4 Baxt. 257, 269; so where one holding a note surrenders it to another in order to delay and defraud creditors, under an agreement to account for said note, no court will aid the party in recovering the same, since "the courts will not, as between the parties, take cognizance of such a fraudulent transaction, nor interpose, at the instance of either, for any purpose whatever": *Mulloy v. Young*, 10 Humph. 297. Such fraudulent sale is binding upon the parties in Arkansas, and may not be rescinded or enforced: *Britt v. Aylett*, 11 Ark. 475; 52 Am. Dec. 282, and note 285; *Anderson v. Dunn*, 19 Ark. 650, 659.

In West Virginia, where, under a contract, something fraudulent or opposed to public policy, is agreed to be done, and the parties are in *pari delicto*, the court will, as a general rule, refuse to enforce such a contract: *Horn v. Star Foundry Co.*, 23 W. Va. 522, 533.

The doctrine that neither party to a fraudulent conveyance can be aided in a court of justice, but that they will be left in exactly that position in which they have placed themselves by their covinous and fraudulent transactions, and that the fraudulent grantor may not be permitted to impeach his deed, or to revoke or rescind such executed contract, is followed in North Carolina: *Elington v. Currie*, 5 Ired. Eq. 21; *Waller v. Mills*, 3 Dev. 515, 519; *Jones v. Gorman*, 7 Ired. Eq. 21, 23; *Bynum v. Miller*, 86 N. C. 559, 562; 41 Am. Rep. 467; and this rule was extended, in that state, to a case where a party, at the suggestion and advice of his attorney, conveyed land to him with the intent to defraud his creditors, the court refusing to grant any relief: *York v. Merritt*, 80 N. C. 285; so in South Carolina: *Kidd v. Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; and the same rule obtains in New Jersey: *Cutler v. Tuttle*, 19 N. J. Eq. 549, 562; *Holt v. Creamer*, 34 N. J. Eq. 181, 182; *Evans v. Herring*, 27 N. J. L. 243; nor may such fraudulent grantor invoke the aid of a court, "either directly or indirectly (as by a suitor in the guise of a creditor), to recover the control of the property, or direct the disposition of it in any form": *Ruckman v. Conover*, 37 N. J. Eq. 583, 585; the rule is also followed in Kentucky: *Martin v. Martin*, 5 Bush. 47; *Norris v. Norris's*

Adm'r, 9 Dana, 318; 35 Am. Dec. 138; *Jones v. Read*, 3 Dana, 540; *Mason v. Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Dale v. Harrison*, 4 Bibb, 65. It also obtains in Alabama: *Williams v. Higgins*, 69 Ala. 517, 523; *Dearman v. Radcliffe*, 5 Ala. 192, 193; it being declared in that state that where lands are conveyed in fraud of creditors, no matter what the agreement of the grantee to hold in trust or to reconvey may have been, the grantor is precluded from recovering back the title, not that the grantee, by such conveyance, is given an honest right to hold, but because, by reason of the vicious intent of the grantor he forfeits all right to recover: *Kelly v. Karsner*, 72 Ala. 106, 111; and this doctrine prevails in Maryland: *Lamborn v. Moore*, 6 Har. & J. 422, 426; *Freeman v. Sedwick*, 6 Gill, 28; 46 Am. Dec. 650; *Bayne v. Suit*, 1 Md. 80, 86; *Roman's Devisee v. Mali*, 43 Id. 513, 533; *Wilson v. Watts*, 9 Id. 356, 456; also in Ohio: *Roll v. Raguet*, 4 Ohio, 400, 419; 22 Am. Dec. 759; *White v. Brocaw*, 14 Ohio St. 339, 341; *Trimble v. Doty*, 16 Ohio St. 118, 129; *Emrie v. Gilbert*, Wright, 764; *Goudy v. Gebhart*, 1 Ohio St. 263, 268; *Barton v. Morris*, 15 Ohio, 408, 428; also in Nevada: *Peterson v. Brown*, 17 Nev. 172; 45 Am. Rep. 437; and in Virginia: *James v. Bird's Adm'r*, 8 Leigh, 510; 31 Am. Dec. 668, and note 670; *Owen v. Sharp*, 12 Leigh, 427, 429; *Thomas v. Soper*, 5 Munf. 28; also in Colorado: *Coon v. Ryden*, 4 Col. 275, 281; also in Connecticut: *Owen v. Dixon*, 17 Conn. 496. Though it is said in *Nichols v. McCarthy*, 53 Id. 299, 324, 55 Am. Rep. 105, that "it is a well settled rule than where a debtor understandingly and deliberately conveys away his property to defraud or hinder his creditors, a court of equity will not lend him its aid to recover the property back. . . . It is not, perhaps, an established qualification of the rule mentioned that a person who, in retaining property conveyed to him, is himself guilty of a fraud, cannot avail himself of the prior fraud of the grantor for the purpose of keeping the property, but such a qualification of the rule is at least implied in *Railroad Company v. Durant*, 95 U. S. 579, and *Byington v. Moore*, 62 Iowa, 470. Such a qualification seems a reasonable one." See also, as sustaining the above principal rule, *Kinney v. Consolidated Mining Co.*, 4 Saw. 382; *Schenck v. Hart*, 32 N. J. Eq. 774, 782; note 34 Am. Dec. 765; *Pemberton v. Smith*, 3 Head, 18; *Fowler v. Stoneum*, 11 Tex. 478, 502; 62 Am. Dec. 490; *Danzev v. Smith*, 4 Tex. 411; *Epperson v. Young*, 8 Id. 135; *Portes v. Hill*, 14 Id. 69; *Hall v. Callahan*, 66 Mo. 316, 323; *Powell v. Inman*, 8 Jones, 436; 82 Am. Dec. 426; *Quirk v. Thomas*, 6 Mich. 98; *Hazard v. Hall*, 5 Mo. App. 584; *Frasner v. City Council*, 19 S. C. 384, 403; *Hollis v. Morris*, 2 Harr. (Del.) 123; *Newson v. Douglass*, 7 Har. & J. 317; 16 Am. Dec. 317; *Cushnea v. Cushwa's Lessee*, 5 Md. 44; *Jackson v. Dutton*, 3 Harr. (Del.) 98; in this last case the conveyance was fraudulently made to deprive the wife of alimony: *Terrel's Heirs v. Cropper*, 9 Mart. (La.) 350; 13 Am. Dec. 309; *Burns v. Baugert*, 92 Mo. 167; *Rust v. Shackelford*, 47 Ga. 534; *Steadman v. Hayes*, 80 Mo. 319; *Skinner v. Oakes*, 10 Mo. App. 45, 50; *Burke v. Adams*, 89 Mo. 505; 50 Am. Rep. 510; *Bush v. Rogan*, 65 Ga. 320; 38 Am. Rep. 785, where the decision seems limited to those cases where a consideration was paid; it was also said in this case that the grantor to such fraudulent deed will not be permitted in an action of ejectment to set up the fraud: *Anderson v. Brown*, 72 Ga. 713, 722; *Edward v. Kilpatrick*, 70 Id. 328; but see *Harrison v. Hatcher*, 44 Ga. 638, 642. Whether such fraudulent executory contracts are held to be valid or a nullity, the conclusion that they can be enforced is certainly not a logical one, or at least not one founded on legal or equitable principles, because, as in the particular instance of enforcing the collection of notes given in the payment of land or personal property so fraudulently transferred, the court

thereby simply enables the fraudulent grantor or vendor to reap the fruits of his covinous transaction by collecting the proceeds of such sale, grant, or transfer. The following cases, therefore, which hold that such executory contract cannot be enforced, seem more consistent with all law and equity: *Hamilton v. Scull's Adm'r*, 25 Mo. 165; 69 Am. Dec. 460; *Norris v. Norris's Adm'r*, 9 Dana, 318; 35 Am. Dec. 138; *Jones v. Read*, 3 Dana, 540; *Dearman v. Radcliffe*, 5 Ala. 192, 193; *Freeman v. Sedwick*, 6 Gill, 28; 46 Am. Dec. 650, and note 654; *Larrimore v. Tyler*, 88 Mo. 661, 668; *Trimble v. Doty*, 16 Ohio St. 118; *Fenton v. Ham*, 35 Mo. 409; *Goudy v. Gebhart*, 1 Ohio, 263; *Roll v. Raguet*, 4 Id. 400, 419; 22 Am. Dec. 759; *Anderson v. Dunn*, 19 Ark. 650, 659; *Vick v. Flowers*, 1 Murph. 321; *Jackson v. Marshall*, 1 Id. 323; 3 Am. Dec. 690; *Powell v. Inman*, 8 Jones, 436; 82 Am. Dec. 426, and note 428; *Boatner v. Yarbrough*, 12 La. Ann. 249, 251; *Denton v. Wilcox*, 2 Id. 60; *Meyer v. Farmer*, 36 Id. 785, 789; *Succession of Pointer*, 24 Id. 275; *Heineman v. Newman*, 55 Ga. 262; *Eyre v. Eyre*, 19 N. J. Eq. 42; *Schenck v. Hart*, 32 Id. 774, 781; although in *Owens v. Owens*, 23 Id. 60, 62, the application of the rule seems limited to executory contracts without consideration; and see *Mason v. Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Dale v. Harrison*, 4 Bibb, 65; but examine *Danzey v. Smith*, 4 Tex. 411, 415; *Holt v. Creamer*, 34 N. J. Eq. 181, 182; *Aubic v. Gil*, 2 La. Ann. 342; *Louis v. Richard*, 12 Id. 684; *Lessee of Barton v. Heirs of Morris*, 15 Ohio, 408, 428; *Hess v. Final*, 32 Mich. 516; *Ross v. Garlick*, 10 Rob. (La.) 365, 370; *Herz v. Wilder*, 10 La. Ann. 199, 201; 1 Pomeroy's Eq. Jur., sec. 401; 2 Id., secs. 916, 940; *McCausland v. Ralston*, 12 Nev. 195; 28 Am. Rep. 781, — where this question in regard to executed and executory contracts is considered, and the English and American authorities reviewed at length; see also Bigelow on Frauds, ed. 1888, 207.

RIGHT OF EXECUTOR OR ADMINISTRATOR TO IMPEACH OR DEFEND ON GROUND OF FRAUD. — In *Lockwood v. Krum*, 34 Ohio St. 1, 10, it was said that the point whether an executor or administrator could recover property so fraudulently conveyed had not then been authoritatively settled in that state; nor was it decided in that case; although such right was denied in *Benjamin v. Le Baron's Adm'r*, 15 Ohio, 517; and it was also decided in *Kilbourne v. Fay*, *Keller v. Shaeffer*, 29 Ohio St. 264, 284, 23 Am. Rep. 741, that where the mortgagor of chattels dies insolvent, and in possession of the estate, the property becomes assets in the hands of the executor or administrator, where such mortgage was based on fraud and was void as to creditors, and that it was the duty and right of such representative of the mortgagor to protect such property against the mortgagee; and that it made no difference that the mortgage was a valid lien against the mortgagor during his lifetime, and against the distributees of his estate after his death. In a majority of cases, however, it is decided that an administrator of a fraudulent grantor cannot maintain a suit to set aside such fraudulent conveyance: *McLaughlin v. McLaughlin's Adm'r*, 16 Mo. 242; *George v. Williamson*, 26 Id. 190; 72 Am. Dec. 203; *Kellinger v. Reidenhauer*, 6 Serg. & R. 531; *Pringle v. Pringle*, 59 Pa. St. 281, 286; *Henriques v. Hone*, 2 Edw. Ch. 119; *Snodgrass v. Andrews*, 30 Miss. 472, 488; 64 Am. Dec. 169, and note 175; *Armstrong v. Stovall*, 26 Miss. 275, 277; *Partee v. Matthews*, 53 Id. 140; *Van Wickle v. Calvin*, 23 La. Ann. 205; *Hall v. Callahan*, 66 Mo. 316, 323; *Kinne-man v. Miller*, 2 Md. Ch. 407; *Holt v. Creamer*, 34 N. J. Eq. 181, 182; *Connell v. Chandler*, 13 Tex. 5; 62 Am. Dec. 545; *Davis v. Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Hunt v. Butterworth*, 21 Tex. 133; 73 Am. Dec. 223, and note 228; *Avery v. Avery*, 12 Tex. 54, 57; 62 Am. Dec. 513, and note 518;

Mulloy v. Young, 10 Humph. 297, 300; *Moody v. Fry*, 3 Id. 567; *Estes v. Howland*, 15 R. I. 127, citing Bump on Fraudulent Conveyances, 3d ed., 445, notes 1, 2; *Crawford's Adm'r v. Lehr*, 20 Kan. 509; *White v. Russell*, 79 Ill. 155; *Burton v. Farinholt*, 86 N. C. 260; *Merry v. Fremon*, 44 Mo. 518; *Zoll v. Soper*, 75 Id. 460; *Cobb v. Norwood*, 11 Tex. 556; *Boggs v. McCoy*, 15 W. Va. 344.

So trover will not lie by the administrator to recover goods of the intestate so fraudulently transferred, although it was not decided in this case whether any remedy would lie in chancery: *Benjamin v. Le Baron's Adm'r*, 15 Ohio, 517, 526. Nor can such fraud be set up by the administrator of a mortgagor in a suit upon the mortgage, since neither party to the fraud could profit by the fraud to defeat the claim of either party under it: *Williams's Adm'r v. Williams*, 34 Pa. St. 312; and where the administrator took possession of such goods so fraudulently conveyed away by his intestate, it was held, in an action of trespass brought by the fraudulent vendee from whom they had been taken, that the fraud of the intestate could not be set up by his administrator as a defense: *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note. The case relies upon *Hawes v. Leader*, Cro. Jac. 270; Yelv. 196. But see *Nellis v. Clark*, 20 Wend. 24; 4 Hill, 424; and see *Pillsbury v. Kinonon*, 33 N. J. Eq. 287; 36 Am. Rep. 556, 565, as to assignee; and examine note 62 Am. Dec. 546; *Tenney v. Poor*, 14 Gray, 500; 77 Am. Dec. 340, and note 342; *Brown's Adm'r v. Finley*, 18 Mo. 375; *Gibbons v. Peeler*, 8 Pick. 254; *Holland v. Krufft*, 20 Id. 32; *Babcock v. Booth*, 2 Hill, 85; 38 Am. Dec. 578; *Stewart v. Kearney*, 6 Watts, 453; 31 Am. Dec. 482; *Buchler v. Gloniger*, 2 Watts, 226; and the fact that the administrator or executor is a creditor himself does not enable him to impeach such deed or conveyance: *Moody's Adm'r v. Fry*, 3 Humph. 567; *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note.

But in New York executors and administrators are by statute enabled to impeach such fraudulent conveyances of the deceased: *Moseley v. Moseley*, 15 N. Y. 334; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 598, and note. They not only may do this in that state, but it is their duty to pursue such property where there are not otherwise sufficient assets to pay the debts, and to recover the same for the benefit of creditors: *Lichtenberg v. Hertfelder*, 103 N. Y. 302, 306. So in Tennessee such fraudulent deed could not be impeached by the administrator for the fraud of the deceased, until the act of 1852, which was carried into the code at section 3241: *Buttle v. Street*, 85 Tenn. 282, 293. And in New Jersey such action lies, under the assignment act, by the representatives of the deceased: *Pillsbury v. Kingdon*, 33 N. J. Eq. 287, and see cases in note thereto 288; 36 Am. Rep. 556, 565. So it was held in *Blake v. Jones*, 1 Bail. Eq. 141, 21 Am. Dec. 530, that the administrator may set up the fact that a gift of his intestate was fraudulent and void as to creditors, in an action to establish such gift; and the personal representative of a fraudulent vendor who remained in possession of the property until the time of his death can because of non-delivery set up the fraud for the benefit of creditors, and thus avoid the sale: *Hunt v. Butterworth*, 21 Tex. 133; 73 Am. Dec. 223.

So such administrator may have such recovery of the estate of the deceased, notwithstanding his fraud, where it appears that such estate is needed to pay the expenses of the administration: *Estes v. Howland*, 15 R. I. 127; or where it appears that a fraudulent assignment of the property of the intestate was procured by the covinous conduct of the assignee: *Prewett v. Coopwood*, 30 Miss. 280. So in Pennsylvania and North Carolina, where his

estate is otherwise insufficient to pay his debts: *Stewart v. Kearney*, 6 Watts, 453; 31 Am. Dec. 482; *Coltraine v. Causey*, 3 Ired. Eq. 246; 42 Am. Dec. 168.

RULE EXTENDED TO OTHER ILLEGAL AND IMMORAL CONTRACTS. — *White v. Hunter*, 23 N. H. 128, was a case which extended the doctrine beyond that of conveyances made in fraud of creditors to all contracts based upon an immoral or illegal consideration, the parties being *in pari delicto*, and declared that the whole current of authority holds that in such case the parties can have no relief, and that land so conveyed, or money so paid, cannot be recovered back. "The party thus guilty, thus *particeps criminis*, thus in *pari delicto*, will not be listened to, when he alleges and offers evidence of his own criminality, or immorality and turpitude, as a ground upon which to establish a claim of right against another in a court of justice."

The following cases are cited by the court and are in point: *Howson v. Hancock*, 8 Term Rep. 575; *Vandyck v. Hewett*, 1 East, 98; *Smith v. Bromley*, Doug. 696, note; *Lowry v. Bourdieu*, Doug. 467; 2 Comyns on Contracts, 109; *Browning v. Norris*, Cowp. 790; *Steers v. Lashley*, 6 Dowl. & L. 61; *Brown v. Turner*, 7 Id. 630; *Clark v. Shee*, Cowp. 197; *McCullum v. Gonslay*, 8 Johns. 113; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368; *White v. Franklin Bank*, 22 Pick. 181; *Babcock v. Thompson*, 3 Id. 446; 15 Am. Dec. 235; *Burt v. Place*, 6 Cow. 431; *Denton v. English*, 2 Nott & McC. 581; 10 Am. Dec. 638; *Roby v. West*, 4 N. H. 285; 17 Am. Dec. 423. See also *Heineman v. Newman*, 55 Ga. 262; *Hinnen v. Newman*, 35 Kan. 709, where the rule is extended to immoral and all transactions which contravene public policy and are clearly illegal.

EXCEPTIONS. — The rule that the courts will refuse to aid either party to a fraudulent transaction entered into to defraud others is subject to very few exceptions: *Watt v. Conger*, 13 Smedes & M. 412, 421. But "where public interest requires its [the court's] intervention, relief will be granted, though the result may be that the property will be restored to, or a benefit derived by, a plaintiff who is in equal guilt with the defendant. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served": *O'Conner v. Ward*, 60 Miss. 1025, 1037, citing *St. John v. St. John*, 11 Ves. 535; *Hatch v. Hatch*, 9 Ves. 292; *Morris v. MacCulloch*, 2 Eden, 190; *Roberts v. Roberts*, 3 P. Wms. 65; *Smith v. Bromley*, Doug. 695; *Browning v. Morris*, Cowp. 790; *Osborne v. Williams*, 18 Ves. 379; *W— v. B—*, 32 Beav. 574; *Ford v. Harrington*, 16 N. Y. 285. And it is further said in this connection that "courts are and should be cautious in affording relief to a fraudulent debtor or other violator of the law under this exception, and should act only where it is evident that some greater public good can be subserved by action than by inaction; some security afforded to a class of persons entitled to peculiar protection, or some safeguard thrown around a relationship which is an object of the law's jealous consideration. But it may be safely asserted that it will be of far greater protection to the public, that one occupying the relation of guardian, trustee, executor, or administrator shall in all cases be compelled to return any property or profit secured by his frauds from those whose interests he is bound to protect, than to permit him under any circumstances to shelter himself behind the plea that those defrauded by him were themselves guilty of an equal wrong": *O'Conner v. Ward*, *supra*. *Starke's Ex'r v. Littlepage*, 4 Rand. 368, is declared in *Horn v. Star Foundry Co.*, 23 W. Va. 522, 537, to be an exception, and one in which "it is obvious that to refuse to enforce this

fraudulent contract would be to encourage such fraudulent arrangements, as such refusal would have made the fraudulent scheme of the debtor a perfect success. . . . In such cases it is only the public interest which the courts regard, and they care nothing for the interest of the parties to such fraudulent arrangements." See also *Cushwa v. Cushwa's Lessee*, 5 Md. 44, 52. So where a creditor has availed himself of his power over the debtor, and by misrepresentation induced him to unite in a fraudulent conveyance to him of certain property, it was held that a court of equity ought to take cognizance of the situation of the debtor as not being so culpable as the creditor, and apportion the relief granted to the degree of criminality in both parties: *Austin v. Winston*, 1 Hen. & M. 33; 3 Am. Dec. 583, and note 601. "And the court, in *Gay v. Wendem*, 2 Freem. 101, refused to enforce a bond privately given by a sister to her brother to return certain money which he had given her to enable her to more favorably form a marriage, this being an exception where the court refused relief because if such bond could be recovered such frauds against public policy could be practiced with impunity.

So it is said in 2 Pomeroy's Eq. Jur., sec. 941, that to the general rule "there is an important exception even where the parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executory contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply, and the affirmative relief may thus be granted, include the class of contracts which are intrinsically contrary to the public policy, — contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts, in which, from their particular circumstances, incidental and collateral, motives of public policy require relief." And in a recent case in Virginia, the court holds that "if, in a particular case, it can be clearly shown that the observance of the rule that the plaintiff will be furnished no relief in such a case, would tend to encourage such fraudulent and vicious practices by really giving effect to the objects which the parties had in contemplation when such fraudulent and vicious schemes were devised, then the courts will not apply the rule, but will permit such fraudulent plaintiff to recover, not because of any favor that the court is disposed to show him, but simply because, in such a peculiar case, the public policy requires that such recovery or relief should be had against the fraudulent defendant. It rarely happens, however, that public policy requires the courts to render relief to the plaintiff on such fraudulent or vicious contract": *Horn v. Star Foundry Co.*, 23 W. Va. 522, 533. So it is held in Florida, in *Bellamy v. Bellamy's Adm'r*, 6 Fla. 62, 103, that "in equity, the general maxim of *pari delicto* does not always prevail. Circumstances of the particular case often form exceptions, and where it is necessary, relief will be granted"; and cites 1 Story's Eq. Jur., sec. 380; *Eastbrook v. Scott*, 3 Ves. Jr. 456; *Austin's Adm'x v. Winston's Ex'r*, 1 Hen. & M. 33; 3 Am. Dec. 583; Hill on Trustees, sec. 164; *Williams v. Avant*, 5 Ired. 50; *Starke's Ex'r v. Littlepage*, 4 Rand. 372; *James v. Bird's Adm'r*, 8 Leigh, 512; 31 Am. Dec. 668; and where a note was given by A to his brother to enable him to make a wealthy marriage, it was enforced because for the public good, and also upon the ground that such contracts would best be

discouraged by enforcing them: *Montefiori v. Montefiori*, 1 W. Black. 363. In Hill on Trustees, sec. 164, it is said that "where the transaction is against public policy, this equity may be enforced by the party himself who has created the interest, although he be *in pari delicto* with the defendant, but relief will only be given in these cases [viz., exceptions to the rule] upon the terms of returning any consideration that may have been received." In *James v. Bird's Adm'r*, 8 Leigh, 512, 31 Am. Dec. 668, doubt is expressed as to whether *Austin's Adm'r v. Winston's Ex'r*, *supra*, was properly decided; the court saying that it was the only case in equity where relief had been given to a grantor of property who had fraudulently conveyed it to another to defeat creditors; and in *Starke's Ex'r v. Littlepage*, 4 Rand. 372, the exception to the rule *in pari delicto* is thus stated: "But this rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both parties are *in pari delicto*. The party is not allowed to allege his own turpitude in such cases when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions." Several instances are considered, and the court adds: "In these and many other cases, . . . the contract is enforced or avoided, both at law and in equity, as may best answer the purpose of discouraging the fraud or contract against the policy of the law; and it is for this purpose, and not because the defendant is, in such cases, strictly entitled, on his own account, to be discharged from the contract, that the rule is established that *in pari delicto* . . . *defendentis*; a rule which, in general, discourages vicious contracts, but which is not enforced when it would counteract this policy of the law."

Another exception is made in *Fagg v. Tennessee Nat. Bank*, 9 Heisk. 479, 487, between cases where the parties are *in delicto*, and not *in pari delicto*, the rule not being applied in the former case. Upon this point, the rule stated in Bump on Fraudulent Conveyances—that where such conveyances are made, the court will not inquire into the degrees of guilt between the grantor and grantee—is disputed in *O'Conner v. Ward*, 60 Miss. 1025, 1035; and it is there declared not to be a universal rule, and not supported by the authorities, the exception being there made that although the parties are *in delicto*, yet not *in pari delicto*, the court will, in certain cases, grant relief to the least guilty, if the "circumstances are such as to justify the court in proceeding, notwithstanding the fraudulent character of the conveyances"; citing *Ybarra v. Lorenzana*, 53 Cal. 197. And it is said by the court in *Roman v. Mali*, 42 Md. 513, 532, that "there are exceptions to the general rule that courts of justice will not actually interpose for the relief of a party who has been *particeps criminis* in an illegal or fraudulent transaction; and that one of the exceptions is, where the party suing, although *particeps criminis*, is not *in pari delicto* with the adverse party. There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve." But see opinion of Stewart, J., Id. 534.

MISCELLANEOUS. — It is said in *Wheeler v. Sage*, 1 Wall. 518, 529, to be a fundamental principle that a party who seeks relief in equity must be able to show that there has been honesty and fair dealing, since the maxim *in pari delicto* otherwise applies. Therefore, where one becomes voluntarily a party to an obligation intentionally made in fraud of the law, and then asks in a court of equity to be relieved from its fulfillment, "the condign and appropriate answer to such a prayer from such a tribunal is this: that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you": *Creath's Adm'r v. Sims*, 5 How. 192, 204. It is determined in Illinois that although the original conveyance is fraudulent, yet a reconveyance made by the fraudulent grantee to his grantor, in pursuance of the original agreement, is not tainted with fraud, but is valid, and that notes executed at the time of such reconveyance, pursuant to a verbal agreement made during the original fraudulent transaction, may be enforced: *Second National Bank v. Brady*, 96 Ill. 498. And if personal property be transferred by way of pledge or security, the party so transferring, or those claiming under him, may redeem the same notwithstanding the transfer is fraudulent as to creditors: *Jones v. Rahilly*, 16 Minn. 320. Or where the grantor subsequently pays his debts, and is relieved therefrom by a discharge in bankruptcy, and a subsequent agreement is entered into by which the grantor surrenders to the grantee the notes given for the property, and in consideration thereof the latter surrenders all his right, title, and interest in the property, and the deed is to be canceled by agreement; here such original transfer is purged of the fraud, and the subsequent agreement will be enforced: *Songer v. Partridge*, 107 Ill. 529, 534; and if the deed is not in fact executed, no property is conveyed, and the title remains in the grantor: *Parkhurst v. McGraw*, 24 Miss. 134, 139.

So where the fraudulent grantee of land takes any steps or does any act subsequent to the conveyance in the performance of his moral duty to restore the property, such acts will be favorably considered by a court of equity: *White v. Brokaw*, 14 Ohio St. 339, 341. As bearing directly upon the question of recriminatory fraud, it was said in *Lord v. Doyle*, 1 Cliff. 453, 458, that "it would be an encouragement to fraud to hold that the wrongful act of one party to a suit is a justification to another wrongful act on the part of the other party of equal magnitude and immorality. Frauds are forbidden in equity, and when committed, they cannot be set off one against another, but each separate transaction must stand or fall by itself." In applying the rule governing in this class of cases, it is held that a bad motive is not alone sufficient; there must be an illegal act, since if such conveyance is made to avoid a debt where none exists, or the property conveyed is of a character which could not be subjected by the creditor, and a contract otherwise valid is entered into to treat the conveyance as a mortgage, or providing for a reconveyance by the grantee, the latter will not be permitted, in an action brought to enforce such agreement, to set up the defense alone that the grantor intended to defraud his creditors by such conveyance: *O'Conner v. Ward*, 60 Miss. 1025, 1037, citing *Denman v. Denman*, 4 Ala. 521; *Brady v. Ellison*, 2 Hayw. 348; *Smith v. Bruser*, 2 Id. 296; *Boyd v. De la Montaigne*, 73 N. Y. 498; 29 Am. Rep. 197.

fn v. Left-hand Ditch Co., 6 Col. 443; opinion by Ross, J., in *Lux v. Haggin*, 69 Cal. 255.

It necessarily follows from the views we have expressed, and from the doctrines announced in the authorities we have cited, that the court did not err in rendering its judgment and decree upon the findings in relation to prior appropriation. The case of *Vansickle v. Haines*, 7 Nev. 280, in so far as the same is in conflict with the views herein expressed, is hereby overruled.

The judgment of the district court is affirmed.

RIPARIAN PROPRIETORS ALL HAVE RIGHT, AT COMMON LAW, TO REASONABLE USE OF WATERS OF STREAM: *Davis v. Getchell*, 79 Am. Dec. 636, and note; *Davis v. Winslow*, 81 Id. 573; *City of Springfield v. Harris*, 81 Id. 715; *Brown v. Bowen*, 86 Id. 406; *Ferre v. Knipe*, 87 Id. 128; *Merrifield v. Lombard*, 90 Id. 172; *Lobdell v. Simpson*, 90 Id. 537; *Pool v. Lewis*, 5 Am. Rep. 526; *Dumont v. Kellogg*, 18 Id. 102; *Hazeltine v. Case*, 32 Id. 715; and this use extends to irrigation: Note to *Davis v. Getchell*, 79 Am. Dec. 643; *Rhodes v. Whitehead*, 84 Id. 631; *Tolle v. Correth*, 98 Id. 540.

REASONABLE USE BY RIPARIAN PROPRIETOR DEPENDS UPON CIRCUMSTANCES, such as the size of the stream, velocity of the water, etc.: *Davis v. Getchell*, 79 Am. Dec. 636, and note 641; *Davis v. Winslow*, 81 Id. 573; *Hayes v. Waldron*, 84 Id. 105; *Pool v. Lewis*, 5 Am. Rep. 526; *Hazeltine v. Case*, 32 Id. 715, 716; and is a question of fact for the jury: Note to *Davis v. Getchell*, 79 Am. Dec. 644; *Hayes v. Waldron*, 84 Id. 105; *Pool v. Lewis*, 5 Am. Rep. 526.

PRIOR APPROPRIATION OF RUNNING WATERS GIVES BETTER RIGHT THERETO in the Pacific states and territories: *Nevada Water Co. v. Powell*, 91 Am. Dec. 685, and note collecting cases; *Lobdell v. Simpson*, 90 Id. 537; *Davis v. Gale*, 91 Id. 554; *Ophir Silver Mining Co. v. Carpenter*, 97 Id. 550.

THOMPSON v. RENO SAVINGS BANK.

[19 NEVADA, 103.]

CAPITAL STOCK OF CORPORATION, AND ESPECIALLY UNPAID SUBSCRIPTIONS THERETO, IS TRUST FUND for the benefit of its general creditors.

CERTIFICATE OF INCORPORATION IS MADE FOR BENEFIT OF PUBLIC, and not for the corporation or its stockholders; and those who participated in the incorporation, and, by a certificate made in pursuance of the statute, announced the amount of the capital stock of the corporation, cannot, as against its creditors, contradict the certificate.

SECRET ARRANGEMENT BETWEEN CORPORATION AND ITS STOCKHOLDERS, BY WHICH RESPONSIBILITY OF STOCKHOLDERS IS MADE LESS than it appears to be under the articles of incorporation, is void as against creditors of the corporation.

ONE WHO SIGNS CERTIFICATE OF INCORPORATION AS SUBSCRIBER TO SHARES OF STOCK OF CORPORATION cannot afterwards, as against its creditors, deny such subscription, especially after having participated in its profits in accordance therewith.

STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, CANNOT SET OFF INDEBTEDNESS OF CORPORATION against the amount of his unpaid subscription, in a suit against him by a creditor of the corporation, to subject the unpaid subscription to the satisfaction of the plaintiff's claim.

STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, MUST PAY AMOUNT OF HIS UNPAID SUBSCRIPTION, and surrender his collateral securities upon the failure of the corporation, and he can then participate in the fund ratably with the other creditors.

STOCKHOLDER MAY BE SUED BY CREDITOR OF CORPORATION TO SUBJECT UNPAID SUBSCRIPTION TO SATISFACTION OF HIS JUDGMENT without making the other stockholders parties defendant. If the stockholder so sued be required to pay more than his proportionate share of the debts, his remedy is against the other stockholders owing unpaid subscriptions for contribution.

CREDITOR OF CORPORATION MAY SUE FOR BENEFIT OF HIMSELF, AND OTHER CREDITORS who may choose to come in, establish their claims, and contribute to the expense of the suit, to subject the unpaid subscription of a stockholder to the satisfaction of their claims under the equity practice, and under section 1077 of the Nevada Compiled Laws, which provides that when the question is one of common or general interest of many persons, one or more may sue or defend for the benefit of all.

COMPLAINT FILED BY CREDITOR OF CORPORATION, IN HIS OWN INTEREST, TO REACH UNPAID SUBSCRIPTION OF STOCKHOLDER, MAY BE AMENDED so that the suit shall be for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit.

CREDITOR OF CORPORATION IS NOT OBLIGED TO GIVE NOTICE TO OTHER CREDITORS, or obtain their consent to the commencement of a suit for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit, to reach the unpaid subscription of a stockholder.

SUIT in equity by William Thompson, a judgment creditor of the Reno Savings Bank, a corporation, against the bank and M. C. Lake, to subject the amount of Lake's alleged unpaid subscription to the capital stock of the bank to the payment of the plaintiff's judgment. The facts are stated in the opinion.

Robert M. Clarke and Trenmor Coffin, for the appellant.

Stone and Hiles, and R. H. Lindsay, for the respondent.

By Court, BELKNAP, C. J. The Reno Savings Bank is a corporation organized under the laws of this state for banking purposes. It was engaged in the business of banking from its organization, in the month of April, 1876, until the twenty-fourth day of June, 1880, when it became involved, and suspended business. It was then indebted to plaintiff, Thompson, and many others, some of whom, for convenience, assigned their demands to him. Thompson recovered judgment

against the bank. An execution issued upon the judgment was returned *nulla bona*, and thereupon Thompson brought this suit in equity against the bank and Lake, averring, among other things, the recovery of the judgment; that the bank had no assets subject to execution; that Lake was indebted to the bank in the sum of seventeen thousand five hundred dollars upon his unpaid subscription to its capital stock; and prayed that this amount be applied to the payment of the judgment. The suit was brought in the first place by Thompson for himself alone. At the commencement of the trial, the complaint was amended so that all other creditors who would contribute to the expense of the suit could come in as parties and seek relief with the plaintiff. A decree was rendered in favor of plaintiff. From the decree, and an order overruling a motion for a new trial, this appeal is taken.

The certificate of incorporation of the bank fixes its capital stock at one hundred thousand dollars, divided into one hundred shares of the par value of one thousand dollars each. The bank commenced business with the sum of thirty thousand dollars, of which defendant Lake paid seven thousand five hundred dollars. Lake claims that he is not liable because this sum was not paid as a subscription to capital stock, but as a capital upon which the bank was to carry on its business, and avers that it was agreed among those who paid the money that it should be in full of all liability as to them.

The capital stock of a corporation, other than a mining corporation, is the amount of money paid or promised to be paid for the purposes of the corporation. It is a fixed sum, not to be increased or diminished except in the mode permitted by the statute. This sum the law requires shall be stated in the certificate of incorporation to be filed with the county clerk of the county in which the principal place of business of the corporation is situated, and a copy in the office of the secretary of state. The purpose of this requirement is obvious.

The share-holders are not, under the constitution, liable for the debts of the corporation. The capital stock, and especially the unpaid subscriptions thereto, is a trust fund for the benefit of the general creditors. When, therefore, the law requires a public declaration of the amount of the capital upon which a corporation operates, it contemplates a truthful statement in which the general public dealing with the corporation may confide. The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those

who participated in the incorporation of this bank, and, by a certificate made in pursuance of the statute, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate. Defendant Lake signed it, was president and one of the directors of the bank, participated in the management of its affairs during the period it was engaged in business, and received dividends upon his investment. He cannot now be heard to deny the truth of the certificate which he helped make, and to assert that the capital of the corporation was thirty thousand dollars instead of one hundred thousand dollars. Not only will equity refuse to hear the defense interposed, but the arrangement alleged to have been made is in defiance of the statute under which the bank was incorporated.

Section 3543 of the Compiled Laws provides: "It shall not be lawful for the directors to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock, nor to reduce the amount of the same." Other provisions of the laws upon the subject of corporations permit an increase or diminution of capital stock. Whether the provision concerning a reduction applies to corporations of the character of defendant, it is unnecessary to inquire, since it is not pretended in this case that any reduction was made in compliance with law. The statute requires that any change in the amount of capital stock shall be made at a stockholders' meeting called for that purpose, upon notice specifying the object of the meeting and the proposed changes, which notice shall be published for eight weeks in a newspaper of the county in which the principal place of business of the corporation is located: 2 Comp. Laws, 3401, 3406-3408, 3544.

The publicity required in this proceeding is for the purpose—in part, at least—of advising the public dealing with the corporation of the proposed change. The requirement of the statute—1. That the publicly recorded certificate of incorporation shall state the amount of the capital stock; and 2. That any change in the amount thereof shall only be made after extended public notice—is in direct conflict with the secret contrivance alleged to have been made by Lake and his associates.

The decisions uniformly hold that any secret arrangement between the corporation and its stockholders, by which the responsibility of the latter is made less than it appears to be

under the articles of incorporation, is void as against creditors. Thus in *Allibone v. Hager*, 46 Pa. St. 48, the registered certificate of incorporation showed that a given amount of stock remained unpaid. The defendants, who had prepared the certificate, claimed that the unpaid balance represented stock subscribed for by them as agents of the corporation, to be sold by it when in need of funds. The court overruled the defense, in this language: "But, if I comprehend the ground of defense, it seems to me to be directly in conflict with the act, and in contradiction of the certificate. The act requires the stock to be subscribed for, and by persons who are to become members of the company, and the certificate shows that all the original stock was subscribed by and for the defendants in this suit. Whatever might be the law between them and the corporation, as between them and the public the certificate is conclusive. I can not agree, therefore, with the position that creditors have only the rights and equities of the corporation as against the stockholders. They have the rights which the statute gives; no more and no less. The certificate discloses the extent of the capital stock, and the statute renders all the subscribers to it liable for its payment when creditors call. Were undisclosed arrangements permitted to defeat or control the effect of the certificate, that safeguard would at once become a snare, instead of a protection. If capital seeks for immunities, it must take them with such liabilities as are the terms upon which they are granted."

In *McHose v. Wheeler*, 45 Pa. St. 40, the certificate was acknowledged and recorded, certifying that one hundred thousand dollars was subscribed as the capital stock of a corporation, and that one quarter of this amount had been paid in. The certificate was untrue. Many of the persons named as subscribers had not subscribed, and no money was paid in. The court held that if a person named in the certificate as a member acted as such, or did not promptly disavow his alleged membership, upon discovering the use of his name, by showing that he was not a member, he would be deemed as ratifying the relation as to creditors; that the defendants, who were incorporators, could not set up their own faults and mistakes in their organization as a defense against creditors; and that, therefore, it was immaterial that no part of the stock had been paid in, although the statute under which the corporation was created required one quarter of the amount to be paid.

Appellant, with others, assumed control of the bank. He

must be held to the consequences of this connection. Persons dealing with the bank were assured that its capital was one hundred thousand dollars. The law contemplates that this representation shall be true. Appellant entered into an arrangement by which he appeared to comply with the articles of incorporation. He must perform the obligation which he appeared to assume. If he did not expressly subscribe for stock, the law implies an agreement upon his part to pay his proportionate share. He received one quarter of the profits of the concern when it was apparently prosperous, and is justly decreed to be a subscriber to its stock to the same extent. Having received the advantages of stockholdership, he cannot escape its responsibilities.

Appellant is a creditor of the bank in a larger sum than the amount of his unpaid subscription, and claims the right to set off his liability with the bank's indebtedness. In *Scammon v. Kimball*, 92 U. S. 366, it was held upon similar facts that set-off could not be allowed. In deciding the case, the court said: "Such an indebtedness [for unpaid shares] constitutes an exception to the rule that when there are mutual debts, 'one may be set against the other,' as originally provided by act of Parliament; or, perhaps, it would be more accurate to say that the rule does not apply when it appears that the debts are not in the same right, as well as mutual: *United States v. Eckford*, 6 Wall. 488. Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and when the proofs are clear and the equity is very strong": 2 Story's Eq. Jur., sec. 1437.

The debt which the appellant owes for his unpaid stock is a trust fund which equity will distribute among all of the creditors. The proofs show a deficiency in the fund. Each must, therefore, take his dividend *pro rata*. If the set-off were allowed, the appellant would appropriate the entire fund. "If such a defense were entertained," said the supreme court of Pennsylvania in *Macungie Sav. Bank v. Bastian*, 11 Rep. 785, "the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who at best has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his

subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead."

The bank's indebtedness to appellant is collaterally secured. The district court correctly held that appellant must pay the amount of his unpaid subscription and surrender the collateral securities. He could then participate in the fund ratably with the other creditors.

Objection is made for want of proper parties to maintain this suit. It is urged that the other stockholders should be made parties defendant, to the end that each shall contribute his proportion to the debt, and also that all of the creditors should be united as plaintiffs, so that each may receive his proportion of the fund, and the matter be finally determined in one suit. In a proceeding to wind up and finally settle all of the affairs of the bank, all of the stockholders would be necessary parties defendant. This is not such a proceeding, but one to subject the equitable assets of the bank to the claim of the creditors. If, in this proceeding, the defendant is required to pay more than his proportionate share of the debts of the bank, he may, in an action against the remaining stockholders, require them to contribute their fair share. In *Hatch v. Dana*, 101 U. S. 210, this question was considered. The court said: "The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription, each becomes a several debtor to the company; as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the share-holders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible

property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such a case, no stockholder can be required to pay more than he owes.”

In *Marsh v. Burroughs*, 1 Woods, 468, the non-joinder of parties was set up in defense. The court said: “A judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosoever hands it may be, and if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money”: *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Bartlett v. Drew*, 57 N. Y. 587.

The authorities are somewhat conflicting upon the question as to necessary parties plaintiff, in suits of this character. In *Marsh v. Burroughs*, *supra*, Mr. Justice Bradley says: “It has long been settled that a judgment creditor who has exhausted his legal remedy by execution returned *nulla bona* may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution.”

To the same effect is *Bartlett v. Drew*, 57 N. Y. 587. This ruling goes further than is necessary to uphold the present case. Other cases hold that all persons interested in the subject-matter of the suit must be made parties, so that complete justice may be done, and a multiplicity of suits avoided. An exception to this rule has been uniformly allowed in cases of the character of the present one, when there are many persons having a common interest. In such cases one or more may sue for the benefit of all, and those who come in and establish their claims share with the plaintiff in the benefit of the decree. The doctrine is thus stated by Chancellor Walworth, in *Hallet v. Hallett*, 2 Paige Ch. 19: “If there are many parties standing in the same situation as to their rights or claims upon a particular fund, and when the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate, or residuary legatees, all the parties interested in the fund must, in general, be brought before the court, so that there may be but one account, and one decree set-

ting the rights of all. And if it appears on the face of the complainant's bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object that all who have a common interest with the complainants are not before the court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation."

This rule of equity practice was adopted in this state by section 1077 of the Compiled Laws. The provision enacts, among other things, that "when the question is one of common or general interest, of many persons, . . . one or more may sue or defend for the benefit of all": See also *McKenzie v. L'Amoureux*, 11 Barb. 516.

The amendment to the complaint heretofore mentioned, by which the other creditors could come in and prosecute the suit with the plaintiff, brought the case within the exception stated. The amendment was made immediately before the trial, but the court, by its decree, allowed the remaining creditors a reasonable time—thirty days from the entry of the decree—within which to prove their claims and share with the plaintiff in the distribution of the trust fund. None came in; but no complaint in this regard has been suggested in behalf of any creditor.

The action of the district court in this particular is consonant with the equity practice. "The court will generally, at the hearing, allow a bill which has originally been filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class": 1 Daniel's Chancery Practice, sec. 245. Nor does it appear that notice to the other creditors was necessary. Thompson, in his treatise upon the liability of stockholders, says of suits brought by one creditor in behalf of himself, and all others who may come in and establish their debts: "This does not mean that the creditor who files the bill is under any obligation to look up all the widely scattered creditors of the corporation, and get their consent to the filing of the bill, or

notify them to join him in it": Thompson on Liability of Stockholders, sec. 351.

The decree and order of the district court are affirmed.

During the pendency of this appeal, Mr. Lake, defendant herein, has died. An order has been made directing the substitution of the administrator of his estate.

LIABILITY OF STOCKHOLDERS TO CREDITORS OF CORPORATIONS FOR CORPORATE DEBTS.—The liability of stockholders to the creditors of a corporation for the corporate debts has already been considered in the notes to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96; *Freeland v. McCullough*, 43 Id. 694; *Prince v. Lynch*, 99 Id. 432; and *Germantown Passenger R'y Co. v. Fidler*, 100 Id. 552. It is now proposed to restate the principles discussed in those notes, and to add a more complete treatment of the subject, warranted by its increasing importance. The liability exists with respect to unpaid subscriptions, and by virtue of statutory provisions.

NO COMMON-LAW LIABILITY TO CREDITORS FOR UNPAID SUBSCRIPTIONS.—While a stockholder is liable in an action at law by the corporation for unpaid subscriptions to its capital stock, which are due and payable by the contract of subscription itself, or which become due by virtue of calls made by the corporation upon its subscribers, in accordance with the terms of the subscription, it does not follow that a creditor of the corporation can maintain such an action. Courts of law, at least in this respect, regard the corporation as an entity or person distinct from its stockholders. A debt due from the corporation is not a debt due from the stockholders. The contract of subscription is made with the corporation, and it, or its successors, only, can enforce the contract at law. There is no privity between the creditors of the corporation and its stockholders, and therefore no legal action can be maintained by the creditors to recover unpaid subscriptions: See 2 Morawetz on Corporations, sec. 818; *Cooper v. Frederick*, 9 Ala. 739, 742; *Jones v. Jarman*, 34 Ark. 323, 328; *Spear v. Grant*, 16 Mass. 9, 15; *Brown v. Fisk*, 23 Fed. Rep. 228; *Patterson v. Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207.

UNPAID SUBSCRIPTIONS, WHEN DUE AND PAYABLE, ARE SUBJECT TO GARNISHMENT BY CREDITORS. The right of a creditor to reach unpaid subscriptions by garnishment proceedings depends upon the question whether or not there is such an indebtedness on the part of the stockholder as would authorize the corporation itself to maintain an action against him for the unpaid subscriptions. This question is governed by the contract of the stockholder with the corporation. A subscriber to the capital stock may agree to pay at once, or in installments falling due at certain times, or, as is usually the case, upon call of the corporation. Plainly, a corporation cannot maintain an action against a subscriber or his successors for unpaid subscriptions, unless they are due and payable by the terms of the subscription itself, or unless a call has been made and the subscriber has become delinquent. Until a subscriber is thus in default, the corporation cannot maintain an action against him, because there is no indebtedness, and as there is no indebtedness, garnishment proceedings by a creditor cannot be maintained: *Bingham v. Rushing*, 5 Ala. 403; *Cooper v. Frederick*, 9 Id. 739, 742; *Paschall v. Whitsett*, 11 Id. 472, 477; *Brown v. Union Ins. Co.*, 3 La. Ann. 177, 182; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Id. 594; *McKelvey v. Crockett*, 18 Nev. 238; *Lane's Appeal*, 165 Pa. St. 49; 51 Am. Rep. 166; note to *Freeland v. McCullough*, 43 Am. Dec. 702.

But, on the other hand, it follows that if subscriptions are due and payable, they are, to that extent, like other debts due the corporation, subject to garnishment: Cook on Stock and Stockholders, sec. 201; *Faull v. Alaska G. & S. Min. Co.*, 8 Saw. 420; 14 Fed. Rep. 657; *De Mony v. Johnston*, 7 Ala. 51; *Meints v. East St. Louis etc. Co.*, 89 Ill. 48; *Brown v. Union Ins. Co.*, 3 La. Ann. 177, 182; *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Hannah v. Moberly Bank*, 67 Mo. 678; *Peterson v. Sinclair*, 83 Pa. St. 250; note to *Freeland v. McCullough*, 43 Am. Dec. 702; 2 Morawetz on Corporations, sec. 819. It is possible, however, that a garnishment law or some other statute may be so framed as to permit a creditor of a corporation to garnish unpaid subscriptions which are not due. Thus, under section 8 of the general incorporation act of Illinois, it is held that stockholders may be compelled to pay to a garnishing creditor any balance unpaid upon stock owned by them respectively, whether such stock has been called in or not: *Robertson v. Noeninger*, 20 Ill. App. 227; and in this case of *In re Glen Iron Works*, 20 Fed. Rep. 674, affirming 17 Id. 324, 16 Phila. 563, it was held that in Pennsylvania the efficacy of attachment process was not confined to the garnishment of legal demands, but extended to those of an equitable nature, and that the unpaid subscriptions to the capital stock of an insolvent corporation could be reached by writ of attachment execution, although no assessment or call had been made; but this case was expressly and pointedly disapproved in *Lane's Appeal* (otherwise cited as *Bunn's Appeal*), 105 Pa. St. 49; 51 Am. Rep. 166. It has been held that, where stockholders are in default after calls regularly made, a judgment creditor of the corporation has a complete remedy at law, and therefore will not, in the absence of some special circumstance, be allowed to proceed in equity: *Allen v. Montgomery R. R.*, 11 Ala. 437; but the case of *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74, holds, perhaps in contravention of the rule hereafter noted that the legal remedies must first be exhausted, that equity has jurisdiction of a suit by a judgment creditor to compel a stockholder to pay the arrears of his subscription, although, installments of the subscription falling due periodically, there is a remedy at law by process of garnishment; although it is well to remember the principle that the jurisdiction of equity is not taken away by statute providing an adequate remedy at law, in the absence of express language, or by necessary implication: See 1 Pomeroy's Eq. Jur., secs. 279-281; *Harmon v. Page*, 62 Cal. 448; *Holmes v. Sherwood*, 3 McCrary, 403; 16 Fed. Rep. 725.

A limitation upon the right of a creditor of a corporation to resort to garnishment proceedings has been placed by *Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166, in which it is asserted that if the corporation is solvent, and the subscription is in the form of an absolute engagement to pay the price of the stock, there was no doubt that the creditor could reach the amounts unpaid by attachment in execution, but that it seems this could not be done if the corporation was insolvent, because upon insolvency the unpaid amounts constituted a trust fund for the benefit of all the creditors.

MANDAMUS BY CORPORATE CREDITORS TO COMPEL OFFICERS OF CORPORATION TO MAKE CALL. — *Mandamus* by creditors of corporations to compel the officers to make calls for the purpose of raising funds to meet their demands is a remedy to which a resort does not appear to have been attempted in this country; and the use of the writ for this purpose has been doubted: Cook on Stock and Stockholders, sec. 202; *Hays v. Lycoming F. Ins. Co.*, 93 Pa. St. 184; but in England, a *mandamus* is sometimes awarded: Cook on Stock and Stockholders, sec. 202; *The Queen v. Victoria Park Co.*, 1 Q. B. 288; *The Queen v. Ledgard*, 1 Id. 616; *The King v. St. Katharine Dock Co.*, 4

Barn. & Adol. 360; and see *Hatch v. Dana*, 101 U. S. 205, 215; *Thompson v. Reno Savings Bank*, 19 Nev. 242, 245, *post*, p. 883. It has, however, been decided that creditors need not apply for a *mandamus*, but may compel the payment of unpaid subscriptions by suit in equity: *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 601; *Dalton etc. R. R. Co. v. McDaniel*, 56 Ga. 191. And in *Patterson v. Lynde*, 112 Ill. 196, 206, the court was of the opinion that a foreign insolvent corporation, if still in existence, could be compelled by *mandamus*, or by bill in equity, to collect the unpaid subscriptions from its stockholders. If it had ceased to exist, a receiver should be appointed, who would represent the corporation.

UNPAID SUBSCRIPTIONS CONSTITUTE, IN EQUITY, TRUST FUND FOR BENEFIT OF CREDITORS. — It is a well-settled doctrine of the American courts that the capital stock of a corporation, including, especially, unpaid subscriptions, constitutes, in equity, a trust fund for the benefit of its creditors: Note to *Freeland v. McCullough*, 43 Am. Dec. 695; *Germantown Passenger R'y v. Filter*, 100 Id. 546, and note 552; Cook on Stock and Stockholders, sec. 199; Thompson's Liability of Stockholders, secs. 10, 11; Angell and Ames on Corporations, secs. 600 et seq.; Boone on Corporations, sec. 112; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, secs. 654 et seq.; 2 Waterman on Corporations, sec. 208; 2 Story's Eq. Jur., sec. 1252; *Wood v. Dummer*, 3 Mason, 308, 311; *Winans v. McKean R. R. etc. Co.*, 6 Blatchf. 215, 222; *Union Nat. Bank v. Douglass*, 1 McCrary, 86; *Holmes v. Sherwood*, 3 Id. 405, 408; 16 Fed. Rep. 725, 727; *Marsh v. Burroughs*, 1 Woods, 463, 468; *Curran v. State of Arkansas*, 15 How. 304; *Railroad Co. v. Howard*, 7 Wall. 392, 409; *Sawyer v. Hoag*, 17 Id. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 Id. 56, 60; *Webster v. Upton*, 91 Id. 65, 66, 71; *Scammon v. Kimball*, 92 Id. 362, 367; *Hatch v. Dana*, 101 U. S. 205, 210; *County of Morgan v. Allen*, 103 Id. 498; *Allen v. Montgomery R. R.*, 11 Ala. 437; *Goodwin v. McGehee*, 15 Id. 232, 246; *Smith v. Huckabee*, 53 Id. 191, 195; *Glenn v. Semple*, 80 Id. 159; 60 Am. Rep. 92-94; *Jones v. Arkansas Mechanical etc. Co.*, 38 Ark. 17; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 599; *Crandall v. Lincoln*, 52 Id. 73; 52 Am. Rep. 560, 562; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 102; 2 Am. Rep. 563, 565; *Clapp v. Peterson*, 104 Ill. 26, 31; *Coffin v. Ransdell*, 110 Ind. 417, 421; *Osgood v. King*, 42 Iowa, 478; *Robertson v. Conrey*, 5 La. Ann. 297; *Rider v. Morrison*, 54 Md. 429, 444; *Farnsworth v. Robbins*, 36 Minn. 369; *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Haskell v. Sells*, 14 Mo. App. 91; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Wetherbee v. Baker*, 35 Id. 501; *Mann v. Pentz*, 3 N. Y. 415, 422; *Dayton v. Borst*, 31 Id. 435, 436; *Bartlett v. Drew*, 57 Id. 587, 589; *Hastings v. Drew*, 76 Id. 9; *Gilmore's Ex'rs v. Bank of Cincinnati*, 8 Ohio, 62, 71; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Macungie Savings Bank v. Bastian*, 11 Rep. 785; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 11 Humph. 1; 53 Am. Dec. 742; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 60.

This doctrine is at the foundation of the principal rules on the subject of the right of creditors of corporations, to compel the payment of unpaid subscriptions by stockholders in America. The overlooking of it, or the failure to recognize its importance by some courts, has caused no little confusion. As a result of the doctrine, a creditor of a corporation can maintain a suit against the personal representatives of a deceased stockholder to compel the payment of his unpaid subscription, without presenting any demand to the representatives for allowance, as is required in ordinary cases by the Nevada Com-

piled Laws: *Thompson v. Reno Savings Bank*, 19 Nev. 242; *post*, p. 883; compare *Davidson v. Rankin*, 34 Cal. 503, in which the liability of a stockholder for the debts of the corporation arose under a statute.

This doctrine seems to be a distinctively American one, and serves to explain some of the differences between the English and American cases. It was first announced by Mr. Justice Story, in 1824, in *Wood v. Dummer*, 3 Mason, 303, 311, who, in speaking of the capital stock of banking corporations, said: "The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation, it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me, this point appears so plain, upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it, and the stockholders have no rights until all the other creditors are satisfied." Again, in *Sanger v. Upton*, 91 U. S. 56, 60, Swayne, J., says: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

And in the oft cited and quoted case of *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 60, Chief Justice Dixon remarks: "The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund pledged for the payment of the debts of the corporation. Until they are paid, the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are extinguished. This is as true

of the unpaid shares subscribed, or balances due thereon, as of the amount which has actually been paid in. Such unpaid shares or balances are as much a part of the capital stock as the sums which have already been realized thereon. Aside from the funds on hand, they often constitute the only resource of the company. They are debts due to it, the payment of which can be enforced by its officers. The delinquent subscribers are its debtors, and the directors are clothed with authority to compel them to pay. When the company is indebted, and other means of meeting its liabilities are exhausted, the exercise of this authority becomes a duty, which they are under the highest moral obligation to perform. Creditors are supposed to have trusted as well to such unpaid subscriptions, and to the fair and faithful exercise of such compulsory power for their payment, as to the sums actually paid in; and when it becomes necessary to their security or satisfaction, they have a legal right, either by the voluntary action of the proper officers, or through the aid of the courts of the country, to such exercise of it. If, therefore, by the willful or stubborn inaction of the directors or stockholders, the company fails to meet its obligations and perform its duties, a court of equity will, on a proper application, afford the requisite relief." But, "in speaking of the assets of an insolvent corporation as constituting a trust fund for the payment of creditors," says Robinson, J., in *Brant v. Ehlen*, 59 Md. 124, "it is necessary to understand precisely what is meant by the courts. No one will pretend for a moment that in subscribing to the stock of a company, the purpose is to create a trust fund for creditors. On the contrary, the object, primarily, is to furnish means to carry on its business, and to share the profits earned by the corporation; and so long as it is a going concern, it has the right, and indeed it is its duty, to manage and dispose of its assets, including stock subscriptions, for the promotion of its own interest. If it ceases to do business, or if it becomes insolvent, then all assets which it then has or owns, including paid and unpaid subscriptions, either in the hands of the original subscriber or in the hands of his assignee with notice, become a trust fund for the payment of creditors, and they have the right to follow the property constituting this fund and subject it to the payment of their debts, unless it has passed into the hands of a *bona fide* purchaser without notice."

EQUITABLE JURISDICTION TO COMPEL PAYMENT OF UNPAID SUBSCRIPTIONS, OR TO MAKE CALLS. — Since unpaid subscriptions to the capital stock are regarded in equity as a trust fund for the benefit of the creditors of a corporation, it results that courts of equity have jurisdiction and will compel the payment of the subscriptions by stockholders, as equitable assets, at the suit of creditors of the corporation, if the legal assets which can be reached by execution prove insufficient: Note to *Freeland v. McCullough*, 43 Am. Dec. 695; note to *Germantown Passenger R'y v. Fidler*, 100 Id. 553; Cook on Stock and Stockholders, sec. 204; Thompson's Liability of Stockholders, secs. 9 et seq.; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, sec. 703; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Holmes v. Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Wilbur v. Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479 (U. S. D. C., E. D. of Pa.); *Allen v. Montgomery R. R.*, 11 Ala. 437; *Glenn v. Siple*, 80 Id. 159; 60 Am. Rep. 92-94; *Jones v. Jarman*, 34 Ark. 323, 328; *Harmon v. Page*, 62 Cal. 448; *Lighttower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Stinson v. Williams*, 35 Ga. 170; *Mann v. Pentz*, 3 N. Y. 415; *Gillet v. Moody*, 5 Barb. 179; 3 N. Y. 479; *Gilmore's Ex'rs v. Bank of Cincinnati*, 8 Ohio, 62, 71; *Henry v. Vermillion etc. R. R.*, 17 Id.

187; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313. And as shown above, even if creditors of the corporation can compel its officers by *mandamus* to make calls to meet the company's liabilities, they are not obliged to do so, but may resort to equity: *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 601; *Dalton etc. R. R. Co. v. McDaniel*, 53 Ga. 191; and as further shown, no action at law, independent of statute, can be maintained by creditors against stockholders, but proceedings must be had in equity: *Cooper v. Frederick*, 9 Ala. 739, 742; *Jones v. Jarman*, 34 Ark. 323, 328; *Spear v. Grant*, 16 Mass. 9, 15; *Brown v. Fisk*, 23 Fed. Rep. 228. This equitable suit, furthermore, is not affected by any remedy which may be given creditors against stockholders by constitutions, charters, general acts of incorporation, or other statutes, unless of course the equitable remedy be taken away expressly or by necessary implication: See *Harmon v. Page*, 62 Cal. 418; *Holmes v. Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; and it is held that although installments of the subscription are due, and may be reached by process of garnishment, the equitable jurisdiction nevertheless exists: *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *contra: Allen v. Montgomery R. R.*, 11 Ala. 437. So where a state constitution provides that the stockholders of corporations "shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more," no new right is created, and the remedy of a creditor against a stockholder for unpaid subscriptions is still in equity: *Patterson v. Lynle*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush v. Cartwright*, 7 Or. 329; *Brundage v. Monumental G. & S. Min. Co.*, 12 Id. 322; compare *Hodges v. Silver Hill Min. Co.*, 9 Id. 200, 204; *Mills v. Stewart*, 41 N. Y. 384, 389; *Stephens v. Fox*, 83 Id. 313.

While it is essential to the recovery by the corporation itself against the stockholders upon their contracts of subscription that the money should be due and payable, either because the contracts themselves have definitely fixed the times of payment, or because calls have been made by the governing body of the corporation, no such condition is imposed upon the creditors with regard to their right to proceed in equity against the stockholders. No previous call need be shown by the creditors, nor need they show that they have endeavored to induce the corporation to make a call as a prerequisite to a suit in equity to compel stockholders to pay their unpaid subscriptions: 2 Morawetz on Corporations, sec. 821; note to *Germantown Passenger R'y v. Fittler*, 100 Am. Dec. 554; *Marsh v. Burroughs*, 1 Woods, 463, 468; *Holmes v. Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; *Thompson v. Reno Sav. Bank*, 19 Nev. 171; *post*, p. 881; *Thompson v. Reno Sav. Bank*, 19 Nev. 242; *post*, p. 883; although the subscriptions are payable "as called for by the company": *Hatch v. Dana*, 101 U. S. 205; see also *Upton v. Hansbrough*, 3 Biss. 417.

Besides the usual proceeding in equity above described, in the nature of a creditor's bill, to compel the payment of unpaid subscriptions by stockholders, it is also settled that when stock is payable upon call, and the corporation refuses or neglects to make a call, a court of equity may itself make it, if the interests of the creditors require it: Cook on Stock and Stockholders, sec. 207; Thompson's Liability of Stockholders, sec. 16; note to *Germantown Passenger R'y v. Fittler*, 100 Am. Dec. 553; *Dr. Salmon v. The Hamborough Co.*, 1 Cas. Ch. 204; *Scovill v. Thayer*, 105 U. S. 143, 155; *Glenn v. Williams*, 60 Md. 93; *Briggs v. Penniman*, 8 Cow. 357, 395; 18 Am. Dec. 454, 460; and the decree determining and making such an assessment is binding and effective upon the stockholders who were not, in their individual

capacities, parties to the suit, they being represented by the corporation: *Glenn v. Williams*, *supra*. It is obviously necessary, however, for such a purpose, that a sufficient corporate organization should continue to exist: *Wilbur v. Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479 (U. S. D. C., E. D. of Pa.). The "assessment," or "call," so named, is also different in its nature from the assessment or call made by a solvent corporation. The proceeding is simply in aid of the judicial recourse of the creditors. "It may promote the enforcement, but is not essential to the existence of the obligation of the stockholders": *Wilbur v. Stockholders of Glen Iron Works*, *supra*.

In the suit first above noted, to compel the payment of unpaid subscriptions, the right of creditors is as clear and strong after as before the dissolution of the corporation: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Tarbell v. Page*, 24 Ill. 46; although at common law, at least under the old theory, the debts due to and from the corporation are extinguished upon its dissolution: See *Hightower v. Thornton*, *supra*; *Thornton v. Lane*, 11 Ga. 459; compare Thompson's Liability of Stockholders, sec. 3. Herein this case differs from that above mentioned, where it is sought to have a call made by a court of equity, in which, it seems, the corporation must be in existence: See *Wilbur v. Stockholders of Glen Iron Works*, *supra*. And notwithstanding the common-law rule as to the extinguishment of debts upon the dissolution of a corporation, it is competent, it may be here observed, for the legislature to interpose and prevent such a result: *Robinson v. Lane*, 19 Ga. 337; and see *Lane v. Morris*, 8 Id. 468, 476; *Thornton v. Lane*, 11 Id. 459; Thompson's Liability of Stockholders, sec. 3. Of course the insolvency of a corporation is no ground for restraining the collection of subscriptions by itself to its stock: Note to *Germantown Passenger R'y v. Fittler*, 100 Am. Dec. 552; *Dill v. Wabash Valley R. R.*, 21 Ill. 91; *Protection Ins. Co. v. Ward*, 23 Conn. 409. "Indeed, it shows the more urgent reason why they should be collected": *Dill v. Wabash Valley R. R.*, 21 Ill. 91.

If it be necessary, creditors may compel discovery of the names of stockholders and the amounts unpaid on their subscriptions: *Morgan v. New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; *Miers v. Zanesville etc. Turnpike Co.*, 11 Ohio, 273; and see *President etc. of Middletown Bank v. Russ*, 3 Conn. 135; *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147. A creditor can compel payment of the entire stock, if required to satisfy his demands: *Haldeman v. Ainslee*, 82 Ky. 395. So, to the extent of their own unpaid subscriptions, stockholders may be liable to make good the deficiency of assets of the corporation arising from the insolvency of other stockholders: *Haslett's Ex'rs v. Wotherspoon*, 1 Strob. Eq. 209. And the fact that holders of unpaid stock of a banking corporation have severally redeemed their shares of bank bills, under the charter which provided that the persons and property of the stockholders should be liable for the redemption of the bills and notes of the bank, in proportion to the number of shares of stock which they held, will not release them from liability for the amounts due on their stock subscriptions: *Marsh v. Burroughs*, 1 Woods, 403; and it may here be further observed that generally where statutes impose an individual liability upon stockholders for the debts of a corporation, that such liability is over and above the liability for unpaid subscription: See *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117. If the complainant is also a stockholder, he must contribute *pari passu* with the defendant stockholders towards the liquidation of his demand against the corporation: *Bisset v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353.

It is possible that share-holders may be liable to creditors of a corporation

for unpaid subscriptions, notwithstanding a violation of the charter with respect to the subscriptions, as the following cases will illustrate. There is no liability on subscriptions to the capital stock of a corporation until the whole of the capital, as prescribed by the charter, has been subscribed; and therefore a creditor's bill will not lie to enforce payment of such subscriptions, unless for some cause the subscribers have estopped themselves from alleging that the entire capital was not subscribed: 2 Morawetz on Corporations, sec. 823; *Temple v. Lemon*, 112 Ill. 51; but if a corporation should, in violation of its charter, begin to carry on business, and incur debts before its entire capital stock had been subscribed, undoubtedly the share-holders would be liable to the extent of their subscriptions, if necessary to pay creditors: 2 Morawetz on Corporations, sec. 823; *Morrison v. Dorsey*, 43 Md. 468; *Musgrave v. Morrison*, 54 Id. 161; *Hager v. Cleveland*, 36 Id. 476; compare *Boston etc. R. R. Co. v. Pearson*, 128 Mass. 445. So a creditor's bill will lie against stockholders to compel the payment of unpaid subscriptions, although they failed to pay at the time of their subscriptions the per cent required by the charter: *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 187. And "if the charter of a bank require a certain portion of the capital stock in specie to be paid in before the directors are permitted to issue bank notes, and the stock is subscribed, but the specie is not paid, and the directors nevertheless proceed to issue and put in circulation the bank notes, if the bank fail or become insolvent, the bill-holders and creditors may proceed at once against the stockholders for the subscribed stock not paid in, and against the directors for a breach of trust for issuing and putting in circulation notes on unpaid subscribed stock, contrary to their duty under the charter": *Schley v. Dixon*, 24 Ga. 273, 277.

If a state has become a stockholder in a corporation, a creditor's right to compel it to pay its unpaid subscription will depend upon the question whether or not suit can be maintained against it under its constitution and statutes; for a sovereign state cannot be sued without its consent, and then only in the particular mode and forum nominated by itself: Thompson's Liability of Stockholders, sec. 20. If, therefore, a state has subscribed to the stock of a corporation, and has not made payment, an action to compel payment will not lie against it without its consent: *Miers v. Zanesville etc. Turnpike Co.*, 11 Ohio, 273; but if a state has rendered itself liable to a private action, and has become a stockholder in a corporation, it subjects itself to the same liabilities which attach to any private stockholders: *Curran v. State of Arkansas*, 15 How. 304; compare *Robinson v. Bank of Darien*, 18 Ga. 65, 109; *Dalney v. Bank of South Carolina*, 3 S. C. 124; and a city having subscribed to the stock of a railroad company, under an act authorizing cities to aid in the construction of railroads, is bound by the same statutory liability which attaches to an ordinary stockholder for labor done in the construction of the road: *Shipley v. City of Terre Haute*, 74 Ind. 297.

It has been held that a court of equity had no jurisdiction to compel resident stockholders to pay their unpaid subscriptions on the application of creditors of a foreign corporation: *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534, — a technical decision; and it is otherwise held that the judgment which it is necessary for the creditor to first obtain against the corporation must be a judgment of the courts of the state where the liability is sought to be enforced: *Patterson v. Lynde*, 112 Ill. 196, 204.

In *Warner v. Callender*, 20 Ohio St. 190, it was held that a judgment creditor could unite, in the same action, a claim to compel payment of unpaid

subscriptions for stock and a claim to enforce the statutory liability of the stockholders for the debts of the corporation.

CREDITOR MUST EXHAUST LEGAL REMEDIES AGAINST CORPORATION BEFORE PROCEEDING IN EQUITY AGAINST STOCKHOLDERS FOR UNPAID SUBSCRIPTIONS. As has already been intimated, before a creditor can resort to equity to compel the payment of unpaid subscriptions, it is necessary, under ordinary circumstances, that he should have exhausted his legal remedies against the corporation by judgment and execution thereon returned unsatisfied: Note to *Germantown Passenger R'y Co. v. Fittler*, 100 Am. Dec. 554; Cook on Stock and Stockholders, sec. 200; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, sec. 703; *Terry v. Anderson*, 95 U. S. 628, 636; *Patterson v. Lynde*, 112 Ill. 196, 204; *Wetherbee v. Baker*, 35 N. J. Eq. 501, 506; *Blake v. Hinkle*, 10 Yerg. 218; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; see also *Ogilvie v. Knox Ins. Co.*, 22 How. 389; *Holmes v. Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Harmon v. Page*, 62 Cal. 448; *Stinson v. Williams*, 35 Ga. 170; *Mann v. Pentz*, 3 N. Y. 415; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166. These are the ordinary prerequisites to the filing of a creditor's bill: See 2 Freeman on Executions, sec. 428; 3 Pomeroy's Eq. Jur., sec. 1415, and notes. But within the general principles of creditors' suits, special circumstances, as the bankruptcy of the corporation, its notorious insolvency, or its formal dissolution, may excuse creditors from first taking these steps: See Cook on Stock and Stockholders, sec. 200; *Terry v. Anderson*, 95 U. S. 628, 636, per Waite, C. J.; but it is not a sufficient showing that no judgment at law could be obtained to allege that the stockholders have failed and refused to elect directors and officers, an act of the legislature expressly authorizing process to be served on the late president, cashier, or any director of the corporation: *Blake v. Hinkle*, 10 Yerg. 218.

It has been held that the judgment must be a judgment of the state in which the creditor's bill is filed: *Patterson v. Lynde*, 112 Ill. 196, 204; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534, — a ruling which might be the means of denying the creditor relief; but if a receiver of the corporation is appointed by a court of equity of one state, or if the corporation has made an assignment for the benefit of creditors, and the court has made an assessment, such receiver or assignee will be permitted to maintain an action at law in another state to recover the amounts unpaid thereunder: *Glenn v. Williams*, 60 Md. 93; *Patterson v. Lynde*, 112 Ill. 196, 206; *Dayton v. Borst*, 31 N. Y. 435, 438.

JUDGMENT AGAINST CORPORATION IS CONCLUSIVE IN CREDITOR'S SUIT TO REACH UNPAID SUBSCRIPTIONS. — Since a judgment conclusively establishes the plaintiff's claim against parties and privies, and cannot be collaterally attacked, except for fraud or want of jurisdiction, it follows that, as the stockholders are represented in the action by the corporation, a judgment against the corporation is conclusive as to the extent and validity of the creditor's demand in his collateral suit against the stockholders to compel the payment of their unpaid subscriptions, unless the judgment can be impeached for fraud or for the want of jurisdiction: Cook on Stock and Stockholders, sec. 209; 2 Morawetz on Corporations, sec. 865; *Marsh v. Burroughs*, 1 Woods, 403; *Bisset v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Glenn v. Springs*, 26 Id. 494; *Glenn v. Williams*, 60 Md. 93; *Bank of Wooster v. Stevens*, 1 Ohio St. 233; *Henry v. Vermillion etc. R. R.*, 17 Ohio, 187, 190; compare *Hastings v. Drew*, 76 N. Y. 9; *Stephens v. Fox*, 83 Id. 313. Of course this does not preclude a

stockholder from setting up special defenses which he may have to his personal liability. The same rules should, on principle, apply in proceedings to enforce the statutory liability of stockholders: See *post*, this note.

PARTIES TO BILL IN EQUITY. — While it is not necessary that all the creditors should be actually parties plaintiff in the equitable suit to compel the payment of unpaid subscriptions, nevertheless the suit must be in behalf of all: Cook on Stock and Stockholders, sec. 205; Thompson's Liability of Stockholders, sec. 351; 2 Morawetz on Corporations, secs. 864, 866; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Marsh v. Burroughs*, 1 Woods, 463, 467; *Holmes v. Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Cleveland Rolling Mill Co. v. Texas etc. Ry.*, 27 Fed. Rep. 250; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman v. White*, 14 Id. 700; 80 Am. Dec. 797; *Mann v. Pentz*, 3 N. Y. 415; *Brundage v. Monumental G. & S. Min. Co.*, 12 Or. 322; *Crease v. Babcock*, 10 Met. 531; *Grew v. Breed*, 10 Id. 569, 575; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Wetherbee v. Baker*, 35 N. J. Eq. 501; compare *Patterson v. Lynde*, 112 Ill. 196, 205; *Hickling v. Wilson*, 104 Id. 54; and see *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; but the cases do not seem to be quite uniform.

The bill, on general, equitable principles, in order that the burden may be equalized, and a multiplicity of suits avoided, should be against all the stockholders, unless they are unknown, insolvent, beyond the jurisdiction of the court, or it is impracticable from their great number to bring them all before the court: Cook on Stock and Stockholders, sec. 206; Thompson's Liability of Stockholders, sec. 353; 2 Morawetz on Corporations, sec. 866; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman v. White*, 14 Id. 700, 702; *Mann v. Pentz*, 3 N. Y. 415; *Patterson v. Lynde*, 112 Ill. 196, 205; *Vick v. Lane*, 56 Miss. 681; *Bronson v. Wilmington L. Ins. Co.*, 85 N. C. 411; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 Id. 371; *Rice v. Merrimac Hosiery Co.*, 56 Id. 114, 128; *Connecticut River Savings Bank v. Fiske*, 60 Id. 363, 368; although, according to a respectable line of authorities, this is not necessary; the suit may be brought against one, or any, or all, leaving those who are joined to seek their remedy over against those who may not be: *Marsh v. Burroughs*, 1 Woods, 463, 468; *Holmes v. Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Hatch v. Dana*, 101 U. S. 205, 210; *Brundage v. Monumental G. & S. Min. Co.*, 12 Or. 322. Thus, says Bradley, J., in *Marsh v. Burroughs*, *supra*, "a judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money"; and again, it is said in *Hatch v. Dana*, *supra*: "The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription, each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several." Some of the authorities which adopt this view suggest a distinction between the case of a bill filed for the purpose of winding up an insolvent corporation, and reaching all the corporate assets, on the one hand, and a bill which has for its object simply the collection of a debt out of unpaid subscriptions, on the other; requiring all the

stockholders to be made defendants in the first case, unless some valid excuse be shown, but permitting the suit to be brought against one or any of them in the second case: See *Brundrje v. Monumental G. & S. Min. Co.*, 12 Or. 322; *Hatch v. Dana*, 101 U. S. 235, 210.

The corporation itself, if in existence, should also be made a party defendant, so as to be bound by the decree: Cook on Stock and Stockholders, sec. 206; Thompson's Liability of Stockholders, sec. 361; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman v. White*, 14 Id. 700; 80 Am. Dec. 797; *Mann v. Pentz*, 3 N. Y. 415; *Patterson v. Lynde*, 112 Ill. 193, 205; *Perkins v. Sanders*, 56 Miss. 733. See the questions as to parties further considered, with reference to the statutory liability of stockholders, in this note, *post*.

DECREE IN EQUITABLE SUIT. — The different notions as to the nature of the creditor's bill, observed under the last preceding head, will evidently result in different rules concerning the decree. According to what may be considered the prevailing idea, the decree should be for the benefit of all the creditors who may choose to come in and prove their debts under it: *Morgan v. New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; and a creditor who first proceeds should not thereby be entitled to priority over the others: See *Robinson v. Bank of Darien*, 18 Ga. 65, 108; compare *Miers v. Zanesville etc. Turnpike Co.*, 13 Ohio, 197; 11 Id. 273; *Jones v. Arkansas Mechanical etc. Co.*, 38 Ark. 17. On the other hand, the decree should be so moulded as to give the stockholders all the privileges to which they would have been entitled under the charter of the corporation, had the stock been called in by the directors: *Hightower v. Thornton*, 8 Ga. 486, 502; 52 Am. Dec. 412; and an equitable contribution is to be made by the court between all the stockholders, as far as may be: *Erickson v. Nesmith*, 46 N. H. 371. If the court makes an assessment, only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and a *pro rata* apportionment is made: *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; compare *Hickling v. Wilson*, 104 Ill. 54; but, it is held, the mere fact that the whole amount due from any stockholder may not be ultimately wanted for the payment of the creditors, if all the other solvent stockholders should pay their ratable proportions of what still remains due on their stock, will not authorize such stockholder to enjoin a receiver from proceeding to enforce the payment of the balance due from him in the first instance: *Pentz v. Hawley*, 1 Barb. Ch. 122; if any balance should remain in the receiver's hands after satisfying the debts of the corporation, and the expenses of executing the trust, it will be distributed among the several stockholders who have paid in full for their stock.

LIABILITY ONLY EXTENDS TO UNPAID SUBSCRIPTIONS. — Independently of an additional liability imposed for the benefit of creditors upon the stockholders of a corporation, by special charter, general acts of incorporation, or other statutes, a stockholder's liability is governed by his contract of subscription, and does not extend beyond the amount due thereon: Taylor on Corporations, sec. 700; 2 Morawetz on Corporations, sec. 831; *Seymour v. Sturgess*, 26 N. Y. 134; *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263; *Jones v. Jarman*, 34 Ark. 323, 328; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 599. There is no common-law liability for the debts of the corporation: See *post*, this note. If, therefore, stock is fully paid up, there is no further liability in equity: *Warfield v. Marshall County Canning Co.*, *supra*; and see *post*. So where a constitution provided that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her," a stockholder whose

stock is fully paid up is not liable for a debt of the corporation: *Schricker v. Ridings*, 65 Mo. 208; *Gausen v. Buck*, 68 Id. 545. It results that solvent stockholders, beyond their unpaid subscriptions, are not bound to make up, for the benefit of creditors, the deficiency resulting from defaulting and insolvent stockholders: *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227; compare *Haslett's Ex'rs v. Wotherspoon*, 1 Strob. Eq. 209. And a statute to which the stockholders did not consent, authorizing assessments against stockholders who have paid the full amount of their subscriptions, is a law impairing the validity of their contract with the company, and is therefore unconstitutional: *Ireland v. Palestine etc. Turnpike Co.*, 19 Ohio St. 269.

The unissued shares of stock of a corporation are not assets; and in the absence of a provision of its charter or other statute to the contrary, it is held, one to whom shares of stock have been transferred by the corporation gratuitously, does not, by accepting them, become a debtor of the company, or make himself liable to pay the nominal face of the shares, as upon a subscription for the stock, or a contract; and an action is not maintainable against him, by a creditor of the corporation, to compel him to pay for such shares: *Christensen v. Eno*, 106 N. Y. 97; compare *Coit v. North Carolina etc. Amalgamating Co.*, 14 Fed. Rep. 12; 15 Phila. 496.

It is the practice in some states to organize mining corporations with a nominal capital, bearing little or no relation to the real capital which the stockholders propose to contribute, and to issue the stock as fully paid up, subject to assessment as the needs of the company may require, in consideration of the transfer of the mining property to the corporation. In such a case, there is no subscribed stock; and a person who contracts with the company must be deemed to have contracted with a view only to such security as the property transferred to it may furnish, irrespective of the capital indicated by the charter: 2 Morawetz on Corporations, sec. 830. It is accordingly held that in a case arising in California, that the only liability of stockholders of such a corporation was the general constitutional and statutory personal liability imposed upon them for the corporate debts and liabilities and the liability of their stock to assessment by the corporation: *In re South Mountain Consolidated Mining Co.*, 8 Saw. 366; 14 Fed. Rep. 347, affirming 7 Saw. 30; 5 Fed. Rep. 403; so in *Ross v. Silver and Copper Island Min. Co.*, 29 N. W. Rep. 591 (Minn.), affirmed on rehearing in 31 Id. 219, it was decided, approving the preceding case, that where a statute, under which a mining corporation was formed, provided that no stock "issued or sold, purporting to be full paid, shall be subject to any further assessment in the hands of the lawful holder thereof without his consent," if the corporation sold, in good faith, at less than par value, shares of its stock purporting to be full paid, the creditors of the corporation had no recourse against the purchasers or holders of the stock for the difference between the par value and the price at which the shares were sold.

PAYMENT OF SHARES, HOW MADE—FULL-PAID SHARES.—Subscriptions to corporate stock need not, in the absence of statutory provisions requiring it, be paid for in cash; but any property which the corporation is authorized to purchase, or which is necessary for the purposes of its legitimate business, or any services for which the corporation would be entitled to expend its funds, may be received or rendered in payment: Cook on Stock and Stockholders, secs. 13, 15; Thompson's Liability of Stockholders, sec. 134; Boone on Corporations, sec. 112; 2 Morawetz on Corporations, sec. 825; Taylor on Corporations, sec. 701; *Coffin v. Ransdell*, 110 Ind. 417; *Brant v. Ehlen*, 59

Md. 1; *Liebke v. Knapp*, 79 Mo. 22; *Kehler v. Lademann*, 11 Mo. App. 550; *Carr v. Le Fevre*, 27 Pa. St. 413. Such a contribution of property or services will, therefore, discharge the stockholder for unpaid subscriptions to the extent of their value. And the creditors will be bound by a valuation of the property or services in good faith, although it prove to be excessive: 2 Morawetz on Corporations, sec. 825; Cook on Stock and Stockholders, secs. 13, 44, 47; Thompson's Liability of Stockholders, sec. 134; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, affirming 14 Fed. Rep. 12; 15 Phila. 496; *Phelan v. Hazard*, 5 Dill. 45; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Coffin v. Ransdell*, 110 Ind. 417; *Brant v. Ehlen*, 59 Md. 1; see, under the English companies' acts, *Leeke's Case*, L. R. 11 Eq. 100; S. C. on appeal, L. R. 6 Ch. 469; *Disderi's Case*, L. R. 11 Eq. 242; *Syker's Case*, L. R. 13 Eq. 255; *Forbes's Case*, L. R. 5 Ch. 270; *Anderson's Case*, L. R. 7 Ch. D. 75; and compare *Schroder's Case*, L. R. 11 Eq. 131; *Coates's Case*, L. R. 17 Eq. 169; *Ferrao's Case*, L. R. 9 Ch. 355; also *Currie's Case*, 3 De Gex, J. & S. 367; *Leifchild's Case*, L. R. 1 Eq. 231; *Ashworth v. Bristol etc. Ry.*, 15 L. T., N. S., 561; *Guest v. Worcester etc. Ry.*, L. R. 4 C. P. 9; *Pell's Case*, L. R. 5 Ch. 11; *Baron De Beville's Case*, L. R. 7 Eq. 11; *Dent's Case*, L. R. 15 Eq. 407; 8 Ch. 775; *Fothergill's Case*, L. R. 8 Ch. 270; *Spargo's Case*, L. R. 8 Ch. 407; *Brown's Case*, L. R. 9 Ch. 102; *Carling's Case*, L. R. 1 Ch. D. 115; "there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account": *Coit v. Gold Amalgamating Co.*, *supra*.

In New York, the act of 1853, amendatory of the act of 1848, authorizing the formation of corporations for manufacturing and other purposes, confers authority upon the trustees of such corporations to purchase property "necessary for their business, and to issue stock to the amount of the value thereof, in payment therefor"; and by section 10 of the act of 1848, stockholders of such corporations are made severally individually liable to the creditors of the company to an amount equal to the stock held by them respectively, until the whole capital stock shall have been paid in. It has been held, under these acts, that when the stock was fully paid up, in money or property, the stockholders were released from personal liability: *Boynton v. Hatch*, 47 N. Y. 225; *Douglass v. Ireland*, 73 Id. 100; but if exemption from personal liability is sought by the holders of stock originally issued for property, a creditor may impeach the transaction for fraud: *Boynton v. Hatch*, *supra*; although a mere mistake or error of judgment by the trustees, either as to the necessity of the purchase, or as to the value of the property so purchased, if made in good faith, and not to evade the statute, will not subject a holder of the stock issued in payment of the property purchased to such liability: *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 Id. 93; *Douglass v. Ireland*, *supra*.

But payment of stock subscriptions is good, as against creditors, only when made in money, or in what may fairly be considered as money's worth: *Weltherbee v. Baker*, 35 N. J. Eq. 501. Thus where a corporation was organized for the manufacture of a patented article, and its capital stock was taken by the defendants in exchange for their interest in the patent, which proved to be worthless, the defendants having paid no value for their stock, are liable to the creditors as for unpaid subscriptions: *Chisholm v. Forny*, 65 Iowa, 333; and see, to the same effect, *Thurston v. Duffy*, 38 Hun, 327. The trust for the benefit of creditors of a corporation in unpaid subscriptions cannot be defeated or the fund impaired by any simulated or pretended payment for the stock, or any device short of actual payment: *Sawyer v. Hoag*, 17 Wall. 610; *Crawford v. Rohrer*, 59 Md. 599, 604; and see *Goodwin v. McGhee*, 15 Ala.

232, 246. Any arrangement, therefore, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, is not a valid payment as against the creditors of the corporation, however it may be regarded as between the corporation and the stockholder: *Crawford v. Rohrer*, *supra*. So where the officers of a corporation made an arrangement with themselves as stockholders, whereby paid-up certificates were issued to themselves, in consideration of real estate conveyed at a price understood to be many times its real value, as between such stockholders and a creditor, the stock will be considered paid only to the extent of the fair value of the property conveyed: *Osgood v. King*, 42 Iowa, 478; and "as between the creditors of the corporation and the original holders of the stock, as in the case here, it in no manner affects the rights of the former that the stock has been issued as fully paid-up stock; for their rights depend, not upon the mere appearance of things, but upon the actual *bona fide* payment by the stockholder, whether that payment be alleged to have been made in money or property": *Crawford v. Rohrer*, 59 Md. 599, 604.

As a rule, a corporation cannot issue its stock at less than the par value, as fixed by the charter: Taylor on Corporations, sec. 702; *Hawley v. Upton*, 102 U. S. 314; *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449; *Chouteau v. Dean*, 7 Mo. App. 210; *Kehlor v. Lademann*, 11 Id. 550; but see *Christensen v. Eno*, 106 N. Y. 97 (where unissued shares of stock were transferred by the corporation gratuitously, without creating any liability in the transferee); and *In re South Mountain Consol. Min. Co.*, 8 Saw. 366; 14 Fed. Rep. 347, affirming 7 Saw. 30; 5 Fed. Rep. 403; *Ross v. Silver and Copper Island Min. Co.*, 29 N. W. Rep. 591 (Minn.), affirmed on rehearing 31 Id. 219 (cases of mining corporations discussed *supra*). Compare the following English cases reaching a different conclusion: *In re Dronfield Silkstone Coal Co.*, L. R. 17 Ch. D. 76; *In re Ambrose Lake T. & C. Min. Co.*, L. R. 14 Ch. D. 390; *In re Ince Hall Rolling Mills Co.*, 30 Week. Rep. 945. Thus where one, by his contract of subscription, agreed to pay but twenty per cent of the par value of the stock, which purported to be non-assessable, he can nevertheless be compelled to pay the remaining eighty per cent at the suit of the company's assignee in bankruptcy: *Hawley v. Upton*, *supra*; and where ten thousand dollars of stock was issued by a corporation as "full-paid" to an officer thereof, in payment of services rendered by him valued at two thousand five hundred dollars, the stock being taken at its market value of twenty-five per cent, such officer was nevertheless held liable to creditors of the corporation to the extent of the difference between the value of his services and the par value of the stock: *Chouteau v. Dean*, *supra*; and in *Jackson v. Traer*, *supra*, it was also decided that where stock of an embarrassed corporation was issued to creditors in settlement of a demand, which it had no other means of paying, at a certain per cent of the nominal value of the stock, that the creditors were liable for the unpaid balance; and in *Flinn v. Bagley*, 7 Fed. Rep. 785, it was further held that where the defendants subscribed to the increased capital stock of an embarrassed corporation, with the understanding embodied in the subscription, assented to by the stockholders, that they were to receive the stock at sixty-six and two thirds cents on the dollar, which was all that it was worth, the assignee in bankruptcy might, notwithstanding, collect the remaining one third of the par value of the stock for the benefit of future creditors; but that the arrangement was binding upon the stockholders, because they assented to it, and it was not a fraud upon existing creditors, because the assets of the corporation were increased by the

amount of money actually paid in, and to that extent they were benefited by the subscription; but, on the other hand, in *Clark v. Bever*, 31 Fed. Rep. 670, it was decided by Love, D. J., in an elaborate and convincing opinion, in which he strongly criticises *Jackson v. Traer*, *supra*, that while an agreement between a corporation and a subscriber by which the latter was to pay less than the par value of his stock is, in general, invalid as to the creditors of the corporation, and also as to other stockholders who did not consent thereto, yet if the agreement would prove a benefit rather than an injury to the creditors and stockholders, they cannot complain. Therefore, where a corporation was insolvent, and its stock worthless, and certain of its creditors, in payment of a debt due them, accepted in good faith, by resolution spread on the minutes of the corporation, unissued stock at twenty cents on the dollar, they are not liable to a judgment creditor of the company for the eighty cents remaining unpaid on each dollar, although the debt on which the judgment was recovered was subsequently contracted, the creditor being assumed to have had notice of the transaction. The justice and good sense of this decision are apparent.

While it is thus true that a corporation cannot, as a general rule, issue its stock at less than the par value, and preclude its creditors from compelling the payment of the difference between the par value and the amount paid for the stock, it is equally true that purchasers of stock, issued as full-paid, in good faith, and without notice that it was not in fact full-paid, cannot be held for the unpaid portion, either by the corporation, or its representatives, or its creditors: *Cook on Stock and Stockholders*, sec. 50; *Thompson's Liability of Stockholders*, sec. 135; 2 *Morawetz on Corporations*, sec. 836; *Taylor on Corporations*, sec. 702; 2 *Waterman on Corporations*, 138; *Foreman v. Bigelow*, 4 Cliff. 508; *Steacy v. Little Rock etc. R. R.*, 5 Dill. 348; *Phelan v. Hazard*, 5 Id. 45; *Cleveland Rolling Mill Co. v. Texas etc. R'y*, 27 Fed. Rep. 250; *Brant v. Ehlen*, 59 Md. 1; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Erskine v. Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; *Waterhouse v. Jamieson*, L. R. 2 H. L. 29. Thus it is said in *Brant v. Ehlen*, *supra*, that "where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser, without notice, to be answerable, either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." So "a share of stock in the ordinary form is to be taken to be paid up, in the absence of anything appearing to the contrary; and it can make no difference whether the certificate says on its face that the stock is fully paid, or says nothing about it": *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496, 501. The presumption is, that a certificate, in the usual form, is full-paid; and a purchaser who takes it without notice to the contrary is not liable to creditors as for unpaid stock: *Johnson v. Lullman*, 15 Id. 55, affirmed in 88 Mo. 567. But a certificate that stock is "full-paid stock" is not conclusive as against the creditors, who may show, as against the original holder from the corporation, that no consideration was paid therefor: *A. Wight Co. v. Steinkemeyer*, 6 Mo. App. 574; or that only a part of the par value of the stock has been paid: *Pickering v. Templeton*, 2 Id. 424; and where the words "non-assessable" are written or printed across the face of certificates, the stockholders are nevertheless liable to pay

whatever remains unpaid upon the stock whenever it becomes necessary that such payments should be made for the purpose of discharging the debts of the company: *Upton v. Burnham*, 3 Biss. 520. At most, the legal effect of the words is a stipulation against liability from further assessments after the entire subscription shall have been paid: *Upton v. Tribilcock*, 91 U. S. 45. And where stock, in the contract of subscription, purports to be non-assessable, it can only mean that no assessment would be made beyond the percentage the subscriber had specially bound himself to pay, unless the legal liabilities of the company required it: *Hawley v. Upton*, 102 Id. 314, 316.

WITHDRAWAL AND RELEASE OF STOCKHOLDERS, AND FORFEITURE OF STOCK, AS AFFECTING LIABILITY FOR UNPAID SUBSCRIPTIONS. — It is clear that a share-holder cannot relieve himself, at his own pleasure, from liability, either to the corporation or to its creditors, for unpaid subscriptions by any attempted withdrawal from the corporation: *United Society v. President etc. of Eagle Bank*, 7 Conn. 456; *Trustees of Bishop's Fund v. President etc. of Eagle Bank*, 7 Id. 476; *Gaff v. Flesher*, 33 Ohio St. 107, 112; *Chouteau v. Dean*, 7 Mo. App. 210; *Haskell v. Sells*, 14 Id. 91; and a provision in the charter of a corporation that the stock of a delinquent subscriber shall be forfeited, being for the benefit of the corporation, and not for the stockholder, is not to be construed as a privilege of the stockholder to abandon his shares at will: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412. And since the unpaid subscriptions constitute a trust fund for the benefit of creditors of the corporation, it is equally clear that a stockholder cannot be altogether released from liability for unpaid subscriptions, or his liability therefor limited, by any agreement or arrangement between himself and the corporation or its agents, or by any resolution adopted by its directors, or by the stockholders themselves, to the prejudice of its creditors: *Cook on Stock and Stockholders*, secs. 168, 170; *Thompson's Liability of Stockholders*, sec. 201; 2 *Morawetz on Corporations*, secs. 824, 841; *Taylor on Corporations*, sec. 745; note to *Freeland v. McCullough*, 699, 709; *Burke v. Smith*, 16 Wall. 390, 395, affirming in part *Putnam v. New Albany*, 4 Biss. 365; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 Id. 65, 71; *County of Morgan v. Allen*, 103 Id. 498; *Scovill v. Thayer*, 105 Id. 143; *Upton v. Hansbrough*, 3 Biss. 417; *Upton v. Jackson*, 1 Flipp. 413; *Mann v. Cooke*, 20 Conn. 178; *Crandall v. Lincoln*, 52 Id. 73; 52 Am. Rep. 560; *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334; *Singer v. Given*, 61 Iowa, 93; *Rider v. Morrison*, 54 Md. 429, 444; *Farnsworth v. Robbins*, 36 Minn. 369; *Vick v. La Rochelle*, 57 Miss. 602; *Gill v. Balis*, 72 Mo. 424; *Chouteau Ins. Co. v. Floyd*, 74 Id. 280, 291; *Chouteau v. Dean*, 7 Mo. App. 210; *Haskell v. Sells*, 14 Id. 91; *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *Sagony v. Dubois*, 3 Sand. Ch. 466; *Gaff v. Flesher*, 33 Ohio St. 107, 112; compare *Directors etc. v. Kisch*, L. R. 2 H. L. 99; *Smith's Case*, L. R. 2 Ch. 604. And where persons became stockholders of a corporation, with the understanding that calls were not to exceed a certain per cent, and afterwards calls are made in excess of that amount, to compensate for which second-mortgage bonds were issued to such stockholders, they are liable to creditors of the corporation, as for unpaid stock, to the amount realized by a sale of the bonds: *Skrainka v. Allen*, 7 Mo. App. 434, affirmed in 76 Mo. 384; compare *Keystone Bridge Co. v. Barstow*, 8 Mo. App. 494. So a stockholder cannot be permitted to reduce the number of his shares of stock, with the consent of the stockholders or of the directors, so as to affect the rights of existing creditors: *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; and an agreement between the officers of a corporation and a stockholder to consolidate the stock held by him will not affect the rights of existing creditors of

the corporation, or of the other stockholders, who were not parties to the arrangement: *Mann v. Currie*, 2 Barb. 294; so an attempt on the part of a portion of the stockholders to withdraw from it, under a resolution of the board of directors, before all the debts are paid, will be none the less void as to the creditors of the corporation because enough remains to meet the claims of the creditors: *Gill v. Balis*, 72 Mo. 424.

Under certain circumstances, however, the agreement or arrangement may be effective in discharging or limiting the liability of stockholders to creditors. It is plain that if a creditor be a consenting party, or is clearly not prejudiced, he will be bound. Thus in *Slee v. Bloom*, 19 Johns. 456, 10 Am. Dec. 273, where, by an act under which a corporation was formed, the persons composing the company at the time of its dissolution were made individually responsible to the extent of their stock for its debts then due and owing, it was held that a resolution allowing the stockholders to forfeit their stock, on the payment of a certain per cent, was void as against a creditor who, although a trustee, protested against the resolution, notwithstanding he accepted money raised under it; but a resolution that any stockholder paying certain sums already called from his shares should not be proceeded against for any further calls, except by way of forfeiture of stock, to which the creditor assented, discharged those who complied with the resolution from further responsibility to him; and in *Kenton Furnace R. R. etc. Co. v. McAlpin*, 5 Fed. Rep. 737, it was held that a corporation might agree, in consideration of the surrender to it by the stockholders of accumulated profits, and of the increased value of its property, to treat its stock as fully paid up, and issue full-paid certificates, and that the arrangement was binding upon the corporation, the stockholders, all of whom assented thereto, existing creditors who also assented, and subsequent creditors with notice, but not as to non-assenting existing creditors. So where a corporation, by resolution of its stockholders, reduces the amount of its capital stock and issues full-paid certificates to take up the partly paid certificates at a certain proportion of the face thereof, it is held that the reduction of the stock did not relieve those who were stockholders at the time from liability on the contracts then existing against the company, but the stockholders to whom full-paid certificates were issued would not be liable on contracts made after the date of the reduction: *In re State Ins. Co.*, 11 Biss. 301; 14 Fed. Rep. 301; and in *Erskine v. Peck*, 13 Mo. App. 280, affirmed in 83 Mo. 465, it was also held that one who surrendered to a corporation stock issued to him as full-paid, but for which he had paid nothing, and which the corporation again issued for value to *bona fide* subscribers, was not liable as a stockholder to one who became a creditor of the corporation long after the surrender, the corporation, its capital stock, and the security of its creditors suffering thereby no real impairment or prejudice by the transaction; and again, in *Johnson v. Lullman*, 15 Mo. App. 55, affirmed in 88 Mo. 567, it was held, following this latter case, that a stockholder who surrendered unpaid stock to the corporation was not liable to a corporate creditor whose demand accrued after the surrender. So, although the capital stock of a corporation is a trust fund for the benefit of creditors, the legislature may so modify the charter as to relieve stockholders from any future liability on their subscriptions: *Robinson v. Bank of Darien*, 18 Ga. 65; but evidently this would impair the obligation of contracts, and could not be done as to non-assenting existing creditors; but an act of the legislature authorizing the reduction of the stock of a corporation to the amount paid in at a certain time, and accepted by the stockholders, will relieve the latter from further liability as to creditors who

have become such since the reduction: *Hepburn v. Comm'rs of Exchange and Banking Co.*, 4 La. Ann. 87; *Palfrey v. Spaulding*, 7 Id. 363; *Stark v. Burke*, 9 Id. 341.

A *bona fide* compromise between a corporation and a share-holder, by which the subscription of the latter is canceled, furthermore, is binding upon the creditors as well as upon the corporation itself: Cook on Stock and Stockholders, sec. 171; Thompson's Liability of Stockholders, sec. 202; 2 Morawetz on Corporations, sec. 841; Taylor on Corporations, sec. 746; *New Albany v. Burke*, 11 Wall. 96, reversing in part *Putnam v. New Albany*, 4 Biss. 365; *Steacy v. Little Rock etc. R. R.*, 5 Dill. 348; *Gelpcke v. Blake*, 19 Iowa, 263; *Lord Belhaven's Case*, 3 De Gex, J. & S. 41.

If the shares of a stockholder have been validly forfeited, moreover, for non-payment of calls, under a power conferred upon the corporation by its charter, the relation between the stockholder and the corporation is thereby terminated, and he cannot afterwards be held liable by corporate creditors for unpaid subscriptions, in the absence of collusion: Cook on Stock and Stockholders, sec. 127; Thompson's Liability of Stockholders, sec. 193; 2 Morawetz on Corporations, sec. 857; Taylor on Corporations, sec. 746; *Allen v. Montgomery R. R.*, 11 Ala. 437; *Mills v. Stewart*, 41 N. Y. 384; *Macaulay v. Robinson*, 18 La. Ann. 619. "The power of declaring a forfeiture of shares is conferred upon a corporation solely for the purpose of compelling the subscribers to pay their dues promptly, and thus to increase the amount of the common fund. It was not conferred, and cannot be exercised, for the purpose of discharging stock subscribers from liability to creditors in case the company should prove a failure": 2 Morawetz on Corporations, sec. 857. Of course further liability to the corporation itself is gone by the forfeiture: *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330; *Mechanics' Foundry etc. Co. v. Hall*, 121 Mass. 272; *Ashton v. Burbank*, 2 Dill. 435; *King's Case*, L. R. 2 Ch. 714, 719, 731; *Knight's Case*, L. R. 2 Ch. 321.

CONDITIONS LIMITING OR RELIEVING LIABILITY OF SUBSCRIBERS FOR UNPAID SUBSCRIPTIONS. — Without entering into any discussion of conditional subscriptions to capital stock generally, or their binding force upon the corporation or other share-holders (see note to *Parker v. Thomas*, 81 Am. Dec. 392), it is enough for our present purpose to state the very evident proposition that a subscription, unconditional on its face, cannot be controlled or qualified, as to creditors of the corporation, by any private understanding or agreement between the subscriber and the officers or other agents of the corporation, by which the subscriber's liability, according to the terms of the subscription, is released or in any way lessened: *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Hickling v. Wilson*, 104 Id. 54; *Peychauld v. Hood*, 23 La. Ann. 732; *Saffold v. Barnes*, 39 Miss. 399; *Haskell v. Sells*, 14 Mo. App. 91; *Burke v. Smith*, 16 Wall. 390, 397, affirming in part *Putnam v. New Albany*, 4 Biss. 365; 2 Morawetz on Corporations, sec. 842; Cook on Stock and Stockholders, secs. 137, 138. Aside from the objection that the general rules of evidence will not permit the contract of subscription to be thus varied or modified, persons dealing with the corporation have a right to rely upon the subscriptions as they purport to be, and it would be a fraud upon them to permit a subscriber to show that his apparently unconditional subscription was in fact conditional. It has even been held that a subscriber to the stock of a corporation could not, in an action against the stockholders by the corporate creditors to compel the payment of unpaid subscriptions, set up a secret collateral agreement between himself and the company, by which his subscription was to be paid in land instead of money: *Noble v. Callender*, 20

Ohio St. 199; and that an agreement incorporated into the contract of subscription itself, limiting the liability of the subscribers to the installments paid by them, and providing that the stock shall be non-assessable, is void as against the creditors of the corporation, at all events creditors without notice thereof: *Union M. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537; 37 Am. Rep. 129. The failure of a corporation to complete the work for which the corporation was established, within the period named by its agent when soliciting subscriptions, such a completion not having been made a condition of the subscriptions, and the subscribers, by not paying the subscriptions, having retarded the work, will not discharge the subscribers from their statutory obligation to satisfy the claims of creditors: *Pickering v. Templeton*, 2 Mo. App. 424. Plainly, a subscriber cannot plead in avoidance of his liability to the creditors of the corporation that he merely signed, at the request of the agent of the company, as an inducement for others to subscribe, with the understanding that when this end had been served his name should come off the list: *Pickering v. Templeton*, *supra*. If one who makes a conditional subscription desires to take advantage of the condition which has not been complied with, he should promptly require the subscription to be canceled, and not wait until debts have accrued against the company before taking any action: *Lee v. Imbrie*, 13 Or. 510.

FRAUD AND MISTAKE AS AFFECTING STOCKHOLDERS' LIABILITY FOR UNPAID SUBSCRIPTIONS.—The rule that a contract obtained by fraud is voidable at the election of the defrauded party applies to the contract of a shareholder in a corporation. Therefore if one is induced to subscribe for or purchase shares of stock of a corporation through the fraud of its agents, he may have all the remedies, affirmative and defensive, against the corporation which he might have had against a principal in any other similar case: See Cook on Stock and Stockholders, secs. 135 et seq.; Thompson's Liability of Stockholders, secs. 142 et seq.; note to *Parker v. Thomas*, 81 Am. Dec. 392. But the contract entered into through fraud is voidable merely, and not absolutely void. It is valid and binding until the defrauded party elects to treat it as void. And if he fails to repudiate it before the rights of innocent third parties have intervened, their equities to treat it as valid may be superior to his claim to avoid it. Thus in *Upton v. Tribulcock*, 91 U. S. 45, 55, Miller, J., dissenting, says: "I am of the opinion that where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for unpaid installments when suit is brought by the corporation, and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation." Again, Dillon, J., in *Upton v. Englehart*, 3 Dill. 496, 499, uses the following language: "The effect of fraud practiced to induce a contract to subscribe to stock or purchase shares is, as respects the company and the person deceived, the same as in other contracts, with the modifications arising from the peculiar nature of the transaction as to repudiating or rescinding the contract"; but he continues, page 501: "The proposition is not a sound one, that the right of a person, who has been drawn into the purchase of stock by the fraud of a company or its agents, to relief is as great against creditors as it would be against the company. If the contest is with the company, it is essentially one with the alleged share-holder's own partners or associates, and if their corporate representative or its agents have practiced a fraud upon him, he is entitled to relief against it. But if a person has accepted a certificate of

stock, and becomes, to all external appearance, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so, and as they cannot know the manner in which he was induced to become a stockholder, there is ground to maintain that as to them the matter is immaterial." It is therefore settled that if a shareholder, whose subscription was obtained through the fraud of the company's agents, has not been vigilant in discovering the fraud and in repudiating the contract, it will be no defense as to creditors of the corporation, and that in general it will be too late for him to set up the fraud after the corporation has become insolvent or bankrupt: *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 Id. 665, 667; *Upton v. Englehart*, 3 Dill. 496; *Farrar v. Walker*, 3 Id. 506, note; *Upton v. Jackson*, 1 Flipp. 413; *Upton v. Hansbrough*, 3 Biss. 417; note to *Germantown Passenger Ry v. Filer*, 100 Am. Dec. 556; see also, in England, under the companies' acts, *Oakes v. Turquand*, L. R. 2 H. L. 325, the leading case; *Stone v. City and County Bank*, L. R. 3 C. P. D. 307; *Henderson v. Royal British Bank*, 7 El. & B. 356; *Dossett v. Harding*, 1 Com. B., N. S., 524; *Parvis v. Harding*, 1 Id. 533; *Daniell v. Royal British Bank*, 1 Hurl. & N. 681; *Reese River etc. Min. Co. v. Smith*, L. R. 4 H. L. 64; *McNeill's Case*, L. R. 10 Eq. 503; *Pugh and Sharman's Case*, L. R. 13 Eq. 572; *Wright's Case*, L. R. 7 Ch. 60; *Peel's Case*, L. R. 2 Ch. 674; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317; *In re Aetna Ins. Co.*, 6 I. R. Eq. 298; also *Brockwell's Case*, 4 Drew. 205; *Ayre's Case*, 25 Beav. 513; *Blake's Case*, 34 Id. 639; and see, further, Thompson's Liability of Stockholders, secs. 143-150; 2 Morawetz on Corporations, secs. 839, 840; Taylor on Corporations, sec. 744; *Stifford v. Barnes*, 39 Miss. 399; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Briggs v. Cornwell*, 9 Daly, 436; *Turner v. Grangers' L. & H. Ins. Co.*, 65 Ga. 649; 38 Am. Rep. 891; *Hamilton v. Grangers' L. & H. Ins. Co.*, 67 Ga. 145. Some of the authorities seem to favor the view that in no case can fraud in obtaining the subscription be set up by the subscriber after the insolvency or bankruptcy of the corporation. This may be true under the English companies' act of 1862, by which it appears a creditor is entitled to hold every share-holder whose name is on the register of the company at the time proceedings are instituted to wind up the company for insolvency; but in America there seems to be no reason for the universality of the rule. Thus in *Upton v. Englehart*, 3 Dill. 496, 505, Dillon, J., remarks: "I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently appearing will not enable the assignee to insist that the purchase of stock is binding upon him."

It is unnecessary to stop to inquire what constitutes fraud within the meaning of the foregoing rules: See note to *Parker v. Thomas*, 81 Am. Dec. 385. However, it may here be noticed that misrepresentations by the agent of a corporation as to the non-assessability of its stock, beyond a certain amount, being held to be a misrepresentation of law and not of fact, cannot be availed of by a subscriber in a suit against him by the assignee in bankruptcy of the corporation to enforce his unpaid subscriptions: *Upton v. Tribilcock*, 91 U. S. 45. But it is possible for the agent of a corporation, formed in one state, to make fraudulent representations concerning the laws of an-

other state, and the provisions of the charter of the corporation granted therein, to the effect that the stock is non-assessable; and if the subscriber relied thereon, he is entitled, in the absence of laches and acquiescence, to resist further payment: *Upton v. Englehart*, 3 Dill. 496, 501.

The case of a subscription entered into under a mistake of fact is probably governed, as far as creditors are concerned, by the same general principles which govern the case of fraud. In order to take advantage of it, the subscriber would be obliged to act promptly. But in an action against a subscriber, brought by the assignee of a bankrupt corporation, to recover for unpaid subscriptions, it is no defense for the subscriber to show ignorance on his part of the condition and circumstances of the company at the time of subscribing: *Payson v. Withers*, 5 Biss. 269; and of course it would be no defense that he was ignorant of the legal effect of the subscription contract which he signs: *New Albany etc. R. R. v. Fields*, 10 Ind. 187; *Clear v. Newcastle etc. R. R.*, 9 Id. 488; see also, on this question, Thompson's Liability of Stockholders, sec. 144; Cook on Stock and Stockholders, sec. 196.

STOCKHOLDERS CANNOT SET OFF DEBTS DUE THEM BY INSOLVENT CORPORATION WHEN SUED FOR UNPAID SUBSCRIPTIONS. — Since if a corporation is insolvent, each creditor is equitably entitled to receive a ratable share of its assets, it follows that in a suit by judgment creditors of an insolvent corporation, whose executions have been returned unsatisfied, or by the assignee of a corporation in bankruptcy or insolvency, or for the benefit of creditors, to compel the payment of unpaid subscriptions, stockholders cannot set off debts due them by the corporation: Cook on Stock and Stockholders, sec. 193; Thompson's Liability of Stockholders, secs. 382 et seq.; 2 Morawetz on Corporations, sec. 861; Taylor on Corporations, sec. 729; 2 Waterman on Corporations, 130; *Sawyer v. Hoag*, 17 Wall. 610; *Scammon v. Kimball*, 92 U. S. 362, 366; *Scorill v. Thayer*, 105 Id. 143; *Wilbur v. Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479, 492; *Singer v. Given*, 61 Iowa, 93; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Lawrence v. Nelson*, 21 N. Y. 153; *Hillier v. Allegheny County M. Ins. Co.*, 3 Pa. St. 470; *Macquie Savings Bank v. Bastian*, 11 Rep. 785 (Pa.); compare *Jarman's Adm'r v. Benton*, 79 Mo. 148, *Webber v. Leighton*, 8 Mo. App. 502, *Merchants' Ins. Co. v. Hill*, 12 Id. 148, *Simmons v. Heman*, 17 Id. 444, in which the liability for unpaid stock was enforced in a special statutory manner, and the set-off allowed. The above rule applies in England to limited companies in winding up under the act of 1862: *Grissell's Case*, L. R. 1 Ch. 528, 536; *Barnett's Case*, L. R. 19 Eq. 449; *Calisher's Case*, L. R. 5 Eq. 214; *Black & Co.'s Case*, L. R. 8 Ch. 254; *Mulford's Case*, L. R. 14 Ch. D. 634; *Gill's Case*, L. R. 12 Ch. D. 755; but this is by virtue of statute. "The debts must be mutual," says Miller, J., in *Sawyer v. Hoag*, *supra*, — "must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." "To permit him to set off the debt due him," says the court, in *Williams v. Traphagen*, *supra*, "would, where the corporation is insolvent, manifestly give him a preference as a creditor. To this he is not entitled." So if a judgment creditor of a corporation who files a bill against stockholders to reach the unpaid balance due on their subscriptions is himself also a stockholder, he must contribute *pari passu* with the defendants towards the liqui-

dation of his demand: *Bisset v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353. But in *Wilbur v. Stockholders of Glen Iron Works*, *supra*, it was held that if the stockholders prove their debts in bankruptcy, deductions equal to their estimated respective dividends might perhaps be made from the amounts of the assignee's demands against them respectively as stockholders.

See *post*, this note, as to the right of set-off in actions by creditors of corporations to enforce the statutory liability of stockholders for the corporate debts.

STOCKHOLDERS ARE ESTOPPED FROM ATTACKING VALIDITY OF CORPORATE ORGANIZATION, ETC., IN SUIT TO COMPEL PAYMENT OF UNPAID SUBSCRIPTIONS. — In a suit by or on behalf of creditors of a corporation to compel the payment by stockholders of unpaid subscriptions, it is no defense that the corporation was not legally organized. Having dealt with it as a valid organization, they are estopped from alleging that it is not, for the purpose of relieving themselves from liability: *Upton v. Hansbrough*, 3 Biss. 417; *Gaff v. Flesher*, 33 Ohio St. 107; this is especially true where subscribers have been active participants in the management of the company's affairs for years: *Hickling v. Wilson*, 104 Ill. 54; and although a corporation was ousted from the franchise of being a corporation, on *quo warranto* it was held that "the rights of the creditors of the company and the liabilities of the stockholders in respect to the payment of the creditors were not affected by the judgment of ouster": *Roland v. Meader Furniture Co.*, 38 Ohio St. 269, 272. On the other hand, a creditor cannot attack the validity of a corporate organization for the purpose of holding its members individually liable for his claim, as members of an unincorporated association: *Laflin etc. Powder Co. v. Sinsheimer*, 46 Md. 315; 24 Am. Rep. 522. On the same principle, where the stock of a corporation was attempted to be increased, those who become subscribers to or purchasers thereof are estopped from denying the regularity of the proceedings by which it was increased: *Clubb v. Upton*, 95 U. S. 665; *Upton v. Hansbrough*, 3 Biss. 417; *Upton v. Jackson*, 1 Flipp. 413; especially where they retain their stock, and continue to participate in the profits of the company, without denying their membership: *Payson v. Withers*, 5 Biss. 269; *Payson v. Stoecker*, 2 Dill. 427. Nor is it any defense that the subscription is not binding because the whole authorized stock was never subscribed for: *Farnsworth v. Robbins*, 36 Minn. 369; S. P., *Hickling v. Wilson*, 104 Ill. 54. But in *Scovill v. Thayer*, 105 U. S. 113, it was held that certificates of stock issued in excess of the limit imposed by the charter of a corporation were void, and the holders of them were not entitled to the rights nor subject to the liabilities of holders of authorized stock; and a holder was not estopped from setting up the invalidity of such unauthorized stock, in an action against him to recover the balance unpaid thereon, by the fact that he attended the meeting at which it was voted to issue the same, or that he received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock.

As to estoppels in actions by creditors of corporations to enforce the statutory personal liability of stockholders, see *post*, this note.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST CREDITORS' CLAIMS FOR UNPAID SUBSCRIPTIONS UNTIL CALL IS MADE OR CORPORATION CEASES TO BE GOING CONCERN. — Lapse of time, in accordance with a general principle of equitable jurisprudence, may preclude creditors of a corporation from coming into equity to compel the payment by stockholders of unpaid subscriptions: *Gilmore's Ex'rs v. Bank of Cincinnati*, 8 Ohio, 62; and in order

that other creditors of a corporation may participate in the benefits of a suit brought by one creditor to enforce the payment of a subscription to the capital stock, they must be guilty of no laches in asserting their rights and complying with the conditions imposed by the court as to participation: *Thompson v. Reno Sav. Bank*, 19 Nev. 291.

It has been asserted that a creditor of a corporation will be barred by the statute of limitations from proceeding against stockholders for unpaid subscriptions whenever the company itself would be barred: *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227; but in *McGinnis v. Barnes*, 23 Mo. App. 413, it was held that when any part of the capital stock of a corporation remains unpaid in a stockholder's hands, he is a trustee thereof for the corporate creditors until their claims are satisfied; and the statute of limitations, as it affects the relations between stockholders and creditors, is to be considered, and not as it affects the relations between stockholders and corporation; consequently, although the statute may have run against the right of the corporation to enforce a stockholder's liability for unpaid subscriptions, — running, for instance, from the time of the dissolution of the corporation, — a creditor may have a subsisting cause of action against the stockholder, the statute running from the time his claim became due and payable. At all events, if stock is payable on call, as is usually the case, the statute of limitations does not run against the right of creditors to enforce payment of unpaid subscriptions until a valid call has been made by the directors of the corporation or by a court of competent jurisdiction, or at least some authorized demand has been made upon the share-holder, or perhaps, otherwise, until the corporation has notoriously ceased to be a going concern: Taylor on Corporations, sec. 709; Thompson's Liability of Stockholders, sec. 291; Cook on Stock and Stockholders, sec. 195; *Scovill v. Thayer*, 105 U. S. 143, 155; *Curry v. Woodward*, 53 Ala. 371; *Harmon v. Page*, 62 Cal. 448; *Glenn v. Saxton*, 68 Id. 353; *Glenn v. Williams*, 60 Md. 93; *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Thompson v. Reno Sav. Bank*, 19 Nev. 171; *post*, p. 881; *Allibone v. Hager*, 46 Pa. St. 48; *Glenn v. Dorsheimer*, 23 Fed. Rep. 695; 24 Id. 536; *Glenn v. Priest*, 28 Id. 907; compare *Hightower v. Thornton*, 8 Ga. 486, 502; 52 Am. Dec. 412, 424; *First National Bank v. Greene*, 64 Iowa, 445. A call made by a court of competent jurisdiction, as a court of chancery or of bankruptcy, has the same effect to set the statute in motion as if made by the officers of the corporation: *Glenn v. Saxton*, *Glenn v. Williams*, *Scovill v. Thayer*, *supra*. In *Glenn v. Dorsheimer* and *Glenn v. Priest*, *supra*, it was expressly held that where an insolvent corporation assigned all its property to trustees for the benefit of creditors, including unpaid stock subscriptions, and ceased to do business, the liability of the stockholders upon their subscriptions became absolute, and the statute of limitations began to run in their favor at once, or within a reasonable time thereafter, as against the creditors and assignees. *Dicta* in the following cases also support the view that the statute is set in motion by a notorious disbandment of the company and cesser of business: *Curry v. Woodward*, *Harmon v. Page*, *Payne v. Bullard*, *supra*; see also *Mitchell v. Beckman*, 64 Cal. 117; but in *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, it was held that where a corporation, becoming embarrassed, executed a deed of assignment for the benefit of creditors, not having called in all the stock subscribed, the statute did not begin to run in favor of the stockholders from the date of the assignment, but from the time a decree is afterwards rendered by a court of equity making an assessment, Somerville, J., saying: "We cannot see that the cessation of business by the company, and

the assignment of its assets, can operate on any just principle to set in motion the running of the statute of limitations in favor of stockholders," criticising some remarks in *Curry v. Woodward*, *supra*: however, in this case, there seemed to have been no proof of a disbandment: See Mr. Thompson's views on this question in *Thompson's Liability of Stockholders*, sec. 291.

See further, *post*, this note, for the questions concerning the statute of limitations in actions by creditors of corporations to enforce the statutory liability of stockholders for corporate debts.

MISCELLANEOUS DEFENSES IN SUIT AGAINST STOCKHOLDERS TO REACH UNPAID SUBSCRIPTIONS. — If calls were made and remained unpaid prior to the bankruptcy of a stockholder, undoubtedly they would be covered by his discharge in bankruptcy; but such discharge is no bar to an action for an installment subsequently called for, the unpaid and uncalled subscription not constituting such a debt or liability as is provable against his estate in bankruptcy: *Glenn v. Howard*, 65 Md. 40. As to whether or not the discharge of a stockholder in bankruptcy or insolvency will affect his statutory liability for corporate debts, see *post*.

A tender during the solvency of a corporation by a subscriber to its stock of the full amount of his subscription, and a demand for the issue of a certificate, which were refused without legal cause, it is held, extinguished the obligation to pay the subscription, as against the assignee of the corporation, when it afterwards became insolvent: *Potts v. Wallace*, 32 Fed. Rep. 272.

The mere change of the name of a corporation does not, of course, relieve a stockholder from liability for unpaid subscriptions: *Glenn v. Springs*, 26 Fed. Rep. 494; *Blackburn's Case*, 8 De Gex, M. & G. 177; *Thompson's Liability of Stockholders*, sec. 111.

WHO ARE STOCKHOLDERS, LIABLE TO CRÉDITORS FOR UNPAID SUBSCRIPTIONS. — Stockholders may become such either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders: See *Webster v. Upton*, 91 U. S. 65, 67, *per* Strong, J. The questions arise, When does the liability to creditors for unpaid subscriptions originally attach, and when does the liability cease, if at all, by subsequent transfer? or, in other words, Who are the stockholders to be held liable to creditors for the sums remaining unpaid on the stock? It is not proposed to here discuss the general questions relating to subscriptions to stock, which will be found treated in the note to *Parker v. Thomas*, 81 Am. Dec. 392, but to notice simply those rules which specially concern the subject in hand. It may be premised that stockholders are equally liable for unpaid subscriptions, whether they became such by original subscription or by subsequent transfer: *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 598; *Webster v. Upton*, 91 U. S. 65, 69. But plainly, to constitute one a subscriber, he must either subscribe himself or authorize some one to subscribe for him, or afterwards ratify the unauthorized subscription made in his name: *McClelland v. Whiteley*, 11 Biss. 444; 15 Fed. Rep. 322; but if one signs a subscription-book for stock in a contemplated corporation to induce others to subscribe, leaving the amount of his own subscription in blank, it is but fair to hold that, as to creditors of the company, he thereby impliedly authorizes those empowered to take subscriptions to fill up the blank, and when so done, such subscriber will be estopped from questioning their authority so to do: *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

It is settled that an express promise to pay the unpaid balance is not necessary to render either the original holder or the subsequent transferee of the stock liable therefor: *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*,

91 Id. 65, 69; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Dayton v. Borst*, 31 N. Y. 435; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; with the exception of two or three New England States: See Cook on Stock and Stockholders, secs. 68, 69. "An express promise," says Strong, J., in *Webster v. Upton*, *supra*, "is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company; in many cases not more than five per cent; in the present, only twenty." And again, he says: "If the law implies a promise by the original subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable."

In general, "the acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a share-holder": *Upton v. Tribilcock*, 91 U. S. 45, 47; *Chubb v. Upton*, 95 Id. 665; *Sanger v. Upton*, 91 Id. 56; Thompson's Liability of Stockholders, sec. 105; but a certificate in favor of an original subscriber, or a new certificate in favor of the subsequent purchaser, is not necessary to render him liable for unpaid balances: *Hawley v. Upton*, 102 U. S. 314; *Upton v. Burnham*, 3 Biss. 431, 520; *Farrar v. Walker*, 3 D'll. 506, note; *Haskell v. Sells*, 14 Mo. App. 91; and see Cook on Stock and Stockholders, sec. 192; Thompson's Liability of Stockholders, sec. 106; note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 93; note to *Freeland v. McCullough*, 43 Id. 697; and the same is true where one is sought to be held individually liable as a stockholder for the debts of a corporation, under statute: See *Mitchell v. Beckman*, 64 Cal. 117; *Corwith v. Culver*, 69 Ill. 502; *Chaffin v. Cummings*, 37 Me. 76, 83; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385, 395; 111 Id. 200; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Spear v. Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Burr v. Wilcox*, 22 N. Y. 551; *Wheeler v. Millar*, 90 Id. 353; *Keyser v. Hitz*, 2 Mackey, 473; and, of course, a subscriber's liability is unaffected by his failure to meet subsequent calls: *Haskell v. Sells*, *supra*; and to the same effect as regards statutory personal liability, see *Mitchell v. Beckman*, 64 Cal. 117; *Chaffin v. Cummings*, 37 Me. 76, 83; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Spear v. Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Wheeler v. Millar*, 90 N. Y. 353; unless his stock has been forfeited therefor: See *supra*, "Withdrawal and Release of Stockholders, and Forfeiture of Stock as Affecting Liability for Unpaid Subscriptions"; note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96; note to *Freeland v. McCullough*, 43 Id. 699; nor is it material that he never participated in any of the business meetings of the corporation: *Haskell v. Sells*, *supra*.

A *bona fide* transfer of stock, perfected upon the books of the corporation, if required, discharges the transferor from liability to the corporation and to its creditors, for installments and calls becoming due thereafter: *Allen v. Montgomery R. R.*, 11 Ala. 437; *Billings v. Robinson*, 94 N. Y. 415; *Gilmore's Ex'rs v. Bank of Cincinnati*, 8 Ohio, 62, 71; Cook on Stock and Stockholders, sec. 255; Thompson's Liability of Stockholders, sec. 210; Taylor on Corporations, secs. 747, 748; unless, of course, the charter or some general statute provides that they shall continue liable; but the liability of a subscriber will not be discharged by an informal *ex parte* transfer, not entered upon the books of the company,

nor recognized by it, although the transfer be in writing, and accompanied by a private agreement that the transferrer should not be liable for anything unpaid on the shares: *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; and where neither the charter nor the by-laws of a corporation declared that its shares should be transferred only upon its books, but the certificate of stock provided that the shares should "be transferable only on the books of the association," it was held, in an action brought by the receiver of the company for unpaid subscriptions, that the liability of a stockholder continued until a transfer was made on the books, notwithstanding he had previously sold and delivered his certificate to another, who had drawn the dividends, but who had not had the stock transferred on the books to himself: *Cutting v. Damerel*, 23 Hun, 339. But it may here be remarked that the transfer of stock does not always relieve the transferrer from his statutory personal liability for the debts of the corporation: See *post*. The transfer must be in good faith. A stockholder is not permitted to make a transfer to an irresponsible person for the purpose of escaping liability for unpaid subscriptions: *Rider v. Morrison*, 54 Md. 429, 444; *Nathan v. Whitlock*, 9 Paige, 152; *Manton v. Firemen's Ins. Co.*, 11 Rob. (La.) 177; note to *Freeland v. McCullough*, 43 Am. Dec. 699; note to *Germantown Passenger R'y v. Filler*, 100 Id. 556; Cook on Stock and Stockholders, sec. 265; Thompson's Liability of Stockholders, secs. 211, 215; 2 Morawetz on Corporations, sec. 838; Taylor on Corporations, sec. 749; not even with the consent of the directors of the corporation: *Nathan v. Whitlock*, *supra*. "The capital stock, embracing both paid and unpaid subscriptions, is a trust fund for the benefit of creditors and share-holders, and it would be inconsistent with the nature of such a trust to permit subscribers to transfer their stock to insolvent persons, and thus escape liability for the payment of their subscription": *Rider v. Morrison*, *supra*. A like rule prevails in case of the statutory individual liability of stockholders for the debts of a corporation: See *Bowden v. Johnson*, 107 U. S. 231; *Bowden v. Santos*, 1 Hughes, 158; *Central Agricultural etc. Ass'n v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Paine v. Stewart*, 33 Conn. 517; *Marcy v. Clark*, 17 Mass. 330; *McClaren v. Franciscus*, 43 Mo. 452; *Provident Savings Inst. v. Jackson Place Skating etc. Rink*, 52 Id. 557; *Veiller v. Brown*, 18 Hun, 571; *Aultman's Appeal*, 93 Pa. St. 505; *Dauchy v. Brown*, 24 Vt. 197; compare *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; and see also the following cases, in which the transfer was taken in the name of an irresponsible person by the purchaser or subscriber for the purpose of avoiding statutory liability: *Davis v. Stevens*, 17 Blatchf. 259; *Case v. Small*, 4 Woods, 78; 10 Fed. Rep. 722; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Roman v. Fry*, 5 Id. 634; but see *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; *Mugruder v. Colston*, 44 Md. 349; *Holyoke Bank v. Burnham*, 11 Cush. 183. As to the effect of a transfer under the English companies' acts, see *Hyam's Case*, 1 De Gex, F. & J. 75; *Costello's Case*, 2 Id. 302; *Budd's Case*, 30 Beav. 143, affirmed in 3 De Gex, F. & J. 297; *Jessopp's Case*, 2 De Gex & J. 638; *De Pass's Case*, 4 Id. 544; *Chinnock's Case*, Johns. 714; *King's Case*, L. R. 6 Ch. 199; *Harrison's Case*, Id. 286; *Ex parte Kintea*, L. R. 5 Ch. 95; *Gilbert's Case*, Id. 559; *William's Case*, L. R. 1 Ch. D. 576.

As a stockholder is discharged from liability for future installments and calls by a valid transfer of his stock, in good faith, so his transferee becomes responsible for installments falling due and calls made while he retains the ownership of the stock: *Webster v. Upton*, 91 U. S. 65, 72; *Upton v. Hansbrough*, 3 Biss. 417; *Mann v. Currie*, 2 Barb. 294; *Merrimac Min. Co. v. Lery*, 54 Pa. St. 227; 93 Am. Dec. 697; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; *Lane's Appeal*, 105 Pa. St. 49, 61; Cook on Stock and Stock-

holders, sec. 256. (The obligation to make good unpaid portions of the stock is an obligation which passes with the stock to a transferee, the original holder being relieved from further liability, unless, in exceptional instances, the original holder is, notwithstanding, liable by virtue of the charter or some general statutory provision. Thus where a statute provides that "on any assignment, the assignee and assignor shall each be liable for any installment which may have accrued, or which may thereafter accrue," while an assignment of the stock may operate a complete transfer of title as between assignor and assignee, it does not release the assignor from his liability as stockholder, but he remains liable, not only for past assessments, but for any future assessments upon the stock, though the assignee becomes liable also: *McKim v. Glenn*, 66 Md. 479; see also *Bell's Appeal*, *supra*; but where an act relating to the formation of corporations provided that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser," the statute applies to such only as are, or have been, holders of the legal title to the stock: *Branson v. Oregonian Ry*, 10 Or. 278. If a corporation accepts as a stockholder one to whom stock has been transferred, by entering his name upon the books, whether he requested it to do so or not, or whether he ever assented thereto, he then becomes liable as a stockholder for the unpaid portion of the stock: *Upton v. Burnham*, 3 Biss. 520.

A creditor is entitled to hold him liable as a stockholder who appears to be the legal owner of the stock; and it may be that although a transfer has taken place, no change has been made upon the books of the corporation, so that the transferor, and not the transferee, will be liable: See Thompson's Liability of Stockholders, sec. 178; 2 Morawetz on Corporations, sec. 852. On the same principle, one who stands upon the books of the corporation as a stockholder may be proceeded against for the recovery of any sum due upon the stock, although he in fact holds such stock as trustee for another: Thompson's Liability of Stockholders, sec. 179; 2 Morawetz on Corporations, sec. 852; *Mann v. Currie*, 2 Barb. 294; *McKim v. Glenn*, 66 Md. 479; *Grew v. Breed*, 10 Met. 569, 576; *Hoar's Case*, 2 Johns. & H. 229; *Bug's Case*, 2 Drew. & S. 452; *William's Case*, L. R. 1 Ch. D. 576; *King's Case*, L. R. 6 Ch. 196; *Mitchell's Case*, L. R. 9 Eq. 196; *Chapman and Barker's Case*, L. R. 3 Eq. 361; or as collateral security for a debt of the transferor: Thompson's Liability of Stockholders, sec. 223; 2 Morawetz on Corporations, sec. 852; Taylor on Corporations, sec. 740; *Pullman v. Upton*, 96 U. S. 328; and a like rule prevails in actions to enforce the personal liability of stockholders for the debts of a corporation under statutory provisions: See *National Bank v. Case*, 99 U. S. 628; *Bowden v. Farmers' etc. Bank*, 1 Hughes, 307; *Moore v. Jones*, 3 Woods, 53; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Met. 524, 545; *Grew v. Breed*, 10 Id. 569, 576; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing Co.*, 15 Gray, 216; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Erskine v. Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *In re Empire City Nat. Bank*, 18 Id. 119, 223; *Aultman's Appeal*, 98 Pa. St. 505. The books of the company are *prima facie* evidence of the ownership of stock in those whose names appear thereon as stockholders: Note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96; *Turnbull v. Payson*, 95 U. S.

418; *Glenn v. Springs*, 26 Fed. Rep. 494; Cook on Stock and Stockholders, sec. 73; Taylor on Corporations, sec. 740; but one who appears to be a stockholder upon the books may show that his name is there without right or authority: *Webster v. Upton*, 91 U. S. 65, 72. A similar ruling is made under charters and general statutes imposing a personal liability upon stockholders for the debts of the corporation: *Hoagland v. Bell*, 36 Barb. 57; *Thornton v. Lane*, 11 Ga. 459; but see *Mudgett v. Horrell*, 33 Cal. 25, which denies that the books are admissible in evidence at all; and *Stanley v. Stanley*, 26 Me. 191, which holds them to be conclusive.

POWERS OF ASSIGNEES FOR BENEFIT OF CREDITORS, OF ASSIGNEES IN BANKRUPTCY, AND OF RECEIVERS, WITH RESPECT TO UNPAID SUBSCRIPTIONS. — Unpaid subscriptions are assets which a corporation may assign like any other choses in action, and they will pass to the assignee under a general assignment for the benefit of creditors: Note to *Germantown Passenger R'y v. Filler*, 100 Am. Dec. 556; 2 Morawetz on Corporations, sec. 819; *Schockley v. Fisher*, 75 Mo. 498; *Eppright v. Nickerson*, 78 Id. 482; *Franklin v. Menown*, 10 Mo. App. 570; 11 Id. 592; *Lionberger v. Broadway Savings Bank*, 10 Id. 499; *Haskell v. Sells*, 14 Id. 91; *Germantown Passenger R'y v. Filler*, 60 Pa. St. 124; 100 Am. Dec. 546; *West Chester etc. R. R. v. Thomas*, 2 Phila. 344; who may maintain a bill in equity to recover them: *Lionberger v. Broadway Savings Bank*, *supra*; notwithstanding certain creditors of the corporation had proceeded by motion, under the statute, against the stockholders: Id.; and after the assignment creditors cannot proceed by motion: *Franklin v. Menown*, *supra*. A court of equity may make a call at his instance: See *Glenn v. Williams*, 60 Md. 93; which is binding and effective upon the stockholders who were not individually parties to the cause, but who were represented by the corporation: Id.; and which may be enforced by him in another state: Id.

Unpaid subscriptions also pass by a decree in bankruptcy or insolvency of the corporation to the assignee, who represents both corporation and creditors, and who alone can enforce the liability of the stockholders: Note to *Germantown Passenger R'y v. Filler*, 100 Am. Dec. 553, 556; Thompson's Liability of Stockholders, sec. 341; *Payson v. Stoecker*, 2 Dill. 427; *Lane v. Nickerson*, 99 Ill. 284; *Hurd v. Tallman*, 60 Barb. 272; *Gilmore v. Bank of Cincinnati*, 8 Ohio, 71; and as the corporation might have sued a stockholder at law for his unpaid and payable subscription, the assignee in bankruptcy, succeeding to its rights, has the same remedy: *Sanger v. Upton*, 91 U. S. 56. It is well settled that a court of bankruptcy has the same power as a court of equity to make an assessment upon the stockholders: 2 Morawetz on Corporations, sec. 822; *Sanger v. Upton*, 91 U. S. 56; *Turnbull v. Payson*, 95 Id. 418; *Payson v. Stoecker*, 2 Dill. 427; *Wilbur v. Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479; notwithstanding a provision in the contract of subscription and in the stock certificates that the unpaid balance was to be paid on the call of the directors, "when ordered by a vote of the majority of the stockholders themselves": *Upton v. Hansbrough*, 3 Biss. 417; and the order of the court directing a payment is conclusive in a suit by the assignee to enforce it: *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 Id. 65, 71; *Pullman v. Upton*, 95 Id. 328, 329; *Payson v. Stoecker*, 2 Dill. 427; and it is not necessary that the stockholders should have received actual notice of the application for the order: Id.; *Upton v. Burnham*, 3 Biss. 520; *Upton v. Hansbrough*, 3 Id. 417.

If a receiver has been appointed, the suit to compel the stockholders to pay their unpaid subscriptions should be prosecuted in his name, unless some

sufficient cause is shown to the contrary: Thompson's Liability of Stockholders, sec. 340; Cook on Stock and Stockholders, sec. 208; 2 Morawetz on Corporations, sec. 867; Taylor on Corporations, 542; note to *Germantown Passenger R'y v. Fittler*, 100 Am. Dec. 533; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Rankine v. Elliott*, 16 N. Y. 377; *Cleveland Rolling Mill Co. v. Texas etc. R'y*, 27 Fed. Rep. 250. A court of chancery may make a call at his instance: *Glenn v. Soule*, 22 Id. 417. He may recover the balance unpaid on subscriptions without any previous call having been made by the corporation: *Winans v. McKean R. R. etc. Co.*, 6 Blatchf. 215; but to enable him to sue at law, a call or assessment by the corporation itself or some competent court is necessary: *Chandler v. Siddle*, 3 Dill. 477; *Glenn v. Soule*, 22 Fed. Rep. 417, 418; *Chandler v. Keith*, 42 Iowa, 99. The order is binding, although the stockholders are not made actual parties to the proceedings: *Glenn v. Soule*, *supra*; but see *Lamar Ins. Co. v. Hindreth*, 55 Iowa, 248. The receiver or assignee in bankruptcy of a foreign corporation may maintain an action against a resident stockholder, if the corporation itself could have maintained it had the stockholder been a citizen of the state in which it was domiciled: Thompson's Liability of Stockholders, sec. 81; Cook on Stock and Stockholders, sec. 208; *Dayton v. Borst*, 31 N. Y. 435; *Patterson v. Lynde*, 112 Ill. 196, 206.

It may be remarked in this connection that the statutory liability of stockholders is not an asset of the corporation, and therefore cannot be assigned by the corporation for the benefit of creditors: *Wright v. McCormack*, 17 Ohio St. 86; and for the same reason it cannot be enforced by the assignee in bankruptcy: *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435; *Bristol v. Sanford*, 12 Id. 341; or by the receiver: *Jacobson v. Allen*, 20 Id. 525; 12 Fed. Rep. 454; *Wincock v. Turpin*, 96 Ill. 135; *Mason v. New York Silk Mfg. Co.*, 27 Hun, 307; *Farnsworth v. Wood*, 91 N. Y. 308; unless the statute otherwise expressly provides: See *Walker v. Crain*, 17 Barb. 11; *Herkimer County Bank v. Furman*, 17 Id. 116, 119; *Story v. Furman*, 26 N. Y. 214.

STATUTORY LIABILITY OF STOCKHOLDERS TO CREDITORS FOR CORPORATE DEBTS. — The policy, so generally existing in America, of imposing a greater or different liability upon stockholders of corporations in favor of corporate creditors than that existing under the rules of equity for unpaid subscriptions has been very fruitful of litigation.

STOCKHOLDERS ARE NOT INDIVIDUALLY LIABLE AT COMMON LAW FOR DEBTS OF CORPORATION. — At the common law, it is well settled that the stockholders or members of a corporation are not individually liable for its debts: Note to *Freeland v. McCullough*, 43 Am. Dec. 694; note to *Prince v. Lynch*, 99 Id. 433; Cook on Stock and Stockholders, sec. 212; Thompson's Liability of Stockholders, sec. 4; Angell and Ames on Corporations, secs. 591, 595; Boone on Corporations, sec. 126; Field on Corporations, secs. 55-74; 2 Morawetz on Corporations, secs. 779, 869; Taylor on Corporations, sec. 700; *Smith v. Hucabee*, 53 Ala. 191, 193; *Jones v. Jarman*, 34 Ark. 323, 328; *French v. Teschemaker*, 24 Cal. 518, 540; *Green v. Beckman*, 59 Id. 545, 548; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593, 599; *Shaw v. Boylan*, 16 Ind. 384; *Hampson v. Weare*, 4 Iowa, 13, 15; *Adams v. Wiscasset Bank*, 1 Me. 361; 10 Am. Dec. 88; *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Id. 9; *Trustees of Free Schools v. Flint*, 13 Met. 539, 541; *Gray v. Coffin*, 9 Cush. 192; *Erickson v. Nesmith*, 4 Allen, 233, 234; *Essex Co. v. Lawrence Machine Shop*, 10 Id. 352; *Inhabitants of Norton v. Hodges*, 100 Mass. 241; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Freeland v. McCullough*, 1 Denio,

414, 422; 43 Am. Dec. 685, 688; *Seymour v. Sturgess*, 26 N. Y. 134; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376, 386; *Woods v. Wicks*, 7 Lea, 40, 45; *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227; *Bird v. Culvert*, 22 S. C. 292, 296; *Walker v. Lewis*, 49 Tex. 123; *Dauchy v. Brown*, 24 Vt. 197; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184, 199; *Terry v. Little*, 191 U. S. 216, 217; *United States v. Knox*, 102 Id. 422, 424; *Knower v. Haines*, 31 Fed. Rep. 513, 514. So far as this question is concerned, the corporation is an entity distinct from its members, and its debts are therefore not the debts of its members. The capital stock is the source of its credit; and when the share-holders have paid in the capital which they agreed to contribute, their liability ceases. It is true, as has been shown above, that unpaid subscriptions may be reached by the corporate creditors in equity; but such a proceeding is simply to reach assets of the corporation, and is in no sense enforcing a personal liability for its debts. Any individual liability of stockholders for the debts of the corporation must therefore in some way be specially imposed.

LIABILITY FOR DEBTS OF CORPORATIONS CAN BE IMPOSED UPON STOCKHOLDERS, AS SUCH, ONLY BY CONSTITUTIONS, CHARTERS, OR STATUTES. — Liability for the debts of a corporation cannot be imposed upon non-assenting stockholders or members by a mere by-law, in the absence of statute: Note to *Freeland v. McCullough*, 43 Am. Dec. 694; *Trustees of Free Schools v. Flint*, 13 Met. 539; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98; 2 Am. Rep. 563; nor by a resolution adopted by the governing body of a corporation: *Vincent v. Chapman*, 10 Gill & J. 279; nor does any personal liability attach to the stockholders of a bank by reason of the words "individual property of stockholders liable," appearing upon the face of bills issued by it: *Lowry v. Inman*, 46 N. Y. 119, 125; and the fact that a by-law purporting to impose an individual liability upon the stockholders has been printed and distributed to the public will not bind the stockholders as stockholders, although it might possibly as individuals: *Reid v. Eatonton Mfg. Co.*, *supra*; so, it seems, if members of a corporation sign a by-law which pledges them to be liable "in their individual as well as their collective capacity" for all moneys lent to the corporation, in order to enable the corporation to obtain a loan, and the by-law is used for that purpose, it gives a right of action against the signers in favor of one who was induced to advance money upon its credit: *Flint v. Pierce*, 99 Mass. 68, 71; and, it seems, that if the members of a corporation, finding it unable to pay all its debts, agree among themselves to contribute proportionally to their stock to make good the deficit, such agreement is binding upon them: *Ripley v. Sampson*, 10 Pick. 371, 373; but an oral promise of a member of a corporation to pay its debts, being within the statute of frauds, will not bind him: *Trustees of Free Schools v. Flint*, 13 Met. 539; and where money was loaned to a corporation on its bond and mortgage, and the stockholders became, by contract, sureties for the repayment of the loan, other creditors of the company have no equity to compel the lender to exhaust his remedy against the sureties before resorting to the company for payment: *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227. While, therefore, a stockholder may so act towards creditors of a corporation, by means of a by-law or otherwise, as to be estopped from denying an individual liability to the creditors who have relied thereon, and while he may become a surety for the corporation, he is not, properly speaking, liable as a stockholder in such cases, but as an individual. And as the liability for the debts of a corporation did not rest upon its stockholders or members at the common law, and could not be imposed upon them

as such by a by-law of the company, it follows that the liability can only arise by virtue of constitutional provisions, special charters, general acts of incorporation, or other statutes. Sometimes the liability is imposed in one of these ways, sometimes in another.

See further, as to the constitutionality of statutes imposing a liability upon stockholders for corporate debts, *post*, "Legislative Power to Impose, Repeal, or Modify Statutory Liability of Stockholders for Corporate Debts."

STATUTES IMPOSING LIABILITY, WHETHER STRICTLY OR LIBERALLY CONSTRUED. — Whether the provision of a charter or other statute which imposes a personal liability upon the stockholders of a corporation for the payment of its debts is to be strictly or liberally construed, is a question upon which the cases are not agreed. It is held by one line of cases that such provisions are remedial, and therefore should be liberally construed: *Freeland v. McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *Marion Township etc. Draining Co. v. Norris*, 37 Ind. 424, 429; *Gauch v. Harrison*, 12 Ill. App. 457, 461; compare *Carver v. Braintree Mfg. Co.*, 2 Story, 432; but another line of cases maintains that, being in derogation of the common law, such provisions should be strictly construed: *Gray v. Coffin*, 9 Cush. 192; *Dane v. Dane Mfg. Co.*, 14 Gray, 488, 489; *Potter v. Stevens Machine Co.*, 127 Mass. 592; *Moyer v. Pennsylvania State Co.*, 71 Pa. St. 293, 297; *Appeal of Means*, 85 Id. 75, 78; *O'Reilly v. Bard*, 105 Id. 569, 573; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184, 199; and see *Chase v. Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; while still another holds that a reasonable or sensible construction is to be adopted: *Carver v. Braintree Mfg. Co.*, 2 Story, 432, 447; *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 265, 266; *Bohn v. Brown*, 33 Mich. 257; *Lane v. Morris*, 8 Ga. 475; *Ingalls v. Cole*, 47 Me. 540; and see also *Dewey v. St. Albans Trust Co.*, 57 Vt. 332; *Weigley v. Coal Oil Co.*, 5 Phila. 67; and this latter is the preferable doctrine; for, "in construing a statutory provision imposing individual liability upon the members of a corporation, it is the duty of the courts to ascertain and carry out the intention of the legislature. To lay down any arbitrary rule for the construction of a particular class of statutes is manifestly contrary to reason, and can only lead to error and perversion of justice": 2 Morawetz on Corporations, sec. 880; and see, favoring this view, Thompson's Liability of Stockholders, sec. 52; note to *Freeland v. McCullough*, 43 Am. Dec. 696; *contra*, Cook on Stock and Stockholders, sec. 214. This class of statutes should be here carefully distinguished from another class, which impose a personal liability for the debts of the corporation upon trustees or other officers, and sometimes upon stockholders, because of the failure to conform to some special requirement; such statutes, being penal, are held to require a strict construction: *Esmond v. Bullard*, 16 Hun, 65; *Cady v. Smith*, 12 Neb. 628, 630; *Cable v. McCune*, 26 Mo. 371. "But even here," says Mr. Thompson, "it is believed that the rule, properly understood, and applied so as not to transcend the scope of judicial power, goes no further than to hold that, where the statute is penal, courts will hesitate more about enlarging the meaning of doubtful terms than where it is remedial": Thompson's Liability of Stockholders, sec. 54.

EXTENT, IN GENERAL, OF INDIVIDUAL LIABILITY FOR DEBTS OF CORPORATION. — The extent of the liability imposed upon stockholders for corporate debts varies greatly with the different constitutional provisions, special charters, general acts of incorporation, and other statutes.

Constitutional Provisions, and Legislation thereunder. — If a constitution provides for the individual liability of stockholders for corporate debts, ques-

tions may arise as to whether or not the provision is self-executory, and as to the extent of the legislative powers under it. These questions must be determined by the language of the provision itself. Thus a section of a constitution which says that "each stockholder of a corporation shall be individually and personally liable for his proportion of all its debts and liabilities" is not self-executing, but legislation is necessary to give it a reasonable and practical operation: *French v. Teschemaker*, 24 Cal. 518; see also *Morley v. Thayer*, 3 Fed. Rep. 737; compare *Peck v. Miller*, 39 Mich. 594; but, on the other hand, a section which reads, "each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," is self-executing to the extent of the minimum liability prescribed by it: *Jones v. Jarman*, 34 Ark. 323. It results that, if a constitution provides that the stockholders shall be individually liable for the corporate debts, but does not fix the extent of the liability or provide means of enforcing it, it is competent for the legislature to determine how far stockholders shall be liable, and in what manner the liability shall be enforced: *French v. Teschemaker*, 24 Cal. 518; *Larrabee v. Baldwin*, 35 Id. 155; *Dicersey v. Smith*, 103 Ill. 378, 385; *Hampson v. Weare*, 4 Iowa, 13; *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231; compare *Peck v. Miller*, 39 Id. 594; for instance, if it is said, as above, that each stockholder of a corporation shall be individually liable "for his proportion of all its debts and liabilities," the legislature may make each stockholder liable for his share of all the debts of the corporation contracted while he was a stockholder: *Larrabee v. Baldwin, supra*; and if the provision is to the effect that the stockholders "shall be subject to such liabilities and restrictions as shall be provided by law," the legislature may enact that when no corporate property can be found on which to levy execution, the acting manager or a member of the corporation may be notified to show cause why the individual property of the members should not be made liable: *Hampson v. Weare, supra*; and under such a provision, every stockholder takes his stock subject to be affected by whatever legislation in that regard the legislature may deem necessary; and therefore statutes imposing a personal liability upon stockholders for future corporate debts are free from constitutional objections: *Weidinger v. Spruance*, 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545, 548; but while the legislature can thus provide for the liability under such constitutional provisions, a statute which attempts to relieve stockholders from liability would plainly be void: *Central Agricultural etc. Ass'n v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *French v. Teschemaker*, 24 Cal. 518, 544, 553; *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231. Besides such questions as the foregoing, a further question as to the meaning of the constitutional provision may arise. Thus where it is provided that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her," a stockholder is not liable for a debt of the corporation, it is held, when his stock is fully paid up: *Schrieker v. Ridings*, 65 Mo. 208; *Gausen v. Buck*, 68 Id. 545; but compare the cases, *post*, this head, under similar statutory provisions; but where it is said that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association," the individual liability under the section means a liability beyond that of members of the corporation: *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231.

Liability to Extent of Unpaid Subscriptions. — As before stated, the extent of the liability imposed upon stockholders for the debts of co. porations varies

greatly. In some instances, constitutions and statutes provide that the stockholders shall be liable to the creditors of the company to the amount unpaid on their stock; and when this is the case, it is obvious that no new right or liability is created, but simply an old one preserved: *Patterson v. Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush v. Cartwright*, 7 Or. 329; *Brundage v. Monumental G. & S. Min. Co.*, 12 Id. 322; *Mills v. Stewart*, 41 N. Y. 384, 389; *Stephens v. Fox*, 83 Id. 313. A simple and less expensive remedy to enforce this pre-existing liability than that given in courts of equity, independent of the statute, may be the result: See *Mills v. Stewart*, *Stephens v. Fox*, *supra*; but, otherwise, one must proceed in equity, it is held, in the usual manner, to compel the payment of the unpaid subscriptions: *Patterson v. Lynde*, *Bush v. Cartwright*, *Brundage v. Monumental G. & S. Min. Co.*, *supra*; but see *Hodges v. Silver Hill Min. Co.*, 9 Or. 200, 204. Under such a provision, a question may occur as to whether or not, in particular instances, anything remains unpaid; or, in other words, in what manner may payments of stock subscriptions be made: See *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 Id. 133; *Boynton v. Andrews*, 63 Id. 93; *Douglass v. Ireland*, 73 Id. 100. This question must be answered upon the general principles heretofore discussed in connection with the right of creditors of corporations to compel the payments of unpaid subscriptions: See *supra*, "Payment of Shares, how Made."

Unlimited Liability. — Sometimes a general liability for all the debts of the corporation is imposed. Thus where an act under which a corporation was formed provided that the stockholders "shall be jointly and severally liable in their individual capacities and estates for all debts, contracts, or other liabilities of the said company, contracted or incurred during the time such stockholders, respectively, own their stock, or are beneficially interested therein," the stockholders are liable for all debts contracted while they were stockholders, although they had paid up all their stock: *Patterson v. Wyomissing Mfy. Co.*, 40 Pa. St. 117; see also, in this connection, *Marsh v. Burroughs*, 1 Woods, 403; and where, by the Revised Statutes of New Hampshire, a creditor of a corporation could recover his whole debt from any one or more of the stockholders, who were to seek contribution from the others, but, by an amendment, proceedings against stockholders was required to be by bill in chancery, in such a proceeding an equitable contribution is to be made by the court between all the stockholders, as far as may be: *Erickson v. Nesmith*, 46 N. H. 371.

Liability Limited to "Extent" or "Amount" of Stock. — Generally, however, a limited liability only for the corporate debts is imposed upon stockholders. Under one statutory form, a liability for the debts of the corporation upon stockholders to the "extent" or "amount" "of their stock" is provided for; and this is interpreted to mean a liability to the extent of the nominal or face value of the stock, without reference to the amount that may have been paid in thereon: *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454; *In re Empire City Bank*, 18 N. Y. 119, 218; *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225; *Root v. Sinnock*, 120 Ill. 350; 60 Am. Rep. 558; *Pettibone v. McGraw*, 6 Mich. 441; *contra*, *Lewis v. St. Charles County*, 13 Mo. App. 48, overruling, 5 Id. 225, and holding that the payment to the corporation of the full amount of a stockholder's subscription was a complete defense to an action against him by a corporate creditor; and see *Schricker v. Ridings*, 65 Mo. 208; *Gausen v. Buck*, 68 Id. 545. In Ohio the constitution provides that "in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal

in amount to such stock"; and under this it was held, in *Aultman's Appeal*, 98 Pa. St. 505, that the liability not only existed in respect of stock subscribed for, but also in respect of stock distributed as a stock dividend, notwithstanding the statute under which a corporation was organized used the word "subscribed" instead of "owned," in a section providing for individual liability. Under this form, by which stockholders are made liable to the extent or amount of their stock for the debts of a corporation, each stockholder, to the extent of his stock, is liable for the entire corporate indebtedness: *Wehrman v. Reukirt*, 1 Cin. Sup. Ct. 230; although as between the stockholders there is an equity to have a contribution in proportion to the amount of stock owned by each: *Id.*; but the payment of a judgment recovered by a creditor of the corporation against him for an amount equal to the amount of stock held by him extinguishes his liability: *Buchanan v. Meisser*, 105 Ill. 638; *Thebus v. Smiley*, 110 Id. 316; *Woodruff etc. Iron Works v. Chittenden*, 4 Bosw. 406; *Mathez v. Neidig*, 72 N. Y. 100; and the same is true of a judgment confessed for such amount by a stockholder in favor of a *bona fide* creditor of the corporation: *Manvill v. Roever*, 11 Mo. App. 317; or of a voluntary payment to a creditor: *Buchanan v. Meisser*, *supra*; *Mathez v. Neidig*, *supra*; *Garrison v. Howe*, 17 N. Y. 458; and therefore where a stockholder's liability is thus discharged, one to whom he transfers his stock will take it freed from further liability: *Thebus v. Smiley*, *supra*; but it is held the payment by a stockholder of a sum equal to the amount of his stock to the firm of which he is a member, in satisfaction of a debt due from the corporation to the firm, will not release him from liability, since the firm could not maintain an action at law against him: *Buchanan v. Meisser*, *supra*; nor can a stockholder discharge himself by buying up debts owing by the corporation, equal to the amount of his liability, at a discount: *Thompson v. Meisser*, 108 Ill. 359; so where, before judgment was obtained against a stockholder, in an action against him by a creditor of an insolvent bank, the stockholder agreed with a friend that if the latter would buy up claims against the bank to the amount of the defendant's liability, the defendant would confess judgment, which understanding was carried out by the purchase of claims at a discount, and such judgment satisfied, the judgment and satisfaction cannot be pleaded in bar to the action: *Manville v. Karst*, 5 McCrary, 142; 16 Fed. Rep. 173. As to a stockholder's right to set off a debt due him by the corporation, in an action by a creditor, see *post*. If a stockholder, by his laches, permits several claims against the corporation, in excess of his liability as a stockholder, to ripen into judgments against him, he cannot require the judgment creditors to interplead concerning the rights which they have of enforcing their judgments: *Hodgson v. Cheever*, 9 Mo. App. 565.

Liability Limited "in Proportion" to Amount of Stock. — Under another statutory form, the stockholders are made liable for the debts of the corporation "in proportion" to the amount of their stock. Thus where the charter of a banking corporation provided that the stockholders should be personally liable "in proportion to the amount of shares and the value thereof," held by them "for the ultimate redemption of its bills or notes," a stockholder is plainly not liable for the ultimate redemption of all the bills and notes of the corporation, but for a part only, bearing the same proportion to the aggregate amount of unredeemed paper that his stock does to the entire capital stock of the corporation: *Adkins v. Thornton*, 19 Ga. 325, 328; *Branch v. Baker*, 53 Id. 502, 512; the liability of each stockholder is, therefore, to be ascertained and fixed by the following proportion: as the whole capital stock is to the entire outstanding circulation, so is each stockholder's shares to his

part to be redeemed: *Robinson v. Lane*, 19 Ga. 337. But where it is provided that "each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock," it is then only necessary, in an action by a creditor of a corporation against a stockholder, to ascertain the whole amount of the capital stock of the company, the amount owned by the stockholder, and the amount of indebtedness of the company to the creditor suing: *Morrow v. Superior Court*, 64 Cal. 383. In such cases as the above, the value of the stock is to be estimated according to the valuation placed upon it by the charter: *Lane v. Morris*, 10 Ga. 162; and where, as in the Georgia cases, the amount of outstanding indebtedness is a necessary element in ascertaining a stockholder's liability, any legitimate evidence should be received in fixing the fact: *Robinson v. Lane*, 19 Id. 337. The liability is a several one, and therefore one stockholder is not bound to make good an insolvent stockholder's portion: *Adkins v. Thornton*, 19 Id. 325, 328; *Crease v. Babcock*, 10 Met. 524, 557, 568; see also *United States v. Knorr*, 102 U. S. 422, 425; and the liability is not increased by the fact that the corporation is to a considerable extent the owner of its own stock: *Crease v. Babcock*, 10 Met. 524, 555; see also *United States v. Knorr*, 102 U. S. 422, 425. But any creditor whose demand is sufficient may collect from any stockholder the entire amount of the latter's liability, and thereupon the stockholder's liability to other creditors ceases: *Larrabee v. Baldwin*, 35 Cal. 155; *Lane v. Harris*, 16 Ga. 217; but compare Cal. Civ. Code, sec. 322; and see *Morrow v. Superior Court*, *supra*; so if a stockholder has otherwise paid his proportion of the outstanding indebtedness to one creditor, he is discharged from liability to the other creditors: *Belcher v. Wilcox*, 40 Ga. 391; *Jones v. Wilberger*, 42 Id. 575; *Branch v. Baker*, 53 Id. 502, 512; and if he has paid less than the whole amount of his liability, it will be a good defense *pro tanto*: *Belcher v. Wilcox*, *Branch v. Baker*, *supra*; but after suit has been commenced against him by one creditor, he cannot defeat it by paying other creditors, even though he pay the full amount of his liability: *Jones v. Wilberger*, *supra*. "Whatever satisfies or extinguishes the debt as to the corporation, extinguishes also the liability of the stockholders, because the creditor can claim only one satisfaction of the debt": *Young v. Rosenbaum*, 39 Cal. 646, 654; *San José Savings Bank v. Pharis*, 58 Id. 380. Therefore, where the debt has been partly satisfied by a forced sale of property pledged and mortgaged by the corporation, a stockholder is liable only for his proportion of the indebtedness remaining: *San José Savings Bank v. Pharis*, *supra*. But the fact that holders of unpaid stock of a banking corporation have severally redeemed their shares of the bills of the bank, under the charter which provides that the persons and property of the stockholders should be liable for the redemption of the bills and notes of the bank, in proportion to the number of shares which they hold, does not release them from liability for the amounts due on their stock subscriptions: *Marsh v. Burroughs*, 1 Woods, 463.

Liability Contingent on Certain Fact or Event. — Sometimes the stockholders are made absolutely liable to the "extent" or "amount" of their stock, or "in proportion" to the amount of their stock; but sometimes it is provided that they shall be so liable simply "until the whole amount of the capital stock shall have been paid in," or that they shall be liable in the event or contingency of a "dissolution," "failure," and the like. The foregoing general principles apply to such cases; but some special questions have arisen. If stockholders are made liable to the amount of their stock until the whole

amount of the capital stock shall have been paid in, the liability plainly depends upon whether or not the capital stock has all been paid up. If it has not been so paid, a stockholder is liable to the full amount of his shares, notwithstanding he may himself have fully paid up his stock: *Butler v. Walker*, 80 Ill. 345; *Tibballs v. Libby*, 87 Id. 142; and his liability is in no way affected by the amount of capital that at any time may remain unpaid: *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Id. 492; but the liability ceases when the whole amount of capital is paid in, and is consequently ended when so paid after the commencement of the action and before trial: *Booth v. Campbell*, 37 Id. 522. Generally, where the liability thus depends upon the payment of the whole amount of the capital stock, a certificate is also required to be made and recorded. And it is held that the certificate made and recorded as prescribed is conclusive evidence, for the stockholders, of the facts therein stated, so far as to exempt them from personal liability for the subsequent debts of the company: *Stedman v. Eveleth*, 6 Met. 114. Where a statute makes the stockholders liable for all debts due from the corporation at the time of its dissolution, it does contemplate a dissolution only as at common law, but a practical dissolution, which occurs "whenever the corporation becomes a nominal, inert body, its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing": *Central Agricultural etc. Ass'n v. Gold L. Ins. Co.*, 70 Ala. 120; so a suspension of specie payments by a banking corporation, and a refusal to pay specie generally, when demanded, is a "failure" within the meaning of its charter making the stockholders liable in the event of a failure: *Lane v. Morris*, 8 Ga. 468, 476; although the bank continued banking operations for some years after the suspension of specie payments: *Terry v. Calnan*, 13 S. C. 220; and where the charter of a bank provided that the individual property of the stockholders should be bound for the ultimate redemption of its bills, in proportion to the number of shares held by them respectively, the liability arises when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent: *Terry v. Tubman*, 92 U. S. 156; *Terry v. Anderson*, 95 Id. 628, 632. If the charter of an insurance company provides that "in all cases of losses exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him," it is necessary, in an action brought against a stockholder, that the declaration should aver that the losses of the company, or its liabilities, exceed its assets: *Blair v. Gray*, 104 Id. 769.

Liability under National Banking Act. — The act of Congress of 1864 provides that the share-holders of a national bank shall be "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Under this act, it is further left to the comptroller of the currency to determine when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and the extent to which the liability shall be enforced, and his order is conclusive upon the stockholders: *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673; *National Bank v. Case*, 99 Id. 628; *Bailey v. Sawyer*, 4 Dill. 463. Creditors of an insolvent national bank cannot proceed, under this act of 1864, directly in their own names against the stockholders. The receiver appointed by the comptroller is the proper party to institute all suits, and it is not necessary to make either the bank or the creditors parties to the action: *Kennedy v. Gibson*, *supra*. But under the amendatory act of 1876, the authority of

the comptroller to appoint a receiver to wind up the affairs of a bank, after a receiver has been appointed by the court, and steps taken under a creditor's bill to enforce the share-holders' liability, as permitted by the amendment, is doubtful: *Harvey v. Lord*, 11 Biss. 144; 10 Fed. Rep. 236. The method of adjusting the liability of the stockholders was given as follows in *United States v. Knox*, 102 U. S. 422, 425, by Mr. Justice Swayne: "In the process to be pursued to fix the amount of the separate liability of each of the share-holders, it is necessary to ascertain: 1. The whole amount of the par value of all the stock held by all the share-holders; 2. The amount of the deficit to be paid after exhausting all the assets of the bank; 3. Then to apply the rule that each share-holder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the individual liability of the other stockholders is computed accordingly." Compare *Crease v. Babcock*, 10 Met. 524, 555; *Adkins v. Thornton*, 19 Ga. 325, 328.

Liability for Debts Due Laborers and Servants, and for Other Special Debts. — Sometimes a special statutory liability is imposed upon the stockholders of a corporation for debts due its "laborers" and "servants." The general meaning of these words is well indicated in the following quotations: "The word 'laborer' in the statute must probably be restricted to mean manual work; but 'servant' cannot be confined to a mere menial service. 'Laborer' is more distinctive than 'servant,' and embraces a smaller class; the former comprehending such only as perform labor with their hands, while the latter includes also such as do menial services": *Hovey v. Ten Broeck*, 3 Robt. 316, 320. "That term [servant] is one in general use. In common parlance it is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature according to the business or occupation in which it is rendered, and not to extend to and include every employee or party who does work for another. The context in which it is used, in the section referred to, being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time and render his service in the performance of work similar in its general character to that done by those employees": *Hill v. Spencer*, 61 N. Y. 274, 278, *per* Lott, Ch. C. In accordance with these principles, a contractor for the construction of a part of a railroad, or who contracts for and furnishes the labor and services of others, or of teams, is not a laborer or servant: *Aikin v. Wasson*, 24 Id. 482; *Balch v. New York etc. R. R.*, 46 Id. 521; *Peck v. Miller*, 39 Mich. 594; *Taylor v. Mainwaring*, 48 Id. 171; nor is a general mining agent or superintendent: *Hill v. Spencer*, 61 Id. 274; *Dean v. De Wolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Id. 463; compare *Sleeper v. Goodwin*, 67 Wis. 577; nor a book-keeper and general manager: *Wakefield v. Faryo*, 90 N. Y. 213; nor the secretary of a corporation: *Coffin v. Reynolds*, 37 Id. 640; *Viele v. Wells*, 9 Abb. N. C. 277; *contra*, *Richardson v. Abendroth*, 43 Barb. 162; although he also acted as book-keeper: *Viele v. Wells*, *supra*; nor is a consulting engineer: *Ericsson v. Brown*, 38 Barb. 390; nor an assistant chief engineer: *Brockway v. Innes*, 39 Mich. 47; 33 Am. Rep. 348; but a civil engineer and a rodman

are servants: *Conant v. Van Schaick*, 24 Barb. 87; so is a civil engineer and traveling agent employed at a fixed salary: *Williamson v. Wadsworth*, 49 Id. 294; and one who acts as a sort of engineer and a sort of foreman, showing the men how to work and working with them, and during the absence of the superintendent, acting in the latter capacity: *Vincent v. Bamford*, 42 How. Pr. 109; 12 Abb. Pr., N. S., 252; 1 Jones & S. 506; so one is both a laborer and a servant, where he acts as a book-keeper and overseer, working also with the men, although employed at a yearly salary: *Hovey v. Ten Broeck*, 3 Robt. 316; so also is one who, for a yearly salary, payable monthly, or as he wanted his pay, acted as foreman, took part in the manual labor, kept the time of the men, solicited orders, collected bills, and did whatever was required of him: *Short v. Medberry*, 29 Hun, 39; and a superintendent or foreman, though he performs no manual labor, was held to be a servant within the meaning of a statute which makes stockholders personally liable for all debts which may be due and owing "clerks, servants, and laborers": *Sleeper v. Goodwin*, 67 Wis. 577; but a traveling salesman is not a "laborer" within the meaning of a provision that stockholders shall be individually liable "for all labor performed" for the corporation: *Peck v. Miller*, 39 Mich. 594; and a corporation aggregate cannot be an employee of another corporation within the meaning of a statute which provides that stockholders shall be individually liable for all debts due and owing "laborers, servants, apprentices, and employees": *Dukes v. Love*, 97 Ind. 341. The question is one of construction and interpretation. Where an act under which a corporation was formed provided that the stockholders should be liable for all the debts due and owing laborers and servants, after an execution returned unsatisfied, to the amount due on such execution, in an action by a judgment creditor of the corporation to enforce the personal liability of a stockholder, the mere proof that a judgment was obtained against the company, and an execution returned unsatisfied is not enough; the plaintiff must also prove that the debt for which judgment was recovered was of the sort named in the statute: *Conant v. Van Schaick*, 24 Barb. 87; and where an act provided that the stockholders should be liable for debts due and owing laborers, servants, and apprentices for services performed for the corporation, but that they should only be liable for debts contracted by the company, "which are to be paid within one year from the time the debt is contracted, and on which a suit is brought against the company within one year after the debt becomes due," a stockholder is liable for the salary or wages of a servant or laborer, payable by the year, for which a suit is brought against the company within a year after the same became due, although the employment was to continue indefinitely: *Hovey v. Ten Broeck*, 3 Robt. 316. The right of action given to laborers and servants by the foregoing statutes is not a personal privilege given to them alone, but may be assigned: *Krauser v. Ruckel*, 17 Hun, 463.

In some instances, a somewhat different liability from the above is imposed; as where the act under which a corporation was formed provided that the stockholders "shall hereafter be jointly and severally liable in their individual capacities only for debts due to miners, quarrymen, and other laborers employed by such companies, and for machinery, provisions, merchandise, country produce, and materials furnished for said companies"; under which it was held that the act contemplated an ordinary sale and delivery to the company in the course of its usual business: *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. St. 295; and that the liability of a stockholder did not extend to the case of a promissory note held by a third person, although given for materials used by the company in manufacturing: *Weightley v. Coal Oil Co.*, 5

Phila. 67; but where a merchant, upon orders of a corporation, furnished merchandise to its employees, and, by arrangement, the company took up the orders monthly by giving its notes, such transaction is within the act: *Reading Industrial Mfg. Co. v. Graeff*, 64 Pa. St. 395. A similar charter provision to the foregoing was held, by a very strict construction, not to include hauling with one's own team, repairing wagons used by the company, lumber for erecting machinery, feed for horses of the company, powder and fuse for blasting, and tools: *Moyer v. Pennsylvania State Co.*, 72 Pa. St. 293.

What are "Debts" for Which Stockholders are Liable. — In determining for what obligations of a corporation the stockholders are made individually responsible, it is the duty of the courts, as in other cases, to ascertain the intention of the legislature, and then, if possible, to carry out such intention. It is competent for the law-making power to impose a liability upon stockholders for the torts as well as the contracts of a corporation, and if this be the intent, effect should be given it in the one case as much as in the other. Charters and statutes, however, provide that stockholders shall be liable for the "debts," or "debts and contracts," or "debts contracted," by the corporation; and the generally accepted doctrine is, that such expressions refer to obligations incurred by the corporation *ex contractu*, and not to liabilities for torts committed by the company's agents or servants: 2 Morawetz on Corporations, sec. 880; Taylor on Corporations, sec. 734; Thompson's Liability of Stockholders, secs. 57, 58; note to *Prince v. Lynch*, 99 Am. Dec. 435; *Prop'r's of Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417; *Child v. Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328; *Heacock v. Sherman*, 14 Wend. 58; *Doolittle v. Marsh*, 11 Neb. 243; *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371; 72 Am. Dec. 214; and see *Cable v. Gaty*, 34 Mo. 573; although the tortious conduct might have been considered as a breach of contract: See *Bohn v. Brown*, *Heacock v. Sherman*, *Cable v. McCune*, *supra*; and although a judgment has been recovered against the corporation, upon which the stockholders are sought to be held: *Bohn v. Brown*, *supra*; compare *Child v. Boston etc. Iron Works*, *supra*. But in *Carver v. Braintree Mfg. Co.*, 2 Story, 432, Mr. Justice Story thought the word "debt," in a statute of Massachusetts, was to be taken in its broadest sense as embracing any just demands, whether growing out of contract or out of tort; and he therefore held it to embrace a claim for unliquidated damages for the infringement of a patent; but see *Child v. Boston etc. Iron Works*, *supra*. However, a claim for a breach of warranty of title of a chattel is a "debt": *Dryden v. Kellogg*, 2 Mo. App. 87; but not such a debt as is to be paid within one year from the time it was contracted, within the meaning of an act declaring that "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under the charter, which is not to be paid within one year from the time the debt is contracted": *Id.* If a statute provides that the stockholders shall be liable for all "debts and contracts" of the corporation, clearly it is not necessary that a claim against the corporation should be liquidated in order to charge the stockholders: *Haynes v. Brown*, 36 N. H. 545. A judgment is not a "debt": *Larrabee v. Baldwin*, 35 Cal. 155; and see *Bohn v. Brown*, 33 Mich. 257; compare *Child v. Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328.

It might be noticed here that the members of a corporation established under the laws of one state are liable upon contracts entered into by the corporation in another state, with citizens of that state, in like manner and to the same extent as upon contracts entered into in the state where the corpo-

ration is established, with citizens thereof: *Hutchins v. New England Coal Min. Co.*, 4 Allen, 580.

Interest and Costs. — If the principal of the original judgment, which has been obtained against the corporation, together with interest, does not exhaust the sum for which a stockholder is liable, the judgment, plainly, should carry interest as in other cases: *Grund v. Tucker*, 5 Kan. 70. "Moreover, if the creditor is kept out of his money through the refusal of the stockholder to pay when demand is made upon him, he ought to receive interest during the time he has been thus wrongfully delayed, although such interest, together with the principal, make a sum in excess of the amount for which the stockholder otherwise would have been liable": Thompson's Liability of Stockholders, sec. 374. It has been therefore held that interest will run against the stockholder from the time of the commencement of the suit against him, that being the time when the liability can be said to attach to him, although it results in charging him with a sum beyond that for which he was individually liable: Thompson's Liability of Stockholders, sec. 374; *Burr v. Wilcox*, 22 N. Y. 551; *Handy v. Draper*, 89 Id. 334; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; *Mason v. Alexander*, 44 Ohio St. 318; but not from the date of the original liability of the company, or any other previous time: *Wehrman v. Reakirt*, *Burr v. Wilcox*, *supra*; compare *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Cleveland v. Burnham*, 64 Wis. 347; although where a referee computed the interest on the plaintiff's demand from the date on which it became due the company, instead of from the date of the commencement of the action, but the indebtedness was less than the defendant's liability as a stockholder, and the allowance of interest did not swell it beyond that limit, there was held to be no error: *Wheeler v. Millar*, 90 N. Y. 353. So it is held, under the national banking act, that interest runs from the date of the comptroller's order, the amount due from the stockholders being then liquidated and payable: *Casey v. Galli*, 94 U. S. 673. But in *Cole v. Butler*, 43 Me. 401, *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225, *Munger v. Jacobson*, 99 Ill. 349, interest was denied where the amount of the recovery would thereby exceed the stockholder's original liability, Dunkin, C. J., in the case from Richardson, placing much stress upon the words "no further," in the New York statute of 1811, in question in the case, which provided that the stockholders should be responsible "to the extent of their respective shares of stock, and no further." And if a statute makes the stockholders of a bank liable to creditors "in proportion" to their stock, for the payment of unpaid bills, at the time the charter expires, interest, either from the time of dissolution, or from the time of the filing of a bill in equity against them will not be allowed, since no stockholder can tell how much he is to pay, or to whom, until it is ascertained by suit: *Crease v. Babcock*, 10 Met. 524, 568; *Grew v. Breed*, 10 Id. 569, 571.

It has also been held that a stockholder, made severally liable for the debts of a corporation, is also responsible for the costs of a proceeding taken against him by a creditor, although he is thereby compelled to pay a sum in excess of his original liability: *Grose v. Hilt*, 36 Me. 22; *Cole v. Butler*, 43 Id. 401; on the principle that he should have paid the amount for which he was liable to the creditor, without putting the creditor to the expense of a suit; although it has been held that a judgment against a stockholder must not include any part of the costs of a proceeding against the corporation: *Bailey v. Bancker*, 3 Ill. 188; *Rorke v. Thomas*, 56 N. Y. 559, 565; but see *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557.

NATURE OF STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — The nature of the liability for the debts of a corporation, imposed upon stockholders for the benefit of creditors by constitutions, special charters, general acts of incorporation, and other statutes, has been much discussed, but in the main the principles are well settled.

Is Contract Liability. — A distinction should be noticed at the outset between the usual liability imposed upon stockholders for the corporate debts, and the liability occasionally imposed upon the officers of a corporation for its debts, because of their failure or neglect to perform some duty with which they are charged, which liability is also sometimes extended to the corporators and stockholders generally. In the latter case, the liability is penal in its nature: Note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 651; *Bird v. Hayden*, 2 Abb. Pr., N. S., 61; *Halsey v. McLean*, 12 Allen, 438; *Cable v. McCune*, 26 Mo. 371, 383; 72 Am. Dec. 214, 215; *Snith v. Steele*, 8 Neb. 115; while in the former it is well settled the liability is not in the nature of a penalty, but of a contract. "This liability is in reality the result of an agreement or contractual relation formed between the shareholders and creditors of the corporation. Whether this agreement be called a contract or not is merely a matter of definition. It may not be a contract according to the technical rules of the common law; but it contains every essential element of a contract, and it is legally binding by virtue of statutory enactment": 2 Morawetz on Corporations, sec. 872. "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act, he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation": *Lowry v. Inman*, 46 N. Y. 119, 125, per Allen, J.; compare *Keyser v. Hitz*, 2 Mackey, 473, per Cox, J.; and see also note to *Prince v. Lynch*, 99 Am. Dec. 433. Therefore, the liability is such as fairly to come within the spirit and intent of an act to facilitate the recovery of judgments in suits "where the cause of action is a contract": *Norris v. Wrenschall*, 34 Md. 492; and falls within a section of the statute of limitations providing that "actions of debt grounded upon any lending or contract, without specialty," shall be brought within a certain period of time: *Carrol v. Green*, 92 U. S. 509; *Terry v. Caban*, 13 S. C. 220; and see *Bullard v. Bell*, 1 Mason, 243; compare *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376; *Hawkins v. Furnace Co.*, 40 Ohio St. 507; and not within a section providing for the limitation of actions "upon any statute made or to be made for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved": *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; overruling, in this particular, *Fresland v. McCullough*, 1 Denio, 412; 43 Am. Dec. 685; compare *Gridley v. Barnes*, 103 Ill. 211; *Lawler v. Burr*, 7 Ohio St. 340. It is not a penalty, and therefore enforceable only in a court of law: *Queenan v. Palmer*, 117 Ill. 619. And the liability, being in effect a liability upon contract, cannot be discharged by a subsequent transfer of the stock: *Brown v. Hitchcock*, 36 Ohio St. 667, 668; *Harger v. Cleveland*, 36 Md. 476; see *post*: and this being the nature of the liability, the assignee of the obligation of a corporation takes all the rights of the assignor: *Blakeman v. Benton*, 9 Mo. App. 107; and a stockholder who has been held liable can maintain an action against other stockholders for a contribution: *Aspinwall v. Sacchi*, 57 N. Y. 331; and see *post*. Furthermore, as respects an ex-

isting creditor, it is part of the obligation of his contract, within the constitution of the United States, and not subject to repeal or modification by a state statute: *Hawthorne v. Calef*, 2 Wall. 10; *Story v. Furman*, 25 N. Y. 214, 221; *Van Hook v. Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; *Provident Sav. Institution v. Jackson Place Skating etc. Rink*, 52 Mo. 552; *St. Louis R'y Supplies Co. v. Harbine*, 2 Mo. App. 134; *Blakeman v. Benton*, 9 Id. 107; compare *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Cummings v. Maxwell*, 45 Me. 190; *Story v. Furman*, 25 N. Y. 214, 221; *Walker v. Crain*, 17 Barb. 119, 129; *Jermain's Adm'r v. Benton*, 79 Mo. 148; *Merchants' Ins. Co. v. Hill*, 86 Id. 466, affirming 12 Mo. App. 148. Not being penal, it may be enforced against a stockholder outside of the state where the corporation is formed: *Flash v. Conn*, 16 Fla. 428; 26 Am. Rep. 721; 109 U. S. 371; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Howell v. Manglesdorf*, 33 Kan. 194, 199; *Hodgson v. Cheever*, 8 Mo. App. 318; *Aultman's Appeal*, 98 Pa. St. 505; *Lowry v. Inman*, 46 N. Y. 119; and see *Woods v. Wicks*, 7 Lea, 40; note to *Prince v. Lynch*, 99 Am. Dec. 433; unless there are difficulties of procedure in the way: *Lowry v. Inman*, *supra*; *Christensen v. Eno*, 106 N. Y. 97; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233; and see note to *Prince v. Lynch*, 99 Am. Dec. 433; compare *Drinkwater v. Portland Marine R'y*, 18 Me. 35. And being a contract liability, it survives against the personal representatives of a deceased stockholder: *Richmond v. Irons*, 121 U. S. 27; *Irons v. Manufacturers' Nat. Bank*, 21 Fed. Rep. 197, 198; *Chase v. Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; *Manville v. Edgar*, 8 Mo. App. 324; but see *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. 371, 372; *Dane v. Dane Mfy. Co.*, 14 Gray, 488; *Cummings v. Wright*, 11 Mo. App. 348; *Donnelly v. Hodgson*, 13 Id. 15; and compare *Diversey v. Smith*, 103 Ill. 378.

Is for Exclusive Benefit of Creditors.—The statutory liability of stockholders is solely for the benefit of the creditors of the corporation. Therefore the corporation cannot enforce it by assessment: Cook on Stock and Stockholders, sec. 216; 2 Morawetz on Corporations, sec. 809; *Winsted v. Buskirk*, 17 Ohio St. 113; *Liberty Female College Ass'n v. Watkins*, 70 Mo. 13; and see *Wincock v. Turpin*, 96 Ill. 135; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376; nor can the corporation assign it to trustees for the benefit of creditors: Cook on Stock and Stockholders, sec. 216; Thompson's Liability of Stockholders, sec. 342; 2 Morawetz on Corporations, sec. 869; Taylor on Corporations, sec. 721; *Wright v. McCormack*, 17 Ohio St. 86; nor can the liability be enforced by the assignee in bankruptcy of the corporation: *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435; *Bristol v. Sanford*, 12 Id. 341; nor by a receiver of the corporation: Cook on Stock and Stockholders, sec. 216; Thompson's Liability of Stockholders, sec. 342; 2 Morawetz on Corporations, sec. 869; Taylor on Corporations, sec. 721; note to *Prince v. Lynch*, 99 Am. Dec. 434; *Jacobson v. Allen*, 20 Blatchf. 525; 12 Fed. Rep. 454; *Wincock v. Turpin*, 96 Ill. 135; *Mason v. New York Silk Mfy. Co.*, 27 Hun, 307; *Cuykendall v. Corning*, 88 N. Y. 129; *Farnsworth v. Wood*, 91 Id. 308; unless, by statute, the receiver is vested with the right to enforce the liability on behalf of creditors: *Walker v. Crain*, 17 Barb. 11; *Herkimer County Bank v. Furman*, 17 Id. 116, 119; *Story v. Furman*, 26 N. Y. 214; *Kennedy v. Gibson*, 8 Wall. 498; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond v. Irons*, 121 U. S. 27. Indeed, the fact that a corporation has gone into bankruptcy, or into the hands of a receiver, fixes the liability of stockholders to creditors: *Tibballs v. Libby*, 87 Ill. 142; *Arenz v. Weir*, 89 Id. 25; *Wincock v. Turpin*, 96 Id. 135. "Neither a receiver, nor an assignee in bankruptcy, nor an assignee under

a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor, or to a body of creditors, by a third person, for the payment of the debts of the insolvent": *Jacobson v. Allen*, *supra*, per Wallace, J. The distinction between the liability of stockholders with respect to unpaid subscriptions, and their statutory liability, will at once be observed; for, as shown *supra*, unpaid subscriptions are assets which a corporation may assign for the benefit of creditors, and they may be collected by an assignee of the corporation in bankruptcy or insolvency, or by a receiver of the corporation.

Again, if the liability is imposed in favor of certain creditors only, no others can enforce it: *Wincock v. Turpin*, 96 Ill. 135; *Farnsworth v. Wood*, 91 N. Y. 308; in which latter case it is said: "The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions. It is not a general right, but one which attaches to the particular creditors only who are within the conditions, and is to be enforced by these in their own right and for their own special benefit." And creditors, in order to enforce the liability, need not be original creditors, but the liability of a stockholder is equally great to pay the assignee of a debt against the corporation as the assignor: *Came v. Brigham*, 39 Me. 35; *Blakeman v. Benton*, 9 Mo. App. 107; *Crease v. Babcock*, 10 Met. 524, 560; *Grew v. Breed*, 10 Id. 569, 579; although in *Gauch v. Harrison*, 12 Ill. App. 457, it was held that a creditor should be allowed only the amount he actually paid for the claims which he had purchased; *contra*, *Grew v. Breed*, 10 Met. 569, 579.

May be Waived by Creditors. — Since the statutory liability of stockholders for the corporate debts is for the benefit of creditors of the corporation, it may be waived by a creditor by express contract with the corporation: *Cook on Stock and Stockholders*, sec. 217; *Thompson's Liability of Stockholders*, sec. 75; 2 *Morawetz on Corporations*, sec. 871; *Taylor on Corporations*, sec. 735; *Robinson v. Bidwell*, 22 Cal. 379, 388; *French v. Teschemaker*, 24 Id. 518; *Baschor v. Forbes*, 36 Md. 154, 166; *Brown v. Eastern Slate Co.*, 134 Mass. 590; see also *In re Athenæum etc. Society*, 3 De Gex & J. 660; *Halket v. Merchant Traders' etc. Association*, 13 Q. B. 960; *Durham's Case*, 4 Kay & J. 517; although the liability is founded upon a constitutional provision: *Robinson v. Bidwell*, *French v. Teschemaker*, *supra*; "and it is equally free from doubt that it may be waived by conduct on the part of the creditor, either at the time of making the contract or subsequently, indicating a clear understanding between the contracting parties that the creditor is to look only to the corporate funds, and not to the individual liability of the shareholders": *Thompson's Liability of Stockholders*, sec. 75. Therefore a stockholder, liable on notes of the corporation, is released from liability, where, after the transfer of his stock, the creditor gave up the notes to the company, and took new notes, especially if done for the purpose of absolving the stockholder from liability: *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688.

Stockholders are not Sureties or Guarantors. — It has sometimes been asserted that the individual liability assumed by the stockholders of a corporation for the security of its creditors was that of guarantors or of sureties: *Moss v. McCullough*, 5 Hill, 131; *Hanson v. Donkersley*, 37 Mich. 184; *Peck v. Miller*, 39 Id. 594, 597; *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Id. 231, 238; *Grand Rapids Sav. Bank v. Warren*, 52 Id. 557, 561; *Grew v. Breed*, 10 Met. 569, 575; *Hicks v. Burns*, 38 N. H. 141; *Patterson v. Wyomissing Mfy. Co.*, 40

Pa. St. 117; and that therefore a judgment against the corporation was not even *prima facie* evidence of the debt in an action against a stockholder: *Moss v. McCullough*, *supra*; *sed qu.*; see note to *Charles v. Hoskins*, 83 Am. Dec. 380; and see *post*; and a stockholder was discharged from liability by the creditor's extending the time, and accepting the note of the corporation: *Hanson v. Donkersley*, *supra*; and see *Grew v. Breed*, *supra*; and no action could be maintained against a stockholder without notice of the neglect of the corporation to pay the debt: *Hicks v. Burns*, *supra*; but compare *Norris v. Wrenschall*, 34 Md. 492, 499. But, on the other hand, it has been expressly denied that stockholders are sureties or guarantors: *Harger v. McCullough*, 2 Denio, 119; *Moss v. Averill*, 10 N. Y. 449; *Moss v. McCullough*, 7 Barb. 279; *Aultman's Appeal*, 98 Pa. St. 505; *Craig's Appeal*, 92 Id. 396; *Perkins v. Sanders*, 56 Miss. 733; *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Id. 503; *Prince v. Lynch*, 38 Id. 528; 99 Am. Dec. 427; *Young v. Rosenbaum*, 39 Cal. 646; *Sonoma Valley Bank v. Hill*, 59 Id. 107; and therefore stockholders are not discharged by the creditor's giving time to the corporation: *Harger v. McCullough*, *supra*; *Aultman's Appeal*, *supra*; virtually overruling *Moss v. McCullough*, *Patterson v. Wyomissing Mfg. Co.*, *supra*; and being original debtors, *scire facias*, to enforce payment of a judgment against the corporation, will not lie against the stockholders: *Southmayd v. Russ*, 3 Conn. 52. Mr. Morawetz says: "It is a truth, which no legislative act or judicial decision can alter, that a corporation consists of its share-holders, and that, when share-holders become individually liable for debts of their corporation, they become individually liable for debts which they themselves owe in a corporate capacity. This individual liability may be in some respects similar to that of suretyship, but it is certain that the share-holders are not in fact sureties, within the accepted meaning of that term": 2 Morawetz on Corporations, sec. 879. And Mr. Taylor observes: "That it is not the liability of guarantors seems too evident to require argument. Suretyship is a legal institution composed of peculiar rules, based on the general notion that a surety is a man conferring a benefit and receiving none in return": Taylor on Corporations, sec. 715. Some of the confusion of ideas seems to have resulted from the fact that in many states, either by virtue of positive statutory provisions, or otherwise, stockholders are not primarily liable, but judgment is first required to be obtained against the corporation, and execution returned unsatisfied, before they can be held, — a proposition which has no necessary connection with suretyship or guaranty.

Stockholders, whether Liable as Partners. — It is frequently stated that the statutory liability of stockholders for the debts of a corporation is that of partners or members of an incorporated association, to the extent indicated by the law-making power: *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 265; *Southmayd v. Russ*, 3 Conn. 52; *Denning v. Bull*, 10 Id. 409; *Paine v. Stewart*, 33 Id. 517; *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 103 Id. 359; *Gauch v. Harrison*, 12 Ill. App. 457, 461; *Perkins v. Sanders*, 56 Miss. 733; *Erickson v. Nesmith*, 46 N. H. 371; *Allen v. Seawall*, 2 Wend. 327; 6 Id. 335; *Lindsay v. Hyatt*, 4 Edw. Ch. 97, 100; *Moss v. Oakley*, 2 Hill, 265, 269; *Bailey v. Bancker*, 3 Id. 188; 38 Am. Dec. 675; *Harger v. McCullough*, 2 Denio, 119, 124; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Story v. Furman*, 25 N. Y. 214, 221, 222; *Wiles v. Suydam*, 64 Id. 173, 176; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Worrall v. Judson*, 5 Barb. 210, 212; *Moss v. McCullough*, 7 Id. 279; *Conant v. Van Schaick*, 24 Id. 87, 96; *Richardson v. Abendroth*, 43 Id. 162; *Conklin v. Furman*, 57 Id. 484, 489; 8 Abb. Pr., N. S., 161, 166; *Clark v. Myers*, 11 Hun, 608; *King v. Duncan*, 38 Id. 461,

464; *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688; *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. 95; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; *Merchants' Bank v. Chandler*, 19 Wis. 434, 437. And it has therefore been frequently held that one stockholder who is a creditor of the corporation cannot maintain an action at law against the others to enforce their individual liability: *Bailey v. Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Richardson v. Abendroth*, 43 Barb. 162; *Beers v. Waterbury*, 8 Bosw. 396, 413; *Clark v. Myers*, 11 Hun, 608; *Thompson v. Meisser*, 108 Ill. 359; *Perkins v. Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works v. Chittenden*, 4 Bosw. 406; *Smith v. Londoner*, 5 Col. 365. His remedy is in equity for a contribution. It has even sometimes been said that stockholders are not made liable, but left liable, for the corporate indebtedness: See *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Story v. Furman*, 25 N. Y. 214, 222; *Buchanan v. Meisser*, 105 Ill. 638; but this is palpably erroneous, and overlooks the indisputable rule of the common law that stockholders were not liable for the debts of the corporation. Mr. Morawetz thus observes, with reference to the doctrine in question: "Share-holders in a corporation are undoubtedly partners within a broad meaning of the term, and this is true whether they are subject to a special individual liability to creditors or not. But it is equally a fact that they are not partners within the narrow meaning of the term 'partners' under the common law. The very object of an act of incorporation is to enable the share-holders to form an association which is not a common-law partnership, and is not subject to the technical rules of the common law. The fact that the share-holders in a corporation are subject to an individual liability to creditors would merely constitute one point of resemblance between the association and a common-law partnership, but it would not render the association a common-law partnership, nor would it make the share-holders common-law partners. To reason that because the liability of the share-holders under the statute resembles the liability of partners under the common law, therefore it must be governed by the technical rules of the common law applicable to the liability of partners, indicates a confusion of ideas": 2 Morawetz on Corporations, sec. 878. "Share-holders," says Mr. Taylor, "are not, like partners, each other's agents; unlike partners, they may transfer their shares at will; then, ordinarily, even in respect of his statutory liability, a share-holder cannot be sued until the creditor has exhausted his legal remedies against the corporation; and finally, under some statutes, a share-holder may be sued alone, though in the end he is entitled to contribution from his fellow-share-holders. Undoubtedly there remains the main resemblance between the liability of partners and the statutory liability of share-holders, — that a share-holder, as well as a partner, is liable individually for the debts of the corporation or firm, — a resemblance which is especially prominent in the unlimited liability of a share-holder, who, like a partner, may be obliged to pay all the debts of the concern. And the danger lies here, lest with eyes fixed on this main resemblance, courts overlook minute differences, and in consequence fail to do accurate justice": Taylor on Corporations, sec. 716.

Liability, whether Primary, or Subject to Proceedings First Taken against Corporation. — If no statutory condition is imposed requiring creditors to first proceed against the corporation, the individual liability of stockholders is regarded as primary; and therefore an action to enforce the liability is maintainable without having obtained a judgment against the corporation, and an execution returned unsatisfied: *Spence v. Shapard*, 57 Ala. 598; *David-*

son v. Rankin, 34 Cal. 503; *Young v. Rosenbaum*, 39 Id. 646; *Faymonville v. McCollough*, 59 Id. 285; *Morrow v. Superior Court*, 64 Id. 383; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Queenan v. Palmer*, 117 Id. 619, 629; *Tollhunter v. Randolph*, 29 Ind. 275; *Marion Township etc. Draining Co. v. Norris*, 37 Id. 424; *Shafer v. Moriarity*, 46 Id. 9; *Marshall v. Harris*, 55 Iowa, 182; *Perkins v. Church*, 31 Barb. 84; *McMahon v. Macy*, 51 N. Y. 155, 160; *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. 95; *Bird v. Calvert*, 22 S. C. 292; *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants' Bank v. Chandler*, 19 Id. 434, 545; *Sleeper v. Goodwin*, 67 Wis. 577, 586; see also *Manufacturing Co. v. Bradley*, 105 U. S. 175; and if a judgment is recovered against the corporation, the stockholders cannot be sued thereon: *Trippe v. Huncheon*, 82 Ind. 307; so it is no defense that property given in pledge by the corporation remains in the creditor's hands undisposed of: *Sonoma Valley Bank v. Hill*, 59 Cal. 107; nor is the creditor obliged first to exhaust his remedy against the sureties on the note of the corporation on which he sues before calling on the stockholders: *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; nor is it an objection to the maintenance of a suit against the stockholders that the plaintiffs have commenced an action against the corporation for the recovery of the same debt: Id.; and, it is held, a release by a creditor of a stockholder's liability for the debt discharges the corporation and the other stockholders to the same extent as the one to whom the release was executed: *Prince v. Lynch*, 38 Cal. 528; 99 Am. Dec. 427; so the indebtedness for which a stockholder is sought to be charged cannot be shown by entries in the books of the corporation, made by its employees: *Neilson v. Crawford*, 52 Cal. 248; *Haynes v. Brown*, 36 N. H. 545; *Hager v. Cleveland*, 36 Md. 476; but see *McHose v. Wheeler*, 45 Pa. St. 32. However, the cases are not agreed; and under the same circumstances, the liability is held not to be a primary resource or fund for the payment of the corporate debts, but that the legal remedies must first be exhausted against the corporation: *Wright v. McCormick*, 17 Ohio St. 86; *Brown v. Hitchcock*, 36 Id. 667, 676; *Hawkins v. Furnace Co.*, 40 Id. 507, 513; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; *Appel of Means*, 85 Pa. St. 75; *Craig's Appeal*, 92 Id. 396; *Cambridge Water Works v. Somerville Dyeing etc. Co.*, 4 Allen, 239; *Harper v. Union Mfg. Co.*, 100 Ill. 225; and see 2 Morawetz on Corporations, sec. 883; Cook on Stock and Stockholders, sec. 221; note to *Prince v. Lynch*, 99 Am. Dec. 434, favoring this view. Here, again, such a construction should be adopted as will best effectuate the legislative intent. Very generally, however, a creditor is, either expressly or by necessary implication, required to obtain a judgment against the corporation, and have an execution issued thereon returned unsatisfied, as a prerequisite to proceeding against a stockholder to enforce his statutory liability: See *Hastings v. Harding*, 2 Dill. 99, 105; *Toucey v. Bowen*, 1 Biss. 81; *Thorn-ton v. Lane*, 11 Ga. 459; *Hanson v. Donkersley*, 37 Mich. 184; *Freeland v. McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Druehy v. Brown*, 24 Vt. 197; and where an act requires the recovery of a judgment, and the return of an execution unsatisfied, as a condition precedent to an action against a stockholder, the complaint must allege these steps to have been taken: *Lindsley v. Simonds*, 2 Abb. Pr., N. S., 69. But where the required proceedings, as to obtaining a judgment against the corporation, and having an execution returned *nulla bona*, or as to instituting suit against the corporation within a limited period of time, as sometimes provided, would be impossible or nugatory, they are excused: See *Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 Id. 548; as where the corporation is notoriously insolvent: *Hodges v. Silver Hill Min. Co.*,

9 Or. 200; or is thrown into bankruptcy: *Shellington v. Howland*, 53 N. Y. 371; *State Savings Ass'n v. Kellogg*, 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87; but see *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605; *Tarbell v. Page*, 24 Ill. 46; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; or is in the hands of a receiver: *Paine v. Stewart*, 33 Conn. 516. It is, however, held that a judgment and execution returned *nulla bona* are only evidence of, and constitute one kind of proof of, insolvency: *Hodges v. Silver Hill Min. Co.*, *supra*; and that it might be shown by any competent evidence that the corporation had no goods on which a levy could be made: *Marks v. Hardy*, 12 Mo. App. 595; and it was sufficient if it be shown that execution issued against the corporation, and that there was no property whereon to levy it, though the return of *nulla bona* on the execution be made before the return day: *Id.*; but these are extreme cases. On the other hand, as to whether the return *nulla bona* is conclusive against the stockholder that no property existed, see *Chaffin v. Cummings*, 37 Me. 76; *Lane v. Harris*, 16 Ga. 217. It has been held that if the statute requires a judgment and execution against the corporation before the stockholders can be charged with their individual liability, a judgment and execution in the state where the corporation was formed are contemplated, and therefore necessary: *Rocky Mountains Nat. Bank v. Bliss*, 89 N. Y. 338; *Dean v. Mace*, 19 Hun, 391; *Viele v. Wells*, 9 Abb. N. C. 277; as to whether this is so in equitable proceedings by creditors to compel the payment of unpaid subscriptions, see *Patterson v. Lynde*, 112 Ill. 196, 204; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; and in suits for the same purpose by receivers and assignees for the benefit of creditors in other states: *Glenn v. Williams*, 60 Md. 93; *Dayton v. Borst*, 31 N. Y. 435, 438; *Patterson v. Lynde*, 112 Ill. 196, 206, discussed *supra*.

Under some statutes, creditors are obliged to bring suit against the corporation, as above intimated, within a limited period of time, before proceeding against the stockholders individually: See *Hastings v. Harding*, 2 Dill. 99; *Shellington v. Howland*, 53 N. Y. 371; *Birmingham National Bank v. Mosser*, 14 Hun, 605; *State Savings Ass'n v. Kellogg*, 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87; and where it is provided that no stockholder shall be personally liable for the payment of any debt contracted by the company, which is not paid within one year from the time the debt is contracted, nor unless a suit for the collection of the debt shall be brought against the company within one year after the debt shall become due, the liability of a stockholder cannot be renewed or extended by any renewal or extension of the indebtedness which the creditor may make with the corporation, as by the acceptance of the creditor's note: *Parrott v. Colby*, 6 Hun, 55, affirmed in 71 N. Y. 597. In other cases, a special demand upon the corporation is required. And where a statute provides that no suit to enforce the individual liability of a stockholder for the debts and contracts of the corporation "shall be commenced until after a legal demand of payment thereof shall have been made upon the company," the demand must be a personal one, so that payment might be made at once: *Haynes v. Brown*, 36 N. H. 545; *Connecticut River Savings Bank v. Fiske*, 60 Id. 363, 368.

Liability, whether Joint, Several, or Joint and Several. — In the consideration of the extent of the liability of stockholders for the debts of the corporation under a particular statutory provision, the manner of its enforcement, the parties to the action, and the judgment which should be rendered therein, it is frequently material to inquire as to whether the liability imposed is joint, several, or joint and several. It may be here remarked that the liability of a stockholder for unpaid subscriptions is necessarily several. He becomes a

several debtor of the corporation by his contract of subscription, or by assuming the obligations of such contract by afterwards purchasing the stock. At law, his subscription is enforceable against him solely by the corporation or its representatives; and in equity the liability does not cease to be several, although in a creditor's suit others may be joined with him: See *Hatch v. Dana*, 101 U. S. 205, 210. So where the constitution of a state provides that the stockholders "shall be liable for the indebtedness of such corporation to the amount of their stock subscribed and unpaid," the liability of a stockholder is likewise several: *Hodges v. Silver Hill Min. Co.*, 9 Or. 200. But whether the statutory liability of a stockholder be joint, several, or joint and several, depends upon no such principle, but solely upon the language of the charter or other statute. The question, as in other cases, is one of construction and interpretation. In some instances it is settled by language which leaves little or no doubt. Were the view that stockholders are liable as partners carried out to its logical extent, they would be jointly liable, so that they would have to be united as parties defendant in actions to enforce their liability, and a joint judgment would be entered up against them. If no limit, as is sometimes the case, is placed upon the liability of the stockholders, but they are made personally liable for the debts of the corporation without limit, plainly the liability should be held to be joint, with all its consequences: *Shafer v. Moriarity*, 46 Ind. 9; *Deming v. Bull*, 10 Conn. 409; compare *Von Glahn v. Harris*, 73 N. C. 323; *Von Glahn v. De Rossett*, 76 Ill. 292, 293.

But if the liability of stockholders is confined to the "extent" or "amount" of their stock, or is "in proportion" to their stock, the liability, being unequal and limited, is several: *Shafer v. Moriarity*, 46 Ind. 9; *Paine v. Stewart*, 33 Conn. 517; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 11 Humph. 1, 33; 53 Am. Dec. 742; *Crease v. Babcock*, 10 Met. 524, 557, 568; *Perry v. Turner*, 55 Mo. 418, 426; *Pettibone v. McGraw*, 6 Mich. 441; *Lane v. Harris*, 16 Ga. 217; *Adkins v. Thornton*, 19 Id. 325, 328; although some cases, in holding the liability to be several, have placed considerable stress upon the statutory form which imposes a liability upon "each" stockholder in a certain amount: *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Id. 113; *Brown v. Hitchcock*, 36 Id. 667, 681; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; and see also *McCarthy v. Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *Vick v. Lane*, 56 Miss. 681; and it therefore follows that where an action at law is possible it can be sustained only against a single stockholder: *Perry v. Turner*, 55 Mo. 418, 426; or if the stockholders be joined, upon equitable considerations, a judgment *in solido* cannot be entered against them: *Crease v. Babcock*, 10 Met. 524, 557, 568; *Vick v. Lane*, 56 Miss. 681; and see *Paine v. Stewart*, 33 Conn. 517; and a stockholder's liability is not extended because other stockholders cannot be reached by process, or are insolvent: *Crease v. Babcock*, *supra*; *Adkins v. Thornton*, 19 Ga. 325, 328. Of course if the charter of a corporation provides that the stockholders shall be "severally and individually" liable, the liability is several: See *Flash v. Conn*, 109 U. S. 371; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Wincock v. Turpin*, 96 Id. 135; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Id. 492; *Weeks v. Love*, 50 N. Y. 568; *Mathez v. Neidig*, 72 Id. 100; *Pfohl v. Simpson*, 74 Id. 137; so the liability is several under the national banking act, which provides that the stockholders "shall be held individually responsible, equally and ratably, and not one for another": *Kennedy v. Gibson*, 8 Wall. 498, 505; *United States v. Knox*, 102 U. S. 422; *Bailey v. Sawyer*, 4 Dill. 463.

It is sometimes provided that the stockholders shall be "jointly and severally" liable for the debts and contracts of the corporation: See *Grund v. Tucker*, 5 Kan. 70; *Hicks v. Barns*, 38 N. H. 141; *Burnap v. Haskins Steam Engine Co.*, 127 Mass. 586; *Hall v. Klinck*, 25 S. C. 348; 60 Am. Rep. 505; and see the expressions that stockholders are "jointly and severally liable as partners," used in *Perkins v. Sanders*, 56 Miss. 733; *Thompson v. Meisser*, 108 Ill. 359; but where the statute further enacted that "such sums as may be decreed to be paid by the stockholders in such suit in equity shall be assessed upon them in proportion to the amounts of stock by them respectively held at the time when the suit in which said judgment was recovered was begun, but no stockholder shall be liable to pay a larger sum than the amount of stock held by him at that time at its par value," a stockholder is not liable for the whole debt of a corporation *in solido*, but is liable severally for a *pro rata* part of the whole amount, in proportion to the stock held by him: *Burnap v. Haskins Steam Engine Co.*, *supra*; and although the Civil Code of California provides that "any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each," stockholders are not made jointly liable to each of the creditors of the corporation; and the amount of the creditor's demand against each stockholder determines the court in which the creditor may seek to enforce such stockholder's liability: *Derby v. Stevens*, 64 Cal. 287.

HOW STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS IS ENFORCED. — If the charter of a corporation, or some general statute, prescribes a special mode of enforcing the individual liability of the stockholders, it is well settled, upon the principle that where a statute confers a right and also prescribes a remedy, that remedy, and that only, can be pursued, that the liability can be enforced in no other way: *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Knowlton v. Ackley*, 8 Cush. 93; *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Id. 173; *Patterson v. Lane*, 35 Pa. St. 275; *Brinham v. Wellersburg Coal Co.*, 47 Id. 43; *Youghioghenny Shaft Co. v. Evans*, 72 Id. 331; *O'Reilly v. Bard*, 105 Id. 569, 574, 575; *Moies v. Sprague*, 9 R. I. 541; *Dauchy v. Brown*, 24 Vt. 197; *Windham Provident Inst. v. Sprague*, 43 Id. 502, 510; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184, 204; 2 Morawetz on Corporations, sec. 893; but see *Ex parte Van Riper*, 20 Wend. 614; *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499; and the remedy must be strictly pursued: *Hoard v. Wilcox*, 47 Pa. St. 51; *Mansfield Iron Works v. Willcox*, 52 Id. 377, 378; *Lane's Appeal*, 105 Id. 49, 58; *O'Reilly v. Bard*, 105 Id. 569, 574. See, as construing such statutes prescribing a special manner of enforcing the stockholder's liability, *Leland v. Marsh*, 16 Mass. 389; *Stedman v. Eveleth*, 6 Met. 114; *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576; *Farnum v. Ballard Vale Machine Shop*, 12 Id. 507, 508; *Robbins v. Justices etc. of Superior Court*, 12 Gray, 225, 226; *Richmond v. Willis*, 13 Id. 182; *Johnson v. Somerville Dyeing etc. Co.*, 15 Id. 216; *Erskine v. Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595. It is also sometimes provided that proceedings to enforce the individual liability of stockholders shall be in equity: See *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 Id. 371; *Rice v. Merrimac Hosiery Co.*, 56 Id. 114; *Connecticut River Savings Bank v. Fiske*, 60 Id. 363; *Erickson v. Nesmith*, 15 Gray, 222; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond v. Irons*, 121 U. S. 27; in which case undoubtedly, on the same principle, a stockholder must be pursued in equity.

Thus far, there is no dispute; but if no special remedy for enforcing the liability of stockholders be provided, the cases are extremely conflicting as to

whether the remedy is at law or in equity, or is at either law or equity. If no new right is created, but the liability of stockholders for unpaid subscriptions is simply preserved, then the remedy of a creditor is in equity, and not at law, as it would have been independently of the statutory provision: *Patterson v. Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush v. Cartwright*, 7 Or. 329; *Brundage v. Monumental G. & S. Min. Co.*, 12 Id. 322; and see *Cornell's Appeal*, 114 Pa. St. 153, 163; *Crawford v. Rohrer*, 59 Md. 599; and compare *Hodges v. Silver Hill Min. Co.*, 9 Or. 200, 204; although it is held that where a statute provides that the stockholders of a corporation "shall be severally individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all debts and contracts made by such company," a creditor may maintain an action at law against an individual stockholder, and recover to the amount of unpaid stock held by him: *Smith v. Londoner*, 5 Col. 365; and see *Mills v. Stewart*, 41 N. Y. 384, 389; *Griffith v. Mangam*, 73 Id. 611; *Stephens v. Fox*, 83 Id. 313.

In some cases it is held that the individual liability of stockholders must be enforced in equity. Thus where the charter of a bank provided that the stockholders "shall be bound respectively for all the debts of the bank in proportion to their stock holden therein," it was held that the proper action was in equity, and not at law: *Pollard v. Bailey*, 20 Wall. 520, Waite, C. J., saying: "The provision for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts. The cases from New York cited upon the argument, and which are supposed to be in opposition to the view we have taken, involved the consideration of such a liability. . . . After an examination of the several sections of this charter, it cannot for a moment be doubted that it was not only the intention to provide for a proportionate liability, but for a *pro ratu* distribution among the different creditors according to their several priorities. Every provision is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security, and exclude all others. A common fund was created for the common benefit, to be collected and distributed by the receiver, who was made the common agent of all. There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit." See also, to the same effect, *Terry v. Tubman*, 92 U. S. 156, 161; *Cuykendall v. Miles*, 10 Fed. Rep. 342, 344; *Terry v. Martin*, 10 S. C. 263; but compare *Bank of United States v. Dallam*, 4 Dana, 574; *Morrow v. Superior Court*, 64 Cal. 383.

Again, where the charter of a banking corporation provided that on failure of the bank each stockholder should be liable individually for a sum not exceeding twice the amount of his shares, a suit in equity was held to be the appropriate mode of enforcing the liability: *Terry v. Little*, 101 U. S. 216, the court saying: "The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation, and provide directly or indirectly a remedy for its enforcement. If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund"; and see also *Mills v. Scott*, 99 Id. 25; *Smith v. Huckabee*, 53 Ala. 191; *Jones v. Jarman*, 34 Ark. 323; *Peck v. Miller*, 39 Mich. 594; *Harris v. First Parish in Dorchester*, 23

Pick. 112; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Id. 113; *Brown v. Hitchcock*, 36 Id. 667, 681; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; and see *Harper v. Union Mfg. Co.*, 100 Ill. 225; *Rounds v. McCormick*, 114 Id. 252; *Von Glahn v. Harris*, 73 N. C. 323; *Von Glahn v. Lattimer*, 73 Id. 333; *Von Glahn v. De Rossett*, 76 Id. 292; in which latter cases the charter provided for a liability "to creditors," and effect was given to that expression.

In some of the earlier Illinois cases, the remedy against a stockholder made severally liable was held to be exclusively at law, on the principle that where a statute creates a right or liability the remedy is at law, unless the statute provides otherwise: *McCarthy v. Lvasche*, 89 Ill. 270; 31 Am. Rep. 83; *Hull v. Burtis*, 90 Ill. 213; *Wincock v. Turpin*, 96 Id. 135; *Lane v. Nickerson*, 99 Id. 284, 287; but the court has receded from this position: *Eames v. Doris*, 102 Id. 350; *Tunesma v. Schuttler*, 114 Id. 156; compare *Harper v. Union Mfg. Co.*, 100 Id. 226; *Rounds v. McCormick*, 114 Id. 252; *Queenan v. Palmer*, 117 Id. 619. And it might be here noticed that the suit by the receiver of a national bank to enforce the assessment made by the comptroller of the currency is at law: *Casey v. Galli*, 94 U. S. 673; *Bailey v. Sawyer*, 4 Dill. 463; but compare *Kennedy v. Gibson*, 8 Wall. 498, 505; although by the amendment of 1876 the individual liability of stockholders might be enforced by a bill in equity filed by any creditor: See *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond v. Irons*, 121 U. S. 27.

But according to many authorities, if it be provided generally that the stockholders shall be individually liable for the debts of the corporation, and especially if it be provided that they shall be "severally," or "jointly and severally," liable, a creditor may sue either at law or in equity, according to the nature of the relief desired or made necessary by the circumstances of the case: See *Manufacturing Co. v. Bradley*, 105 U. S. 175, 182; *Flash v. Conn*, 109 Id. 371; *Morrow v. Superior Court*, 64 Cal. 383; *Adkins v. Thornton*, 19 Ga. 325; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Eames v. Doris*, 102 Id. 350; *Tunesma v. Schuttler*, 114 Id. 156; *Grund v. Tucker*, 5 Kan. 70; *Bank of United States v. Dallam*, 4 Dana, 574; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Id. 492; *Vick v. Lane*, 56 Miss. 681; *Perry v. Turner*, 55 Mo. 418, 426; *Hodgson v. Cheever*, 8 Mo. App. 318; *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Masters v. Rossie Lead Min. Co.*, 2 Sand. Ch. 301; *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147; *Garrison v. Howe*, 17 N. Y. 458, 463; *Weeks v. Love*, 50 N. Y. 568; *Mathez v. Neidig*, 72 Id. 100; *Griffith v. Mangam*, 73 Id. 611; *Pfohl v. Simpson*, 74 Id. 137; *Hall v. Klinck*, 25 S. C. 348; 60 Am. Rep. 505; compare *Young v. New York etc. Steamship Co.*, 15 Abb. Pr. 69; 10 Id. 229, 231. But a stockholder who is also a creditor of the corporation cannot maintain an action at law against the other stockholders, but must proceed in equity for a contribution: See *Bailey v. Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Richardson v. Abendroth*, 43 Barb. 162; *Beers v. Waterbury*, 8 Bosw. 396, 413; *Clark v. Myers*, 11 Hun, 608; *Thompson v. Meisser*, 108 Ill. 359; *Perkins v. Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works v. Chittenden*, 4 Bosw. 406; *Smith v. Londoner*, 5 Col. 365; and, on the other hand, if a stockholder is a creditor of the corporation to the amount of his liability, no action at law can be maintained against him by another creditor, since he has an interest in the fund sued for, the amount of which can only be determined by an accounting, which cannot be had in such

an action: *Garrison v. Howe*, 17 N. Y. 458, 463; *Mathez v. Niedig*, 72 N. Y. 100; and see *Agate v. Sands*, 73 Id. 620; *Wheeler v. Millar*, 90 Id. 353.

If the liability can be enforced at law, debt will lie, if the sum to be recovered is certain: *Bullard v. Bell*, 1 Mason, 243; but not if the amount to be recovered is not certain, and cannot be readily reduced to certainty: *Carrol v. Green*, 92 U. S. 509, 513.

It has been held that a judgment creditor could unite in the same action a claim to enforce the statutory liability of the stockholders for the debts of the corporation, with a claim to compel payment of unpaid subscriptions: *Warner v. Callender*, 20 Ohio St. 190; but not with a claim against the same persons, as officers, for failure to comply with some statutory duty: *Mappier v. Mortimer*, 11 Abb. Pr., N. S., 455, 459; *Cambridge Water Works v. Somerville Dyeing etc. Co.*, 14 Gray, 193.

PARTIES IN ACTIONS TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.—The foregoing discussions as to the nature of a stockholder's statutory liability, and how it may be enforced, leave little to be added concerning parties. Wherever it is held that the proceeding against the stockholders must be in equity, either because some statutory provision preserves simply the liability to the extent of the unpaid subscriptions, or because it expressly requires a suit to be brought in equity, or because a proportionate liability is imposed, or a fund provided for, the rules heretofore given under the head "Parties to Bill in Equity" to compel the payment of unpaid subscriptions will apply; all the creditors should be parties plaintiff, or the suit should be in behalf of all: 2 Morawetz on Corporations, sec. 902; *Brundage v. Monumental G. & S. Min. Co.*, 12 Or. 322; *Crease v. Babcock*, 10 Met. 524, 531; *Grew v. Breed*, 10 Id. 569, 575; *First National Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Jones v. Jarman*, 34 Ark. 323; *Harperv. Union Mfg. Co.*, 100 Ill. 225; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Von Glahn v. Harris*, 73 N. C. 323; *Von Glahn v. Lattimer*, 73 Id. 333; *Von Glahn v. De Rossett*, 76 Id. 292; *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Id. 113; *Brown v. Hitchcock*, 36 Id. 667, 681; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; but see *Cornell's Appeal*, 114 Pa. St. 153, 163; all the stockholders should be joined as parties defendant, unless it be impossible, useless, or impracticable: 2 Morawetz on Corporations, sec. 902; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 Id. 371; *Rice v. Merrimac Hosiery Co.*, 56 Id. 114, 128; *Connecticut River Savings Bank v. Fiske*, 60 Id. 363, 368; *Jones v. Jarman*, 34 Ark. 323; *Umsted v. Buskirk*, 17 Ohio St. 113; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; *Von Glahn v. Harris*, 73 N. C. 323; *Von Glahn v. De Rossett*, 76 Id. 292, 293; compare *Brundage v. Monumental G. & S. Min. Co.*, 12 Or. 322; and see *Cornell's Appeal*, 114 Pa. St. 153, 163; *Pettibone v. McGraw*, 6 Mich. 441; and the corporation should be made a co-defendant: 2 Morawetz on Corporations, sec. 903; *Umsted v. Buskirk*, 17 Ohio St. 113; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; *Jones v. Jarman*, 34 Ark. 323; *Wetherbee v. Baker*, 35 N. J. Eq. 501; and see *Thompson v. Jewell*, 43 Mich. 240.

If the liability of stockholders is several, it is not possible, unless, perhaps, permitted by statute, to join them as defendants in an action at law to enforce the liability, but each creditor has a remedy against each stockholder: *Abbott v. Aspinwall*, 26 Barb. 202; *Morrow v. Superior Court*, 64 Cal. 383; if it be joint, they must all be sued jointly: *Allen v. Sewall*, 2 Wend. 327; and see *Overmyer v. Cannon*, 82 Ind. 457; and if joint and several, a joint action, or several actions, may be instituted: *Larrabee v. Baldwin*, 35 Cal. 155.

In Ohio, if stock is transferred after a debt is contracted, the assignees

should be made parties defendant in a suit in equity to enforce the individual liability of the assignors, the assignees being bound to discharge the liability, as between themselves and the assignors: *Wheeler v. Fawcett*, 37 Ohio St. 26; and see *Bonewitz v. Van Wert County Bank*, 41 Id. 78.

JUDGMENT AGAINST CORPORATION, WHETHER CONCLUSIVE IN ACTION TO ENFORCE STOCKHOLDER'S STATUTORY LIABILITY. — It has already been shown that a judgment against a corporation is conclusive, in the absence of fraud or want of jurisdiction, in a creditor's suit against the stockholders to compel the payment of their unpaid subscriptions, so as to dispense with further proof of the creditor's claims. On principle, there is no reason why this rule should not apply in actions to enforce the statutory liability of stockholders. It makes no difference whether or not a judgment against the corporation is required to be obtained as a prerequisite to the enforcement of such liability. A judgment against the corporation is really a judgment against the stockholders in their corporate capacity, and the stockholders are amply represented in the action. The weight of authority is decidedly in favor of this view: *Cook on Stock and Stockholders*, sec. 222; 2 *Morawetz on Corporations*, sec. 886; *Slee v. Bloom*, 20 Johns. 669; *Moss v. Oakley*, 2 Hill, 265; *Moss v. McCullough*, 7 Barb. 279, 290; *Moss v. Averill*, 10 N. Y. 449, 452; *Belmont v. Coleman*, 21 Id. 96; *Conklin v. Furman*, 57 Barb. 484; 8 Abb. Pr., N. S., 161; *Hovey v. Ten Broeck*, 3 Robt. 316, 319; *Donworth v. Coolbaugh*, 5 Iowa, 300; *Corse v. Sanford*, 14 Id. 235; *Cane v. Brigham*, 39 Me. 35; *Cole v. Butler*, 43 Id. 401; *Milliken v. Whitehouse*, 49 Id. 527; *Grund v. Tucker*, 5 Kan. 70; *Coalfield Co. v. Peck*, 98 Ill. 139; *Wilson v. Stockholders of Pittsburgh etc. Coal Co.*, 43 Pa. St. 424; *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants' Bank v. Chandler*, 19 Id. 545. Some few of these cases say the judgment is *prima facie* evidence, but only impeachable for fraud or want of jurisdiction, which, however, is simply stating the rule in another form. Nevertheless, some authorities hold the judgment to be to all intents and purposes *prima facie*: *Hoagland v. Bell*, 36 Barb. 57; *Scharffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; and see *Stephens v. Fox*, 83 N. Y. 313; and some hold that it is not even *prima facie*: *Moss v. McCullough*, 5 Hill, 131; *Strong v. Wheaton*, 38 Barb. 616; and see also *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 Id. 155, 162-165; *Union Bank v. Wando Mining etc. Co.*, 17 S. C. 339; *Chestnut v. Pennell*, 92 Ill. 55; *Whitman v. Cox*, 26 Me. 335; and *Merrill v. President etc. of Suffolk Bank*, 31 Id. 57, 50 Am. Dec. 649, overruling the same.

WHO ARE STOCKHOLDERS PERSONALLY LIABLE FOR CORPORATE DEBTS. — *In General, how One Becomes Stockholder.* — Some of the rules which will be given under this head, because announced in cases involving the individual liability of stockholders for the debts of corporations under charters and statutes, are of a general nature, and will equally apply to cases where creditors are seeking to compel stockholders to pay their unpaid subscriptions by equitable proceedings, while other rules are entirely special. It has been held that where the act under which a corporation was formed provided that the trustees and "corporators" should be individually liable for its debts until the whole of the capital subscribed shall have been paid in, and a certificate thereof recorded, the word "corporators" does not include stockholders: *Chase v. Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; but *per contra*, the word "corporators," in a similar act, was held to be used in the sense of share-holders, and not that of commissioners or promoters in the organizing of the corporation: *Gulliver v. Roelle*, 100 Ill. 141; *Shufeldt v. Curver*, 8

Ill. App. 545. Such questions must evidently be decided upon a reading of the entire act.

It has been stated *ante*, under the division, "Who are Stockholders Liable to Creditors for Unpaid Subscriptions," that stockholders may become such either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders. But it is not necessary, in an action to enforce the individual liability of stockholders, for the plaintiff to state the particular manner in which the defendants acquired their stock. The averment that they were stockholders is sufficient: *Overmyer v. Cannon*, 82 Ind. 457. If all the capital stock of a corporation is subscribed for and taken at the time the articles of incorporation are filed, no subsequent subscribers, by merely writing their names in the corporation-book, and affixing a number of shares to their respective names, can acquire a right to any shares of stock, or become by such act stockholders of the corporation, and liable as such for its debts: *Lathrop v. Kneeland*, 46 Barb. 432. Plainly, one who never accepts, but refuses to accept, any stock in a corporation is not a stockholder, even though the secretary enters his name in the books as such: *Mudgett v. Horrel*, 33 Cal. 25. So a mere charge of shares of stock to a certain person made upon the stock-book of a corporation, without some evidence that such person admitted the charge to have been correctly made, or sanctioned the same, cannot make him the owner thereof, so as to render him individually liable to creditors of the corporation: *Fowler v. Ludwig*, 34 Me. 455, 459; but if a person named as a member in the certificate required by an act relating to corporations to be made out, acknowledged, and recorded, and, in the charter obtained thereunder, afterwards acts as a member, or does not disavow the relation as soon as he discovers the use made of his name, he cannot evade his liability as a member under the act, merely by showing that he was not in fact a subscriber, and never paid in any stock: *McIlrose v. Wheeler*, 45 Pa. St. 32. Mere irregularities in becoming a stockholder, however, cannot avail him as a defense to his statutory liability, if the corporation had waived the irregularities, and recognized him as a legal stockholder: *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576. Where executors, without authority, made an investment in the stock of a corporation, the estate cannot be held liable as a stockholder for corporate debts: *Diven v. Lee*, 36 N. Y. 302. But one who permits himself to be represented on the books of a corporation as a stockholder, and holds an office to which no one but a stockholder is eligible, cannot escape responsibility for the debts of the company by showing that the stock standing in his name was transferred to him simply to enable him to become an officer of the company: *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319; nor is it any defense to an action by creditors of a corporation against subscribers to its stock, that the defendants subscribed as agents of the corporation, which it was to hold and sell at pleasure for its benefit: *Allibone v. Hager*, 46 Pa. St. 48. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution, under the statutes of Missouri, against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability: *Bray's Adm'r v. Seligman's Adm'r*, 75 Mo. 31. "Each member of a partnership is liable for the indebtedness of the firm."

As in the case of creditors seeking to compel the payment by stockholders of unpaid subscriptions, so in proceedings by creditors to enforce the statutory personal liability of share-holders for the debts of the corporation, it is settled that a subscriber for shares is responsible as a stockholder, although

no certificate has been issued to him: *Mitchell v. Beckman*, 64 Cal. 117; *Corwith v. Culver*, 69 Ill. 502; *Chaffin v. Cummings*, 37 Me. 76, 83; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385, 395; 111 Id. 200; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Spear v. Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Burr v. Wilcox*, 22 N. Y. 551; *Wheeler v. Millar*, 90 Id. 353; note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96; note to *Freeland v. McCullough*, 43 Id. 697; Cook on Stock and Stockholders, sec. 192; Thompson's Liability of Stockholders, sec. 106; and although the stock has not even been divided into shares: *Hawes v. Anglo-Saxon Petroleum Co.*, *supra*; so where a savings bank is converted into a national bank, neither the rights nor the liabilities of the stockholders are affected by the mere omission to issue a new form of stock certificate to them: *Keyser v. Hitz*, 2 Mackey, 473. Nor, of course, is the liability of the subscriber affected by the fact that he has not paid for his stock: *Mitchell v. Beckman*, 64 Cal. 117; *Chaffin v. Cummings*, 37 Me. 76, 83; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Spear v. Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Wheeler v. Millar*, 90 N. Y. 353; note to *Freeland v. McCullough*, 43 Am. Dec. 697.

Transfer — Stockholders when Debt was Contracted or Action Brought. — Where the stock has been transferred, the question of the party liable has been much disputed. If the charter or other statute simply provides that "the stockholders" shall be personally liable for the debts of the corporation, then, according to a respectable line of cases, only those who were stockholders at the time the debt was contracted, and not those who became such afterwards, are liable: *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie Galena Co.*, 9 Paige, 598; 38 Am. Dec. 569; *Harger v. McCullough*, 2 Denio, 119, 122; *Tracy v. Yates*, 18 Barb. 152; *Phillips v. Therasson*, 11 Hun, 141; *Williams v. Hanna*, 40 Ind. 535; *Chesley v. Pierce*, 32 N. H. 388; *Larrabee v. Baldwin*, 35 Cal. 155; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Id. 492; and see *Fleeson v. Savage S. M. Co.*, 3 Nev. 157; *Windham Provident Inst. for Savings v. Sprague*, 43 Vt. 502; Cal. Civ. Code, sec. 322; but compare *Freeland v. McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *McCullough v. Moss*, 5 Denio, 567; *Sayles v. Bates*, 15 R. I. 342; *Root v. Sinnock*, 120 Ill. 350; 60 Am. Rep. 558. So where the charter of a banking corporation provided that if the corporation should refuse or neglect to pay its bills on demand, "the original stockholders, their successors, assigns, and the members of the said corporation," should, in their private capacities, be jointly and severally liable to the holder, it was held that only such of the original stockholders, their successors and assigns, as were members of the corporation when the payment of the bills were refused are liable: *Bond v. Appleton*, 8 Mass. 472; 5 Am. Dec. 111. The reasons for this rule are stated by Bronson, J., in the leading case of *Moss v. Oakley*, *supra*, as follows: "A man who purchases stock and comes into a corporation after it has been engaged in business may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder, he can know something about the extent of obligation contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns; and as to those who may deal with the corporation, they bestow their labor or part with their property on the credit of those who are known to be stockholders"; and again, by Worden, J., in *Williams v. Hanna*, *supra*: "The holder of stock in a corporation has a voice in conducting the affairs of the corporation, so far, at least, as the selection of its officers is concerned, and has the means of knowing the situation of its affairs and business, and he should not be permitted to avoid his liability for the debts of the corporation by transferring

his stock to another person. On the other hand, the purchaser of stock who has previously had no connection with the corporation has not the means of knowing very definitely the amount of debts owed by the corporation. He may know the market value of the stock, but this furnishes no very safe criterion by which to determine the amount of indebtedness. The creditor, if he looks to the individual liability of the stockholders at all, looks to those who are stockholders at the time he lends his credit, and to those he should be content to look for the collection of his debt."

According to this view, it results that a stockholder cannot relieve himself from liability for debts already incurred by a transfer of his stock: See *Wehman v. Reakirt*, 1 Cin. Sup. Ct. 230, 237; *Brown v. Hitchcock*, 36 Ohio St. 667; but decided under a different theory; but for debts contracted by the company after he parts with his stock, he is not liable: *Matthews v. Albert*, 24 Md. 527. The complaint or declaration must show that the defendant was a stockholder when the debt was contracted: *Young v. New York etc. Steamship Co.*, 10 Abb. Pr. 229; 15 Id. 69; *Weber v. Fickey*, 47 Md. 196. But where the act under which a corporation was formed provided that the stockholders should be liable to the creditors of the company for all debts made by it, a person who was not a stockholder at the time a contract was made is liable for installments falling due thereunder after he became and while he continued to be a stockholder: *McMaster v. Davidson*, 29 Hun, 542; and where a statute provided that a retiring member of a corporation shall be liable only for a "debt" contracted by it while he was a member, since rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the land, no action can be maintained against a stockholder of a corporation which had leased certain premises for the rent of a quarter which commenced after he sold his stock, although the lease was executed before such sale: *Bordman v. Osborn*, 23 Pick. 295; and since a debt is merged in a judgment recovered thereon, a stockholder of a corporation, who had ceased to be a member thereof prior to the rendition of a judgment against the corporation, cannot be summoned, under the Massachusetts statute, in an action upon the judgment against the corporation, although he was liable on the original debt, having been a stockholder when the debt was contracted: *Handrahan v. Cheshire Iron Works*, 4 Allen, 396; *Mason v. Cheshire Iron Works*, 4 Id. 398, 399. So when the debt of a corporation is settled by its negotiable note, and that note, when due, is taken up by another note, the original liability being extinguished, in the absence of anything to the contrary, the date of the second note must be treated as the time when the indebtedness accrued, so far as relates to the liability of the stockholders: *Milliken v. Whitehouse*, 49 Me. 527; see also *Wheeler v. Faurot*, 37 Ohio St. 26.

Under some charters and general statutes, on the other hand, the time when the debt was contracted is not the criterion by which to determine who are liable as stockholders therefor. Thus, in an early case in Connecticut, it was held that where the charter of a corporation provided that "the persons and property of the members of said corporation shall, at all times, be liable for all debts due by said corporation," persons who were members at the time the debt was contracted, but had transferred their stock before the commencement of the action, were not liable: *President etc. of Middleton Bank v. Magill*, 5 Conn. 28; compare *Deming v. Bull*, 10 Id. 409; and where a statute under which a corporation was formed provided that the stockholders "shall be individually responsible, to the amount of their respective shares of stock, for all its indebtednesses and liabilities of every kind," it was decided that it

was not the stockholders at the time the debt accrued, but the stockholders at the time the action is commenced, who were individually responsible: *Cleveland v. Burnham*, 55 Wis. 598; but these cases are at variance with the numerous others cited *ante*. If, however, it is provided, as in an early statute of Massachusetts (act of 1808, c. 65, sec. 6), that an execution issued against a manufacturing corporation, if not satisfied within fourteen days after demand made upon the president, treasurer, or clerk of such corporation, may be levied upon the body or estate of any member or members, there is more reason in holding that this must be understood to be such as were members at the time of the commencement of the action: *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. 371, 372; and therefore, if a member died before the commencement of the action, the execution could not be levied upon his estate, no proceedings against executors or administrators having been provided: *Id.*; but see *Marcy v. Clark*, 17 Mass. 330, where it is said that the execution might be levied upon him who was a member at the time of the levy; and where a constitutional provision says that "in all cases each stockholder shall be individually liable" in a certain amount for the debts of the corporation, and a statute under it enacts that "if any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders" to the extent of such amount, the liability attaches to those who are actual stockholders when the execution is issued, and not to those who were stockholders when the debt was contracted, and who have transferred their stock in good faith to responsible parties: *McClaren v. Franciscus*, 43 Mo. 452; but it is held that, under these provisions, the liability of a stockholder is measured by the number of shares held by him at the date of the return of the execution against the corporation *nulla bona*, and not by the number he held when the motion for execution against him, as further required to be made by the statute, was filed: *Skvinka v. Allen*, 76 Mo. 384, reversing, in this particular, 7 Mo. App. 384. So where a statute of Maine (1836, c. 200) provided that "in case of deficiency of attachable corporate property or estate, the individual property, rights, and credits of any stockholder shall be liable to the amount of his stock for all debts of the corporation contracted prior to the transfer thereof for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation, in any suit commenced within the year aforesaid," a stockholder may be liable, although the debt was contracted before he became such: *Longley v. Little*, 26 Me. 162; and where the charter of a corporation provided that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer," the provision has reference to the continuance of the liability, and not to the time within which an action shall be instituted, and a stockholder is plainly liable for debts incurred while a member, and for those incurred for three months after he gives notice of the transfer of his stock: *Fuller v. Ledden*, 87 Ill. 310; *Hull v. Burtis*, 90 Id. 213; so, also, where the charter of a bank declared that no stockholder should be relieved from personal liability for the ultimate redemption of bills and notes issued by the bank by the sale of his stock until he shall have caused to be given sixty days' notice of said sale in some public gazette of the state, and in case of the failure of the bank, all the stockholders who may have sold their stock at any time within six months prior to said failure shall be liable in the same manner as if they had not sold their stock, all the stockholders who have given the required notice

are exempt, unless a failure occur within six months thereafter, and all the other stockholders are liable, whether they have transferred their stock or not: *Lane v. Morris*, 8 Ga. 468; *Thornton v. Lane*, 11 Id. 459; under the English companies act of 1832, also, past members remain liable to creditors for a limited period of time.

It has also been held that certain acts of incorporation and other statutes impose a liability for the debts of the corporation upon both stockholders who were such when the debts were contracted and stockholders who are such when the action is brought. Thus it is held that where a statute provides that "all members" or "all stockholders," shall be individually liable, those who were such when the debt was contracted, and also those who are such when the action is brought, are liable: *Curtis v. Harlow*, 12 Met. 3; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing etc. Co.*, 15 Gray, 216; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Id. 26; *Bonewitz v. Van Wert County Bank*, 41 Id. 78; *Mason v. Alexander*, 44 Id. 318, 338; but see *Reeder v. Maranda*, 66 Ind. 485; the courts finding this interpretation in the use of the word "all" by the legislature; and the same result has been reached in a few cases where the charters or statutes simply provided that "the members" or "the stockholders" should be liable: *Sayles v. Bates*, 15 R. I. 342; *Freeland v. McCullough*, 1 Denio, 414, 425; 43 Am. Dec. 685; *Root v. Sinnock*, 120 Ill. 350; 60 Am. Rep. 558; but see *supra*, the many contrary cases. It is evident, according to this ruling, that a stockholder is not relieved from liability for debts of the corporation incurred while he was such by a subsequent transfer of his stock: *Brown v. Hitchcock*, 36 Ohio St. 667; *Mason v. Alexander*, 44 Id. 318, 338; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. 230, 237; but he is not liable for debts contracted before he became a stockholder, if his membership ceased before the debts became payable and action brought: *Holyoke Bank v. Burnham*, 11 Cush. 183; *Sayles v. Bates*, 15 R. I. 342; note to *Prince v. Lynch*, 99 Am. Dec. 434; so the liability of stockholders for debts of the corporation incurred during their ownership of stock for which the promissory notes of the corporation were given, is discharged by the cancellation of such notes and the execution of new notes in payment of the debt, after the stockholders ceased to be such: *Wheeler v. Faurot*, 37 Ohio St. 26; and see *Milliken v. Whitehouse*, 49 Me. 527. And while it is thus held that stockholders who were such when a debt was contracted, and those who are such when action is brought, are liable, the extent of the liability is not increased, whether the stockholder first liable retained the stock or transferred it, and the successive assignees or holders, by accepting the stock, and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock: *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Id. 26. As to when debts are to be regarded as contracted, it was held that when debts of a corporation were paid with the proceeds of bonds issued by the corporation, the debts represented by the bonds were contracted as and when the bonds were issued: *Sayles v. Bates*, 15 R. I. 342.

Each of these three diverging views as to the liability of stockholders in case of a transfer of stock has a decided argument in its favor. The reasons in support of the first view, holding only those liable who were stockholders when the debt was contracted, have already been given. The subsequent transferees are here the favored parties; while the second rule, which confines the liability to those who are stockholders when the action is commenced, favors the prior holders; and the third decidedly favors the creditors, in giving them a recourse, not only against those who were stockholders

when the debt was contracted, but those who are such when the liability is sought to be enforced. The opinion of Mr. Morawetz, who favors liability in point of time when the action is commenced, is worthy of quotation: "If it were held that each creditor of the corporation may pursue these particular persons who happened to be share-holders when the indebtedness arose, whether he has continued to be a share-holder or not, it would often become a matter of extreme difficulty, amounting to a practical impossibility, to adjust the rights of the past and present share-holders; and there would be no object to be gained by adopting such a rule. The substantial rights of creditors are protected by the rule which invalidates a transfer as to creditors unless a solvent transferee is substituted in place of the transferrer; moreover, it cannot fairly be claimed that a person dealing with a corporation, organized on the usual plan in the United States, deals on the faith of the surety offered by the individuals who happen to be share-holders at the time": 2 Morawetz on Corporations, sec. 888. However, the question is one of construction and interpretation; and sometimes all difficulty is obviated by an express provision of the charter or statute which leaves no doubt as to the legislative intent.

Transfer, when Effective to Relieve from Liability.—Since a transfer of stock may, in the absence of anything to the contrary contained in the charter or in some general statute, operate to relieve the holder from debts thereafter incurred, or even, under some of the foregoing authorities, for existing debts, it becomes material to inquire under what circumstances the transfer is effective for this purpose. As a general rule, those who appear upon the books of the corporation at the time the liability attaches are primarily liable. While, therefore, a transfer may be good as between the parties themselves, unless it be consummated in the form required by the charter or by-laws of the corporation, by a change upon books of the company, the transferrer who still appears to be a stockholder when the liability attaches is liable: *Shellington v. Howland*, 53 N. Y. 371; *Worrall v. Judson*, 5 Barb. 210; *McClaren v. Franciscus*, 43 Mo. 452, 468; *Pullis v. Franciscus*, 43 Id. 469; *A. Wight Co. v. Steinkemeyer*, 6 Mo. App. 574; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; 17 Id. 308; *Richmond v. Irons*, 121 U. S. 27; but if no record of the transfer is required by the charter or by-laws, it is held that a stockholder may be relieved from liability by a transfer of his stock, although the transfer was never registered: *Sayles v. Bates*, 15 R. I. 342. In *Whitney v. Butler*, 118 U. S. 655, it was, however, held that the responsibility of the seller of stock of a national bank ceased upon his surrender of the certificate to the bank, and the delivery to its president of a power of attorney sufficient to effect a transfer of the stock on the books of the bank, although no formal transfer had been made. As to whether the purchaser of stock can be held liable as a stockholder before a formal transfer to him upon the books of the corporation, see *Cleveland v. Burnham*, 64 Wis. 347, in which the liability seems to have been denied. Clearly, where stock is transferred by one person to another, without the knowledge or consent of the latter, such transferee cannot be held liable as a stockholder unless he acquiesced in the transfer after notice thereof: *Robinson v. Lane*, 19 Ga. 337. Where shares of stock, with other property, were allotted to a widow out of her husband's estate, and an order of distribution made, and the estate settled, she having assented to the order, and accepted a part of the property so allotted, it was held that she became a stockholder, and liable as such to a creditor of the corporation: *Coquard v. Marshall*, 14 Mo. App. 80; and the same result was reached where an executrix, who inventoried stock as be-

longing to the estate, received the stock as residuary legatee, and collected dividends thereon, either as executrix or legatee: *Roeder v. Knobel*, 12 Id. 587; although in both cases no transfer had been made on the books of the company, and although the creditors failed in both to prove up their claims against the decedents' estates; but in *Simmons v. Ellis*, 17 Id. 470, a distributee of the estate of a deceased stockholder, no portion of the stock having been distributed, was held not liable.

Stock Held as Collateral Security, or in Representative Capacity. — In accordance with the foregoing general rule, one to whom stock has been transferred upon the books of a corporation, and who appears thereon as a stockholder when the liability attaches, is liable as a stockholder, although the transfer was made as collateral security: *National Bank v. Case*, 99 U. S. 628; *Bowden v. Farmers' etc. Bank*, 1 Hughes, 307; *Moore v. Jones*, 3 Woods, 53; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Met. 524, 545; *Grew v. Breed*, 10 Id. 569, 576; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing etc. Co.*, 15 Gray, 216; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *In re Empire City Nat. Bank*, 18 Id. 119, 223; *Aultman's Appeal*, 98 Pa. St. 505; *Erskine v. Lowenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; Thompson's Liability of Stockholders, sec. 223; Taylor on Corporations, sec. 741; and this, although the debt to secure which the stock was transferred is in fact paid: *Bowden v. Farmers' etc. Bank*, *Johnson v. Somerville Dyeing etc. Co.*, *Erskine v. Lowenstein*, *supra*. The same rule prevails in suits by creditors of corporations, or in their behalf, to compel the payment by stockholders of unpaid subscriptions: See *supra*; *Pullman v. Upton*, 96 U. S. 328. But, in accordance with the same rule, a holder of stock as collateral security, to whom the stock has not been transferred upon the books of the corporation, is not liable as a stockholder: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. The general rule likewise applies when the stock is held as trustee for others: *Grew v. Breed*, 10 Met. 569, 576; and see, to the same effect, *supra*, *Mann v. Currie*, 2 Barb. 294, and *McKim v. Glenn*, 66 Md. 479, under the general liability of stockholders to creditors for unpaid subscriptions; although, it has been held, the trust appeared upon the books of the corporation: *Grew v. Breed*, *supra*. Sometimes, however, statutes provide that persons holding stock in a representative capacity, such as trustees, executors, and guardians, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the person or estate represented, or the pledgor, as the case may be, shall be liable. Under such a statute, it has been held that where one was sought to be individually charged as a stockholder, evidence was proper, upon his part, to show that an assignment of stock, absolute upon its face, was in fact given and held as collateral security only: *McMahon v. Macy*, 51 N. Y. 155; *Burgess v. Seligman*, 107 U. S. 20; *Union Savings Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. But one who subscribes for stock in his own name, for the benefit of another, is held not to be exempted from individual liability as a trustee under the New York act of 1848: *Storer v. Flack*, 30 Id. 64. It was at one time held in Missouri, under such a statutory exception, that the statute had no application to stock which was not issued in the usual course of business, and therefore it did not exempt from liability persons holding as collateral security unsubscribed stock issued to them by a corporation: *Griswold v. Seligman*, 72 Mo. 110; *Fisher v. Seligman*, 75 Id. 13, reversing 7 Mo. App. 383; but these cases have been overruled, and it is now held that persons to whom a corporation itself pledges its stock are within the exemption:

Burgess v. Seligman, 107 U. S. 20; *Union Savings Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776; and under these latter rulings, the act of voting the stock, by the persons so holding it, will not make them absolute stockholders, either as between themselves and the corporation, or as between themselves and corporate creditors: Compare *Fisher v. Seligman*, *supra*.

Transfer must be Bona Fide. — In order, in any event, that a stockholder may relieve himself from individual liability to creditors of a corporation for its debts, the transfer must be *bona fide*. A transfer of stock to an irresponsible person, for the purpose of escaping personal liability to creditors, is, as to them, inoperative and void: *Bowden v. Johnson*, 107 U. S. 251; *Bowden v. Santos*, 1 Hughes, 158; *Central Agricultural etc. Ass'n v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Paine v. Stewart*, 33 Conn. 517; *Marcy v. Clark*, 17 Mass. 330; *McClaren v. Franciscus*, 43 Mo. 452; *Provident Savings Inst. v. Jackson Place Skating etc. Rink*, 52 Id. 557; *Veiller v. Brown*, 18 Hun, 571; *Aultman's Appeal*, 98 Pa. St. 505; *Dauchy v. Brown*, 24 Vt. 197; *Cook on Stock and Stockholders*, sec. 265; and see also, to the same effect, under the general liability of stockholders for unpaid subscriptions, *Rider v. Morrison*, 54 Md. 429, 444; *Nathan v. Whitlock*, 9 Paige, 152; *Mandion v. Firemen's Ins. Co.*, 11 Rob. (La.) 177; but if the transfer be made honestly, and without any intention of defeating the creditors, the mere fact that the purchaser was insolvent at the time is not sufficient to hold the transferrer still liable for the debts: *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; the question is, whether or not the transfer was fraudulent; so a husband who in good faith assigns to his wife, who is capable by statute of becoming a stockholder, his stock in a solvent corporation is relieved from further liability as a stockholder: *Simmons v. Dent*, 16 Mo. App. 288. On the same principle a purchaser of stock who has it transferred upon the books of the corporation from the seller to an irresponsible third person, in order to avoid the individual liability of a stockholder, is nevertheless liable so long as he remains the actual owner of the stock: *Davis v. Stevens*, 17 Blatchf. 259; *Case v. Small*, 4 Woods, 78; 10 Fed. Rep. 722; and one who subscribes to stock in the names of infants, for the purpose of avoiding individual responsibility, is, notwithstanding, responsible: *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Roman v. Fry*, 5 Id. 634. But it is nevertheless held that a pledgee of stock in a national bank who, in good faith and with no fraudulent intent, takes the stock in the name of an irresponsible trustee, for the avowed purpose of avoiding liability as a share-holder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure: *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; and a sale of the stock, under an authority conferred by the terms of a pledge, is not obnoxious to the charge of having been done in fraud of creditors, although its leading object and purpose may have been, on the part of the pledgees, to avoid liability under the national banking act: *Magruder v. Colston*, 44 Md. 349; so a retransfer on the books of the corporation of shares of stock by the vendee to the vendor, in pursuance of an agreement to do so, made contemporaneously with the original transfer from the vendor to the vendee, terminates the vendee's individual liability as a stockholder for the debts of the company, although made for that very purpose: *Holyoke Bank v. Burnham*, 11 Cush. 183.

Stock-books as Evidence of Ownership. — The stock-books of a corporation are generally held to be *prima facie* evidence of the ownership of stock in those whose names appear thereon as stockholders for the purpose of charging them individually with the corporate debts: *Hoagland v. Bell*, 36 Barb. 57; *Thornton v. Lane*, 11 Ga. 459; compare *Stanley v. Stanley*, 26 Me. 191;

and see, to the same effect, in proceedings to charge stockholders with unpaid subscriptions, *Turnbull v. Payson*, 95 U. S. 418; *Webster v. Upton*, 91 Id. 65, 72; *Glenn v. Springs*, 26 Fed. Rep. 494; but in *Mudgett v. Horrell*, 33 Cal. 25, it was held that where a statute provides that the stock-book "shall be presumptive evidence of the facts therein stated in any action or proceeding against the company, or against any one or more stockholders," the book is nevertheless not admissible in evidence in an action by a creditor of the corporation against one claimed to be a stockholder, for the purpose of proving that he is such; and in fixing the ownership of stock, it is not competent to give in evidence the declarations of the officers and agents of the company for that purpose: *Robinson v. Lane*, 19 Ga. 337.

Bill for Discovery of Stockholders. — A bill for discovery of the individual members of a corporation made liable by statute for its debts has been held sustainable by the creditors: *President etc. of Middletown Bank v. Russ*, 3 Conn. 145; *Fogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147; probably an unnecessary and obsolete proceeding everywhere at the present day; and, to the same effect, in proceedings by creditors to reach unpaid subscriptions, see *Morgan v. New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; *Miers v. Zanesville etc. Turnpike Co.*, 11 Ohio, 273.

Married Women are Subject to Statutory Liability of Stockholders for Corporate Debts. — Since a married woman may become the owner of stock of a corporation, and since the liability of stockholders for the debts of the corporation is a statutory liability, and incident to the ownership of stock, it is settled that a married woman is subject to such liability: *Sayles v. Bates*, 15 R. I. 342; *Keyser v. Hitz*, 2 Mackey, 473; *Anderson v. Line*, 14 Fed. Rep. 405; *In re Reciprocity Bank*, 22 N. Y. 9; *Simmons v. Dent*, 12 Mo. App. 288.

LEGISLATIVE POWER TO IMPOSE, REPEAL, OR MODIFY STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — As has already been stated, a statute, or an ordinance of a state constitution, which repeals a former statute or constitutional provision making the stockholders of a corporation individually liable for its debts, or which reduces the extent of the liability by amendment, is, as respects creditors whose debts were contracted prior to its passage, in derogation of the constitution of the United States, and void: *Thompson's Liability of Stockholders*, sec. 71; *Hawthorne v. Calef*, 2 Wall. 10; *Provident Savings Inst. v. Jackson Place Skating etc. Rink*, 52 Mo. 552; *Jermain's Adm'r v. Benton*, 79 Id. 148; *St. Louis Railway Supplies Co. v. Harbine*, 2 Mo. App. 134; compare *Robinson v. Bank of Darien*, 18 Ga. 65; although the holder of evidences of debt against the corporation became such after the modification: *Blakeman v. Benton*, 9 Mo. App. 107; but a creditor may waive his right to claim the constitutional protection: *Van Hook v. Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; and where the individual liability imposed by a constitution was lessened by an amendment, a stockholder who becomes such after the amendment is not liable, according to the original form of the provision, for debts owing by the corporation prior to the amendment: *Ochiltree v. Iowa Railroad Contracting Co.*, 54 Mo. 113; affirmed in *Ochiltree v. Railroad Co.*, 21 Wall. 240. But a statute which affects the remedy of the creditor merely is not invalid: *Thompson's Liability of Stockholders*, sec. 73; *Merchants' Ins. Co. v. Hill*, 86 Mo. 466, affirming 12 Mo. App. 148; *Cummings v. Maxwell*, 45 Me. 190; *Coffin v. Rich*, 45 Id. 507; 71 Am. Dec. 559; *Story v. Furman*, 25 N. Y. 214; *Penniman, Petitioner*, 11 R. I. 333; compare *Walker v. Crain*, 17 Barb. 119, 129.

As far as the power of the legislature to impose an individual liability upon the stockholders of an existing corporation is concerned, there is no doubt

that if the right has been reserved, it may be exercised: *Weidenger v. Spruance*, 101 Ill. 278; *In re Empire City Bank*, 18 N. Y. 119; *Bailey v. Hollister*, 26 Id. 112; and where the charter of a corporation provided "that no stockholder of the corporation hereby created shall be liable, in his individual capacity, for any debt or liability of said company beyond the amount of stock held by him," the section is one of limitation and restriction only, and a stockholder cannot claim that a subsequent statute fixing the liability to that amount, and prescribing a mode of enforcing it, impaired the obligation of his contract: *Gridley v. Barnes*, 103 Ill. 211; *Arenz v. Weir*, 89 Id. 25-28. But it has been held, in cases where there was no such reservation, that a statute which makes the stockholders of an existing corporation liable for its future debts was a valid exercise of the legislative power: *Gray v. Coffin*, 9 Cush. 192, 200; *Stanley v. Stanley*, 26 Me. 191; *Coffin v. Rich*, 45 Id. 507; 71 Am. Dec. 559; but it would be otherwise if the charter imposed a liability, and provided that the charter should not be altered or amended except by the consent of a majority of the stockholders, and subsequently a greater liability was imposed, to which the stockholders never assented: *Steacy v. Little Rock etc. R. R.*, 5 Dill. 348. And in Ohio it was held that a statute which authorized assessments against stockholders, who have paid the full amount of their subscriptions, without their consent, was a law impairing the validity of the stockholders' contract with the company, and therefore unconstitutional: *Ireland v. Palestine etc. Turnpike Co.*, 19 Ohio St. 369; but Mr. Thompson "cannot avoid thinking that this case is based on an erroneous premise, namely, that for all purposes a corporation is a distinct person from the members; whereas, the sound doctrine is, that they are distinct only for certain purposes of convenience in the transaction of business, and in the administration of justice": Thompson's Liability of Stockholders, sec. 67.

STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS, WHETHER MAY BE ENFORCED OUTSIDE OF STATE IN WHICH CORPORATION IS ORGANIZED. — It has been heretofore seen that certain cases maintain that the judgment against the corporation which creditors are required to obtain before proceeding in equity to compel stockholders to pay their unpaid subscriptions must be a judgment of the state in which the creditor's suit is commenced: *Patterson v. Lynde*, 112 Ill. 196, 204; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; which means a denial of the right to file a creditor's bill outside of the state in which the corporation is formed, — the court having no jurisdiction over foreign corporations; but that a receiver or an assignee for the benefit of creditors may maintain an action at law to recover unpaid subscriptions against a stockholder in another state: *Patterson v. Lynde*, 112 Ill. 196, 206; *Dayton v. Borst*, 31 N. Y. 435, 438; *Glenn v. Williams*, 60 Md. 93. It has also been seen that the usual statutory liability of stockholders for the debts of the corporation is not in the nature of a penalty, but of a contract, and that it may therefore be enforced in a state other than that in which the corporation was created: *Flash v. Conn*, 16 Fla. 428; 26 Am. Rep. 721; 109 U. S. 371; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Howell v. Manglesdorf*, 33 Kan. 194, 199; *Hodgson v. Cheever*, 8 Mo. App. 318; *Aultman's Appeal*, 98 Pa. St. 505; and see *Woods v. Wicks*, 7 Lea, 40; *Drinkwater v. Portland Marine R'y*, 18 Me. 35; differing from the case where a liability for debts is imposed upon officers of a corporation, and sometimes upon the stockholders also, for the failure or neglect to comply with some duty imposed: See Cook on Stock and Stockholders, sec. 218; Thompson's Liability of Stockholders, sec. 82; but it is equally well settled that if a special remedy is given creditors against the stockholders, it cannot be en-

forced in another state: *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 Id. 97; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; even if the remedy provided be a suit in equity, because of the inherent difficulties of first obtaining a judgment against the corporation, and next making the corporation a party to the bill: *Erickson v. Nesmith*, 4 Allen, 233; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; and see *Erickson v. Nesmith*, 15 Gray, 221; see also *Cook on Stock and Stockholders*, sec. 219. So where an act under which a corporation is formed requires, as a condition precedent to the bringing of an action against a stockholder to enforce his individual liability, that judgment shall be recovered against the corporation, and execution issued and returned unsatisfied, a judgment in and an execution issued out of a court of the state in which the corporation exists are contemplated: *Rocky Mountains Nat. Bank v. Bliss*, 89 N. Y. 338; *Dean v. Mace*, 19 Hun, 391; *Viele v. Wells*, 9 Abb. N. C. 277.

SURVIVAL OF STATUTORY LIABILITY FOR CORPORATE DEBTS AGAINST DECEASED STOCKHOLDER'S PERSONAL REPRESENTATIVES.—Since the general individual liability of stockholders for the corporate debts is a contract liability, and not a penalty, it survives as against the personal representatives of a deceased stockholder: *Richmond v. Irons*, 121 U. S. 27; *Irons v. Manufacturers' Nat. Bank*, 21 Fed. Rep. 197, 198; *Manville v. Edgar*, 8 Mo. App. 324; and see *Chase v. Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; compare *Diversey v. Smith*, 103 Ill. 378; but as to whether the peculiar remedy provided against stockholders in Massachusetts and Missouri can be enforced against the estate of a deceased stockholder, see *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. 371, 372; *Dane v. Dane Mfg. Co.*, 14 Gray, 488; *Cummings v. Wright*, 11 Mo. App. 348; *Donnelly v. Hodyson*, 13 Id. 15; although it may be that if the liability is joint, upon the death of a stockholder the liability at law remains only against the survivors: *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154; 75 Am. De. 688; but the creditor may proceed against the estate of the deceased stockholder in equity: Id. If claims against decedents are required to be presented to the personal representatives for allowance, the claim against a deceased stockholder must be so presented: *Davidson v. Rankin*, 34 Cal. 503; compare *Roeder v. Knobel*, 12 Mo. App. 587; *Coquard v. Marshall*, 14 Id. 80; but unpaid capital of a corporation being a trust fund for the benefit of creditors, it is properly no part of a deceased stockholder's estate, and therefore a creditor of the corporation can maintain a suit against the stockholder's personal representatives to compel the payment of his unpaid subscription without presenting any demand to the representatives for allowance: *Thompson v. Reno Sav. Bank*, 19 Nev. 242, *post*, p. 883.

PRIORITY OF CREDITOR FIRST SUING STOCKHOLDER TO ENFORCE STATUTORY LIABILITY FOR CORPORATE DEBTS.—Where separate actions by creditors of corporations are permitted to enforce the statutory liability of stockholders for the corporate debts, it is a general rule that the creditor first suing thereby acquires a priority over other creditors with respect to the stockholder sued: *Cook on Stock and Stockholders*, sec. 228; *Thompson's Liability of Stockholders*, sec. 424; *Cole v. Butler*, 43 Me. 401; *Ingalls v. Cole*, 47 Id. 530, 541; *Jones v. Wellberger*, 42 Ga. 575; *Lowry v. Parsons*, 52 Id. 356; *Thebus v. Smiley*, 110 Ill. 316; and therefore a stockholder, after notice of such a suit, cannot defeat the suing creditor by paying the claims of other creditors to the extent of his liability: *Jones v. Wellberger*, *Cole v. Butler*, *Thebus v. Smiley*, *supra*; but in *City of Chicago v. Hall*, 103 Ill. 342, it was held that the mere institution of a suit at law by one of several creditors of

an insolvent bank to enforce the personal liability of a stockholder for the payment of his claim did not give him a prior right or lien on the fund, when collected, to the exclusion of all other creditors of the bank; and the fact that such creditor was prevented from obtaining final judgment in his suit by injunction on bill filed by other creditors made no difference; and in *State Savings Ass'n v. Kellogg*, 63 Mo. 540, it was also held that the institution of a suit against a stockholder for a corporate debt did not operate as a lien upon his liability, so as to hold him therefor against a senior judgment and execution obtained in another action commenced later; and see also *Marks v. Mulhall*, 13 Mo. App. 590; *Bittner v. Lee*, 25 Id. 559. But "when the proceeding to enforce the statutory liability is in equity, there can be, upon plain principles, no priority among creditors": Cook on Stock and Stockholders, sec. 228.

ACTIONS BY STOCKHOLDERS AGAINST OTHER STOCKHOLDERS—CONTRIBUTION.—It has already been observed that stockholders made individually liable for corporate debts are considered partners to such an extent that one stockholder who is also a creditor of the corporation cannot maintain an action at law against other stockholders: *Bailey v. Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Beers v. Waterbury*, 8 Bosw. 396, 413; *Richardson v. Abendroth*, 43 Barb. 162; *Clark v. Myers*, 11 Hun, 608; *Thompson v. Meisser*, 108 Ill. 359; *Perkins v. Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works v. Chittenden*, 4 Bosw. 406; and, at all events, even if the rule be not placed on this ground, there are inherent difficulties in the suit at law: See *Mathez v. Neidig*, 2 N. Y. 100, 104; *Garrison v. Howe*, 17 Id. 458, 463. But where a stockholder is thus a creditor, or where he has been compelled to pay more than his share of a debt of the corporation to a creditor, he has a claim for contribution in equity against the other stockholders, who are liable for the debt: *Beers v. Waterbury*, *Clark v. Myers*, *Perkins v. Sanders*, *supra*; *Judson v. Rossie Galena Co.*, 9 Paige, 598, 603; 38 Am. Dec. 569; *Aspinwall v. Torrance*, 1 Lans. 381; *Garrison v. Howe*, 17 N. Y. 458, 463; *Aspinwall v. Sacchi*, 57 Id. 331; *Mathez v. Neidig*, 72 Id. 100, 104; and see *Polk v. Reynolds*, 54 Ind. 449; *Ward v. Polk*, 70 Id. 309; Cook on Stock and Stockholders, sec. 229. He has, however, it is held, no right against another stockholder, under a statute making stockholders liable to creditors of the corporation to an extent equal to their unpaid subscriptions, while his own subscription remains unpaid: *Weber v. Fickey*, 47 Md. 196; *Franklin v. Menown*, 10 Mo. App. 570. So it has been held that a suit in equity for contribution, brought by a member of a corporation who had paid a debt of a corporation, against other members, cannot be maintained until the complainant had first applied and exhausted all property of the corporation: *Gray v. Coffin*, 9 Cush. 192. But in *Smith v. Londoner*, 5 Col. 365, it was decided that where a statute provided that the stockholders of a corporation "shall be severally individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all debts and contracts made by such company," a stockholder, who was also a creditor, but who had paid in full for his stock, and consequently was not individually liable for the debts of the company, might maintain an action at law against another stockholder, and recover to the amount of unpaid stock held by him. As to the right of a stockholder to enforce contribution under special statutes, see *Andrews v. Callender*, 13 Pick. 484; *Thayer v. Union Tool Co.*, 4 Gray, 75; *Potter v. Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43.

If a stockholder himself cannot proceed in a special way, provided by stat-

ute, against other stockholders, one to whom he has assigned his claim for the sole purpose of enforcing such liability stands in no better position: *Thayer v. Union Tool Co.*, 4 Gray, 75; *Potter v. Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; and see also *Richardson v. Abendroth*, 43 Barb. 162.

The liability for contribution is co-extensive with the liability for the debt; and therefore all persons who are so liable are proper contributors: *Sayles v. Bates*, 15 R. I. 342.

STOCKHOLDER'S RIGHT TO SET OFF DEBT DUE HIM BY CORPORATION IN ACTION TO ENFORCE HIS STATUTORY LIABILITY. — It has been heretofore shown that a stockholder cannot set off a debt due him by the corporation in a creditor's suit to compel the payment of his unpaid subscriptions. It would seem that a like rule should obtain in equitable actions against stockholders to enforce their statutory liability, where it is held that the statute creates a fund out of which the creditors are to be paid ratably: See *Cook on Stock and Stockholders*, sec. 227; 2 *Morawetz on Corporations*, sec. 898; also *In re Empire City Bank*, 18 N. Y. 119, 227; *Buchanan v. Meisser*, 105 Ill. 633; *Thompson v. Meisser*, 108 Id. 359; *Thebus v. Smiley*, 110 Id. 316; *Burnap v. Haskins Steam Engine Co.*, 127 Mass. 586; *Matthews v. Albert*, 24 Md. 527; compare *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454; but the cases are far from satisfactory; and in New York, in actions to enforce the liability of stockholders under the act of 1848, by which they are made "severally individually" liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, it is held by recent cases that if the stockholder sued is himself a creditor of the corporation to an amount equal to his statutory liability, he may set up that fact as an equitable defense; but not where the amount of his claim is less than such liability: *Mathez v. Neidig*, 72 N. Y. 100, 105; *Agate v. Sands*, 73 Id. 620; *Wheeler v. Millar*, 90 Id. 353. Thus, says Finch, J., in *Wheeler v. Millar*, *supra*: "If the stockholder sued is himself such creditor to an amount equaling his statutory liability, he has quite as good a right to the fund which is pursued as the pursuer. Indeed, he has the better right, because it is already in his possession, and it would be inequitable to take it from him for the benefit of another creditor who has no superior equity. But the stockholder must be really a creditor of the company. He must stand in a relation to it which in equity and justice is as strong as that of the assailant. . . . But here the facts show that the stockholder is not a creditor when accounts are adjusted, and has no equity against the fund in his hands. He is bound first to pay his own debt to the company, and is in the end not its creditor at all. If, after paying his debt, the company still owed him, to the extent of that balance, he would have an equitable defense. But the balance is the other way. Equitably he is the debtor of the company, with his claim against it extinguished, and has nothing upon which to found an equitable claim against the statutory liability." See also *Remington v. King*, 11 Abb. Pr. 278. In Missouri, in the special statutory proceeding against a stockholder, he is allowed to offset a debt due him from the corporation: *Jerman's Adm'r v. Benton*, 79 Mo. 148; *Webber v. Leighton*, 8 Mo. App. 502; *Merchants' Ins. Co. v. Hill*, 12 Id. 148; but where an unsatisfied judgment in favor of a stockholder and against the corporation has been allowed as a set-off in a former proceeding by another creditor against such stockholder, this cannot avail in a subsequent proceeding against him, such judgment having been in the mean time satisfied: *Simmonds v. Heman*, 17 Id. 444. And in Georgia, applying the principle that a stockholder may reduce or discharge

his proportionate individual liability by payment to one creditor before suit brought by another, it is held that a *bona fide* debt of a stockholder against the corporation may be set off by him in a suit to enforce his liability: *Boyd v. Hall*, 56 Ga. 563.

ESTOPPELS IN ACTIONS TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.—As in the case of creditor's suits to compel the payment of unpaid subscriptions by stockholders, in actions to enforce their statutory liability for the corporate debts, they are estopped from denying that the corporation was legally organized: *Corwith v. Culver*, 69 Ill. 502; *Whelock v. Kost*, 77 Id. 296; *McCarthy v. Lavasche*, 89 Id. 270; 31 Am Rep. 83; *Shaffer v. Moriarity*, 46 Ind. 9; *Hager v. Cleveland*, 36 Md. 476; *Hammoud v. Straus*, 53 Id. 1, 15; *Eaton v. Aspinwall*, 19 N. Y. 119; *Abbott v. Aspinwall*, 26 Id. 202; *Aspinwall v. Sacchi*, 57 Id. 331; *Perkins v. Hatch*, 4 Hun, 137; *McHose v. Wheeler*, 45 Pa. St. 32; *Slocum v. Providence Steam etc. Co.*, 10 R. I. 112; *Keyser v. Hitz*, 2 Mackey, 473; *Casey v. Galli*, 94 U. S. 673; and where an attempt has been made to increase the capital stock of a corporation, stockholders who have voted for the increase, accepted their share of the additional stock, and received dividends thereon, as against creditors are estopped from questioning the validity of the increase to escape their individual liability: *Feeder v. Mudgett*, 95 N. Y. 295.

STATUTE OF LIMITATIONS IN ACTIONS TO ENFORCE STOCKHOLDER'S STATUTORY LIABILITY.—Where the liability of a stockholder is immediate and primary, and not contingent upon obtaining a judgment against the corporation, the statute of limitations plainly begins to run against the stockholder at the same time it begins to run against the corporation: *Cook on Stock and Stockholders*, sec. 227; *Mitchell v. Beckman*, 64 Cal. 117; *Stillphen v. Ware*, 45 Id. 116; and see *Conklin v. Furman*, 57 Barb. 484; 8 Abb. Pr., N. S., 161, affirmed in 48 N. Y. 527; but where a creditor is first obliged to obtain a judgment on his claim against the corporation, and have an execution issued thereon and returned unsatisfied, the statute does not begin to run in favor of a stockholder until the return of the execution: *Cook on Stock and Stockholders*, sec. 227; *Handy v. Draper*, 89 N. Y. 334; and see *Shellington v. Howland*, 53 Id. 371. Where the individual liability of stockholders arose under the charter, "upon failure of the bank," the liability gave at once the right to sue, and consequently the statute began to run at the same time: *Carrol v. Green*, 92 U. S. 509, 511; and see *Godfrey v. Terry*, 97 Id. 171; *Terry v. McLure*, 103 Id. 442.

The liability of the stockholder has been held to be a liability "created by law," within the meaning of a section of the statute of limitations: *Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 15 Pac. Rep. 670 (Cal.); *Hawkins v. Furnace Co.*, 40 Ohio St. 507; and to be a debt grounded upon a "contract without specialty": *Terry v. Calnan*, 13 S. C. 220; *Carrol v. Green*, 92 U. S. 509; and a debt "founded on specialty": *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376; *Bullard v. Bell*, 1 Mason, 243; but not a liability upon a "statute" for a "forfeiture": *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; overruling *Freeland v. McCullough*, 1 Denio, 412; 43 Am. Dec. 685; and holding that the only limitation provided for a suit against a stockholder was six years, within which actions of account, *assumpsit*, or on the case founded on any contract or liability, express or implied, are to be commenced; but see *Lawler v. Burt*, 7 Ohio St. 340; and compare *Gridley v. Barnes*, 103 Ill. 211.

STOCKHOLDER'S DISCHARGE IN BANKRUPTCY AS AFFECTING STATUTORY LIABILITY FOR CORPORATE DEBTS.—A discharge in bankruptcy releases a shareholder of a national bank from his statutory liability to creditors of the bank, where, at the time of his discharge, the claims of the creditors were prov-

able, and not merely contingent: *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; 17 Id. 308. But it is otherwise held, the liability of stockholders for the debts of the corporation is not a "debt" which can be proved against their estates in insolvency: *Kelton v. Phillips*, 3 Met. 61; *Bangs v. Lincoln*, 10 Gray, 600.

STATE v. NEVIN.

[19 NEVADA, 162.]

PUBLIC OFFICERS WHO ARE INTRUSTED WITH PUBLIC FUNDS, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence. Their liability is fixed by their bonds; and the fact that money is stolen from them, without any fault or negligence upon their part, does not release them from liability thereon.

BOND REQUIRING FAITHFUL PERFORMANCE OF OFFICIAL DUTY IS AS BINDING upon the principal and his sureties as if all the statutory duties of the officer were inserted in it.

COUNTY TREASURER IS REQUIRED TO SAFELY KEEP PUBLIC MONEY, by the Compiled Laws of Nevada, and pay it out only as provided by law.

STATE IS NOT COMPELLED TO WAIT UNTIL CLOSE OF COUNTY TREASURER'S TERM OF OFFICE before commencing an action upon his bond, where he admits the defalcation, and claims the right to interpose the defense of a robbery of the funds.

ACTION against the county treasurer and his sureties upon his official bond. The facts are stated in the opinion.

W. E. F. Deal and William Woodburn, for the appellants.

W. H. Davenport, attorney-general, and *J. A. Stephens*, district attorney, for the respondent.

By Court, HAWLEY, J. This action was brought against the county treasurer of Storey County, and the sureties upon his official bonds, to recover an amount of money admitted to be deficient in the accounts of the county treasurer. The answer alleges that the money was forcibly taken by robbers from the treasurer and carried away by irresistible force, "without any fault or negligence or want of reasonable care or diligence in the preservation and care of said sum of money, so that said sum of money was entirely lost to the treasury of said county, and no part thereof has ever been recovered." The district court sustained a demurrer, which was interposed to this answer, upon the ground that the facts stated did not constitute any defense to the cause of action.

Was this ruling of the court correct? The conditions named in the official bonds "is such that if the above-bounden Den-



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HUTZLER *v.* PHILLIPS.

[26 SOUTH CAROLINA, 136.]

Equitable Mortgage.



We take occasion, however, to add, with a view to avoid prejudice, that our decision is based upon the case as now presented, and upon the assumption (in the absence of any allegation to the contrary) that the conveyance to Harriet M. Ketchin is a valid conveyance. Should that conveyance be impeached for fraud or other good ground, a different question, as to the right of appellant to the homestead, would arise, as to which we do not now propose to indicate any opinion.

The judgment of this court is, that the judgment of the circuit court in the case first above mentioned be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced. And the judgment of this court is, that the judgment of the circuit court in the second case above stated be affirmed.

JUDGMENT LIEN DOES NOT ATTACH TO HOMESTEAD while it is held and occupied as such: *Bliss v. Clark*, 89 Am. Dec. 330; *McDonald v. Badger*, 83 Id. 123, note 129; *Cummings v. Long*, 85 Id. 502, and note 504; note to *Blue v. Blue*, 87 Id. 278.

HOMESTEAD RIGHT IS NOT SUBJECT TO JUDGMENT LIENS, and it may be transferred in fee, free from any encumbrance existing at the date of conveyance: *McDonald v. Crandall*, 92 Am. Dec. 112, note 116, 117; *Cummings v. Long*, 85 Id. 502; *Bliss v. Clark*, 89 Id. 330, and note 335; Freeman on Executions, sec. 239.

HOMESTEAD IS NOT GENERALLY SUBJECT TO SALE UNDER EXECUTION: See note to *Blue v. Blue*, 87 Am. Dec. 273, collecting numerous cases; *Riggs v. Sterling*, 1 Am. St. Rep. 554; *McCracken v. Adler*, 2 Id. 340, note 342.

INJUNCTION WILL ISSUE TO PREVENT CLOUD ON TITLE at execution sale: Note to *Carlin v. Hudson*, 62 Am. Dec. 523 et seq.; Freeman on Executions, secs. 438, 439; or equity will remove a cloud so created on a homestead: Note to *Blue v. Blue*, 87 Am. Dec. 273; but in Kentucky the granting of such an injunction is confined by statute to the court which rendered the judgment on which the execution issued: *C. O. & S. R. R. Co. v. Reasor*, 84 Ky. 369.

HUTZLER BROTHERS v. PHILLIPS.

[26 SOUTH CAROLINA, 136.]

EVIDENCE NOT OBJECTIONABLE ON GROUND OF INTEREST. — Conversations of a creditor with a debtor since deceased are admissible in an action by creditors against the heirs of deceased, the witness, and other creditors.

EVIDENCE OF STATEMENTS MADE BY PARTNERS, that certain real estate standing in the name of their copartner was partnership property, is inadmissible as against an individual mortgage creditor of such copartner, when such statements were not brought home to the mortgagee at the time of the execution of the mortgage.

EQUITABLE MORTGAGE. — WHERE TITLE DEEDS ARE DEPOSITED AS PRESENT SECURITY, and with intent thereby to create a lien upon the land therein conveyed, an equitable mortgage is created notwithstanding the statute of frauds.

EQUITABLE MORTGAGE IS NOT CREATED by the deposit of title deeds in pursuance of a parol agreement to make a mortgage.

EQUITABLE MORTGAGE, WHAT DOES NOT CREATE. —Where title deeds are deposited with an attorney to have an actual mortgage prepared for execution to accomplish a loan in accordance with an oral agreement to that effect, and after preparation the mortgage is not executed nor delivered on account of the death of the debtor, an equitable mortgage is not created, though the debtor has received the money.

PARTNERSHIP CREDITORS, IN ABSENCE OF LIEN IN FAVOR OF INDIVIDUAL CREDITORS, may share *pro rata* in the individual property of the partners after exhausting the partnership assets.

C. S. Nettles and R. W. Boyd, for the plaintiffs.

J. N. Nathans, for Louis Cohen & Co.

SIMPSON, C. J. C. Phillips, Leonard Phillips, and Leopold Phillips, father and sons, were copartners, doing business as merchants in the town of Florence, in this state, under the name of C. Phillips and Sons. During the existence of this partnership, C. Phillips, the father, negotiated a loan of five thousand dollars from the defendants, Louis Cohen & Co., of Charleston, with the understanding and agreement that said loan was to be secured by a mortgage of certain real estate situated in Florence, the titles to which were in the name of the said C. Phillips, except one portion, to which he had a bond for titles from one McRary, under a contract to purchase, upon which a part of the purchase-money had been paid. In pursuance of this agreement the title deeds, having been placed in the hands of the said Louis Cohen for examination, were turned over to their attorney, J. N. Nathans, Esq., who drew a bond and mortgage as agreed upon. These papers were at once forwarded to C. Phillips at Florence by express, but for some reason the package remained in the office for some days uncalled for. In the mean time, however, the five thousand dollars had been advanced by Cohen & Co. on drafts of C. Phillips and Sons, drawn (as stated) at the request of the said C. Phillips. When the package containing the bond and mortgage aforesaid was at length received, C. Phillips was quite ill, and he died within a few days, leaving the bond and mortgage unexecuted. Leonard Phillips also died within two or three months after the death of his father, leaving the defendant Leopold sole survivor of the firm. Shortly after the

death of the said C. Phillips and Leonard Phillips, to wit, on the 6th of March, 1884 (the said C. Phillips having died in October previous, and Leonard Phillips in January, 1884), their heirs and distributees, in order to secure the payment of the said five thousand dollars to Cohen & Co., united in a mortgage of the real estate herein mentioned to the said Cohen & Co., which, on the 8th of March, was placed on record in the clerk's office for Darlington County.

After the death of his copartners, Leopold was left in charge as survivor, and the plaintiffs, not being satisfied with his management, instituted the action below, in which they prayed, in their own behalf and in behalf of the other creditors of C. Phillips and Sons, an injunction, the appointment of a receiver, an accounting from Leopold, and especially that the real estate described in the complaint (to wit, the real estate embraced in the mortgage hereinabove mentioned) be adjudged to belong to the firm of C. Phillips and Sons, and therefore assets for the payment of their debts, and that the same be sold to that end; and also that McRary be required, upon payment made to him of the balance of the purchase-money of the land under contract of sale to C. Phillips, to convey the same to the receiver as assets also of the said firm. The defendants denied that the real estate mentioned was the property of the firm, and claimed that it belonged entirely to C. Phillips, their father. They denied, also, the allegation of fraud in connection with the loan of five thousand dollars by Cohen & Co., and the execution of the papers intended to secure the same; and Cohen & Co. claimed the benefit of an equitable mortgage growing out of the deposit of titles, under the facts as stated above.

The circuit judge, his honor T. B. Fraser, found as matters of fact, that the real estate mentioned belonged to C. Phillips individually, and was not partnership property, and that there was no fraud in the transaction with Cohen & Co. He also adjudged, as matter of law, that an equitable mortgage had arisen in favor of Cohen & Co., to the benefit of which they were entitled, in preference to plaintiffs and other creditors. He further adjudged, that if there had been no transaction between C. Phillips and Cohen & Co., creating a lien on the real estate, then Cohen & Co. would stand as an individual creditor of C. Phillips, and in that event he would hold that while the creditors of the firm were bound to exhaust the partnership assets, they would then have the right to share

pro rata with the individual creditors the individual estate of the deceased partners.

The plaintiffs' appeal questions the rulings of his honor as to the competency of certain testimony, which will be noticed below. Also the findings of fact of his honor as to the alleged fraud, as to the real estate not being partnership property, and as to the knowledge of Cohen & Co. that said real estate had been represented to the plaintiffs as partnership property, and also his holding in reference to the equitable mortgage by the deposit of the title deeds and its application to this case. The defendants Cohen & Co. excepted, on the ground that his honor "seemed to hold that the real estate of C. Phillips, though individual property, is not first applicable to the payment of the said Cohen & Co., as individual creditor, in priority to partnership creditors of C. Phillips and Sons."

We do not feel authorized to disturb the findings of fact by his honor. There is no patent error in these findings, nor is the weight of the testimony against them. As to the real estate being partnership property, the evidence is, that the titles were certainly in C. Phillips when the copartnership was formed, and there was no express change subsequent thereto. No do we find any testimony that it was the intention of the parties to embrace the real estate as a portion of the partnership property. The firm seems to have been an ordinary mercantile firm, having no connection with the purchase and sale of real estate. As to the alleged conspiracy and fraud between Cohen & Co. and C. Phillips and Sons, seeking to put the said real estate beyond the reach of the creditors of the firm, we see nothing to overthrow the findings of his honor thereon. Nor does it appear that Cohen & Co. had any information that the plaintiffs had been informed that said real estate belonged to the firm.

Nor was there error in the rulings of his honor upon the competency of certain testimony offered. The testimony of Louis Cohen relating to conversations and transactions between himself and C. Phillips was objected to as obnoxious to section 400 of the code. This testimony not being against any one belonging to the classes mentioned by this section, there was no error in admitting it: *Cantey v. Whitaker*, 17 S. C. 530.

Certain testimony as to statements made by the sons, copartners, that the real estate in question was partnership property, was excluded as to Cohen & Co., on the ground that said statements had not been brought home to them before their claim

originated, the court holding that they, Cohen & Co., had the right to deal with C. Phillips in reference to property standing in his name as his own, the record showing that this real estate belonged to C. Phillips, and there being no record of a transfer to the copartnership. The reasons given by his honor seem to be sufficient.

The main question in the case is the one in reference to the equitable mortgage. And this involves the consideration of the three following points: 1. What is this doctrine of equitable mortgages, created by the deposit of title deeds? 2. Does it exist in this state? and 3. If so, do the facts of this case entitle Cohen & Co. to its benefit?

The leading case upon this doctrine in England is the case of *Russel v. Russel*, 1 Bro. C. C. 229. In fact, it is from this case we first hear of it. It was followed by *Birch v. Ellames*, 2 Anstr. 429, and although it has been violently attacked and denounced as pernicious by eminent English judges, and especially by Lord Eldon and Sir William Grant, yet it now seems to be well settled and firmly established in the English law, and in many of the American states, to a certain extent, to wit, where the title deeds are deposited as a present security, and with the intent thereby to give a lien upon the land, such deposit shall operate as an equitable mortgage, notwithstanding the statute of frauds. The English courts, however, have manifested a determined disposition to keep within the letter of the precedents, and not to give the doctrine further extension. And accordingly they have held that a mere parol agreement to make a mortgage, or to deposit a deed for that purpose, will not give any title in equity. There must be an actual and *bona fide* deposit of the title deeds with the mortgagee himself in order to create the lien. These positions will be found sustained, we think, in the following English cases: *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Langston*, 17 Id. 230; Lord Ellenborough in *Doe v. Hanke*, 2 East, 481; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Coombe*, 4 Madd. 249; *Lucas v. Dorrien*, 7 Taunt. 279; *Ex parte Coning*, 9 Ves. 117. Also in 4 Kent's Com. 151, and Washburn on Real Property.

It appears from these authorities that in England, and also in several of the states, that where the title deeds are actually deposited by the debtor with his creditor upon an advance of money, and perhaps even for an antecedent debt, as a security, that the equitable mortgage will arise without more; the deposit standing in the place of an actual mortgage, and dis-

pensing with the necessity of the execution of such mortgage. But will the deposit of title deeds for the purpose of having an actual mortgage prepared for execution in accordance with an agreement to that effect raise the equitable mortgage? In other words, where money is proposed to be lent upon the security of a mortgage to be actually executed and delivered, and the titles are placed in the hands of an attorney to prepare the mortgage so as to accomplish the loan, which, although prepared, yet the debtor, from accident or some other cause, fails to execute and deliver, although he has received the money, — will these facts create the mortgage?

Mr. Washburn says: "To give the effect of a lien to the possession of title deeds, it must be shown affirmatively that they were deposited as a *bona fide*, present, immediate security. If left, for instance, with the attorney for the purpose of his drawing a mortgage which had been agreed upon by the parties, it will not be sufficient. Mere possession, even by a creditor, is not enough": 2 Washburn on Real Property, 89. See cases referred to in note by Mr. Washburn. And in *Ex parte Bolton*, 2 Cox, 243, it was held "that the delivery of title deeds to an attorney to prepare a mortgage deed does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt." We think the weight of authority is against this doctrine being applied to cases with facts like those suggested, and that an equitable mortgage resulting from a deposit of title deeds can exist only where such deposit is the matter relied upon without anything further being done.

Does this doctrine exist in South Carolina? We have been referred to no case where the question has been squarely made, but it seems that the possibility of such mortgages has been recognized in three of our cases, to wit: *Welsh v. Usher*, 2 Hill Ch. 170; *Harper v. Barsh*, 10 Rich. Eq. 154; *Boyce v. Shiver*, 3 S. C. 528. And although, perhaps, the question was not absolutely necessary to the decision of the points actually involved in these cases, yet we are disposed to regard the recognition made as sufficient to the extent as above.

Do the facts of the case bring it under the doctrine as above? Clearly not. The title deeds were not deposited as an immediate security, nor did Cohen & Co. rely upon them in the least as giving in themselves the lien which he wanted, and for which he contracted. They were placed in his hands as affording the information upon which a bond and mortgage were to be drawn. These papers were actually drawn and

sent, doubtless with the titles, to C. Phillips for formal execution, but which his sickness and death prevented. With these facts, we do not see how it can be said that the title deeds had been deposited in order to raise by the deposit an equitable mortgage.

We concur with the circuit judge, that in the absence of a lien in favor of an individual creditor, partnership creditors, after exhausting partnership assets, may share *pro rata* in the individual property of the partners. The English rule upon this subject is to apply the joint estate to the joint debts, and the separate estate to the separate debts, though this rule has not met the uniform approval of all the English judges. Lord Thurlow disregarded it in the case of *Ex parte Hodgson*, 2 Bro. C. C. 5, and Lord Eldon failed to give it his cordial approval. It may, however, be regarded as the established rule in the English law. In this state, from 1804 to 1827, the English rule as above seems to have been followed. During this period there are three cases sustaining this view: *Tunno v. Trezevant*, 2 Desaus. Eq. 264, decided in 1808; *Woddrop v. Price*, 3 Id. 207, decided in 1811, and the case of *Sniffer and Paxton v. Sass*, decided in 1827, found in a note to *Kuhne v. Law*, 14 Rich. 20.

But afterwards, from 1827 to 1866, our courts held, in substance, that while private creditors had the right generally to throw the copartnership creditors upon copartnership assets in the first instance on the two-fund doctrine, yet that copartnership creditors, after exhausting copartnership assets, had the right to share the individual assets *pro rata* with the individual creditors. During this period, the leading cases on this subject were: *Wardlaw v. Gray*, Dud. Eq. 112, decided in 1837; *Gowan v. Tunno*, Rich. Eq. Cas. 369, in 1832; *Fleming v. Billings and Belk*, 9 Rich. Eq. 149; *Gadsden v. Carson*, 9 Id. 252; 70 Am. Dec. 207; and *Wilson v. McConnell*, 9 Id. 500, in 1856 and 1857,—in all of which the rule as above stated was recognized as the settled law of the state.

Roberts v. Roberts, 8 Rich. 15, in 1854, held that of two executions of same date, one in favor of partnership creditors and the other in favor of separate creditors, and both levied on separate property, the execution of the separate creditors should prevail; but in 1866 this was overruled by the court of errors, and in *Kuhne v. Law*, 14 Rich. 28, 1866, which was a contest between a senior copartnership judgment creditor and a junior separate judgment creditor, over the proceeds of the

separate property of the debtor by rule against the sheriff in behalf of the separate creditor to have said proceeds applied to his judgment, the court held, *Roberts v. Roberts, supra*, having been in substance overruled, that a separate creditor could not set up any equity, even if he had any, in a law court; that in such courts the liens could only be looked at, and that they should be satisfied according to their priority, and the rule was dismissed. In that case it was stated by Judge Wardlaw, in delivering the opinion, that the court of errors, when *Roberts v. Roberts, supra*, was considered, attained no satisfactory conclusion respecting the rule which should prevail in equity in the distribution of separate effects between separate and partnership creditors. But the judges, he said, were nearly, if not entirely, unanimous in the opinion that at law the supposed preference given to a separate creditor should not be allowed to prevail against a prior lien acquired by a partnership creditor. In *Adickes v. Lowry*, 15 S. C. 136, the present court, Mr. Justice McIver delivering the opinion, said: "This question seems yet open in this state."

The above is the state of the authorities upon this subject. Under the circumstances, we think the weight of authority is in favor of the rule as decided below by the circuit judge. Certainly from 1832 to 1866, from *Gowan v. Tunno* to *Kuhne v. Law, supra*, in the courts then under the direction of the most eminent jurists that have ever adorned the bench in this state, such was regarded to be the rule. It was so announced in all of these cases without hesitation or qualification, and it seems to us that the case of *Kuhne v. Law, supra* (from which it seems that a doubt first came), upon a careful consideration of the principle decided there, instead of raising a doubt, should have affirmed the rule. It was there held, as we have stated, that a senior copartnership judgment creditor had priority to a junior separate judgment creditor upon separate property. Now, unless each of these creditors had an equal claim upon the separate property before judgment, or in other words, an equal right to seek payment out of the separate property, it is not clear how either could get priority by obtaining judgment in advance of the other.

If separate creditors have a right as a principle of equity or law to postpone copartnership creditors as to separate assets, a judgment obtained, as it seems to us, by the copartnership creditor would be subject to that right, and could not have a lien prior thereto. We think the true doctrine is as

stated by the circuit judge, with the right of the separate creditor, if any equity exists in his behalf, such as two funds, to throw the copartnership creditor on the partnership assets in the first instance; but after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us.

Besides, a debt contracted by a copartnership is not only a debt of the firm, but a debt in substance of each individual member of the firm, and the property of the firm, and of each member, is liable for it; but the property of the firm is not liable for the separate debt of a member,—only the interest of the member is liable, which is nothing until the firm debts are paid. So that, because a copartnership creditor has an exclusive claim upon the firm property, it does not follow that a separate creditor should have an exclusive claim upon the separate property. In the first case, the effect of the contract is to pledge, as a basis of credit, both partnership and private property; in the second case, the separate property alone gives the credit. And as to partnership property, there is no separate property until the debts are paid, which is liable to both partnership and separate debts by contract: *Kuhne v. Law, supra*.

While, as we have said, we do not think that an equitable mortgage was created in this case under the facts in favor of Cohen & Co., yet there was a state of facts which presents a very strong case for specific performance; or at least, had C. Phillips lived, and after receiving the five thousand dollars from Cohen & Co. he had refused to execute the mortgage prepared and agreed upon, Cohen & Co., as against him, would have had a strong equitable claim for specific performance; or if the transaction, instead of being a loan to be secured by mortgage, had been a contract of purchase by Cohen & Co., with the purchase-money paid down in full, and Phillips had died before the execution of the conveyance promised, could not the titles have been demanded successfully from the heirs? Or at least, if the heirs afterwards had voluntarily executed such conveyance, could it be assailed except by subsequent creditors without notice or for fraud? How far this principle might operate in a mortgage transaction like that before the court, where the heirs have voluntarily come forward and have attempted to carry out the contract of their ancestor (see *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 468), we are not now at liberty

to consider, as this question was not passed upon or considered by the circuit judge. We think, however, without expressing any opinion in reference to it, that it is one which Cohen & Co. should have the opportunity of making before the circuit judge, and to this end the case should be remanded.

It is the judgment of this court that the judgment below be reversed, on the ground of error in the ruling of the circuit judge as to the equitable mortgage claimed by Cohen & Co.; and while affirming the rulings of his honor in other respects, that the judgment below be vacated, and the case be remanded for further hearing, in accordance with the principles herein above.

MR. JUSTICE McIVER dissented, upon the ground that, in his judgment, an equitable mortgage cannot be created by the deposit of title deeds in South Carolina.

PARTNERSHIP CREDITOR HAS EQUAL RIGHT with individual creditor to share equally with him in individual partnership property after exhausting the partnership property: *Gadsden v. Carson*, 70 Am. Dec. 207, and note 210.

EQUITABLE MORTGAGE IS CREATED by an agreement to give a mortgage, or by a mortgage defectively executed, or by an imperfect attempt to execute a mortgage: *Love v. Water & M. Co.*, 91 Am. Dec. 602; *Martin v. Nixon*, 92 Mo. 26.

EQUITABLE MORTGAGE, WHAT CONSTITUTES. — There are many methods of creating equitable mortgages, almost as many as there are different ways in which contracts securing or pledging some interest in lands may be made; and it does not seem even necessary that such contract should in its express terms create a security, for equity will very often imply this from the nature of the dealings between the contracting parties. Therefore, any deed or written contract used by the parties for the purpose of pledging real estate, or some interest therein, as security for a debt or obligation, which, though informal and insufficient as a common-law mortgage, by its terms shows that the parties intended that it should operate as a lien or charge upon specific real property, will constitute an equitable mortgage, and may be enforced as such in a court of equity. In other words, the attempt to create a security in legal form upon such property having failed, effect is given to the intention of the parties in interest, and the lien which they designed to call into being is enforced as an equitable mortgage. Any agreement between such parties, showing an intention to create a lien, may in equity be a mortgage: *Hoyt v. Carwithen*, 21 W. Va. 516-521; *Moore v. Lackey*, 53 Miss. 85; *Richardson v. Barrick*, 16 Iowa, 407; *Robinson v. Farrelly*, 16 Ala. 472; *Dunman v. Coleman*, 59 Tex. 199; *Flagg v. Mann*, 2 Sum. 486-533; *Fisk v. Stewart*, 24 Minn. 97; *Newlin v. McAfee*, 64 Ala. 357. Whenever the real nature of the transaction between the parties is confessedly that of a loan of money advanced upon the security of real estate, whatever the form of the instrument taken as security, it is treated as a mortgage in equity, and no terms or words used therein will be allowed to change its character or to cut off the right of redemption: *Robinson v. Farrelly*, 16 Ala. 472; *Flagg v. Mann*, 2 Sum. 533; *Dunman v. Coleman*, 59 Tex. 199; *Fisk v. Stewart*, 24 Minn. 97; *Anthony v.*

Anthony, 23 Ark. 479; *Moore v. Lackey*, 53 Miss. 91. An equitable mortgage may arise from a deposit of title deeds, from the non-payment of purchase-money, from an imperfectly executed mortgage deed: *Gale v. Morris*, 29 N. J. Eq. 222; or an agreement in writing to give a mortgage, a mortgage defectively executed, an imperfect attempt to appropriate specific property to the discharge of a particular debt, and in other ways which will be treated hereafter: See *Daggett v. Rankin*, 31 Cal. 322.

Deposit of Title Deeds. — An equitable mortgage may be created by the deposit of the title deeds to a legal or an equitable estate as a present security for the payment of money; and it is now settled in England, beyond question, that if the debtor deposits his title deeds to an estate with his creditor as security for an antecedent debt, or when a loan of money is made, it will constitute a valid agreement for a mortgage in equity as between the parties, and is not within the operation of the statute of frauds: *Russel v. Russel*, 1 Bro. Ch. 269; *Birch v. Ellames*, 2 Anstr. 427; *Ex parte Coming*, 9 Ves. 117; *Whitebread v. Jordan*, 1 Younge & C. 303; *Hales v. Berchem*, 2 Vern. 618; *Ex parte Mountford*, 14 Ves. 606; *Ex parte Langston*, 17 Id. 228; *Pain v. Smith*, 2 Mylne & K. 417; *Keys v. Williams*, 3 Younge & C. 55; *London Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *National Bank v. Cherry*, L. R. 3 P. C. C. 299; *Ex parte Holthausen*, L. R. 9 Ch. App. 728; *Mandeville v. Welch*, 5 Wheat. 277; *Ex parte Whitebread*, 19 Ves. 209; *Ex parte Coombe*, 4 Madd. 249; *Baynard v. Woolley*, 20 Beav. 586; *Ex parte Hooper*, 1 Mer. 7; *Ex parte Kensington*, 2 Ves. & B. 83. By making such deposit, the mortgagor agrees that whatever interest he holds in the land shall be liable for the debt; and that he will make a conveyance sufficient to vest such interest in the mortgagee, and bind what interest he has in the property described in the title deeds: *Pryce v. Bury*, 2 Drew. 41. But he does not thereby agree to make perfect title, but merely to give effect to the interest held at the time, or acquired afterwards during the deposit, by removal of an encumbrance or otherwise: *Ex parte Bisdee*, 1 Mont. D. & D. 333. It does not seem necessary that all the deeds of the title be deposited; but the deeds deposited must be material to the title, and the deposit must be made to create a mortgage: *Lacon v. Allen*, 3 Drew. 582. However, if the deposit is accompanied by any written instrument, the terms of the latter must be referred to to ascertain the exact nature of the deposit: *Shaw v. Foster*, L. R. 5 H. L. Cas. 321. It is not necessary that the deed deposited show title in the depositor by including the deed by which he acquired title: *Roberts v. Croft*, 24 Beav. 223; 2 De Gex & J. 1. The deposit of title deeds for the purpose of having a mortgage prepared will create an equitable mortgage: *Ex parte Hooper*, 1 Mer. 7; 19 Ves. 477; *Hockley v. Bantock*, 1 Russ. 141. Where, in such case, nothing in writing accompanies the deposit, a mortgage will be presumed as the intention of the parties; but this may be rebutted by parol evidence: *Ex parte Langston*, 17 Ves. 227. The rule is otherwise when a writing is lodged with the deposit: *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

Where a citizen of a foreign country makes a deposit of his title deeds in England as security for money advanced, his contract is controlled by the law of the latter place, though the law of his domicile would not create a mortgage by such deposit: *Ex parte Holthausen*, L. R. 9 Ch. App. 722. While the above authorities hold that an equitable mortgage results from a deposit of title deeds when such deposit is relied upon without anything further being done, still parol agreements to make a mortgage, or to make deposit of title deed for that purpose, will not ordinarily be enforced; but to

be valid, the deposit must be *bona fide* as a present security, and made with intent to create a lien upon the land: See *Norris v. Wilkinson*, 12 Ves. 197. And though this doctrine is firmly established, the courts have gone no further, and they now recognize the rule with hesitation and disapprobation, and evince a strong desire to lessen rather than to enlarge its operation. This method of creating a lien on land is peculiarly adapted to England, where, in the absence of laws requiring the registration of instruments of conveyance, the possession of title deeds is the only evidence of the ownership of land, and there no conveyance of the estate can be made without such deeds. No one is presumed to have the right to their possession unless he also has an equitable or legal title to the land described therein, and their exhibition when a conveyance is executed is the only safeguard in the hands of the vendee that the valid title is in the vendor. No necessity for this rule exists in the United States. Here the system of registry laws dispenses with the necessity of any exhibition of title deeds, and supplies all evidence necessary to protect the parties to the conveyance. Here the public records furnish at once a full and true statement of the present condition of the title and all legal rights to land; and if the original conveyance is ever lost or destroyed, a copy from the records takes its place for all intents and purposes: *Probasco v. Johnson*, 2 Disn. 98. Therefore no equitable mortgage is created in Ohio by the deposit of the title deeds, even if accompanied by a parol agreement that such was the purpose of the deposit: *Probasco v. Johnson*, *supra*. The English doctrine is generally repudiated in the United States, especially when it is sought to sustain as a mortgage a parol agreement or implied promise in connection with the deposit of the title deeds: *Gothard v. Flynn*, 25 Miss. 58; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Sidney v. Stevenson*, 11 Phila. 178; *Meador v. Meador*, 3 Heisk. 562; *Vanmeter v. McFadden*, 8 B. Mon. 438. These courts rest their decisions on the ground that to sustain such mortgages would be to violate the statute of frauds.

It is held in *Gardner v. McClure*, 6 Minn. 250, that the deposit of title deeds to land as security for a debt, even when accompanied by a written instrument stating that the deposit is made as a lien on the land, will not create an equitable mortgage, but merely a lien on the deeds. On the other hand, some cases are found which recognize the rule that the mere deposit of title deeds to secure the payment of borrowed money constitutes an equitable mortgage: *Carpenter v. Black Hawk etc. Co.*, 65 N. Y. 43-51; *Jackson v. Parkhurst*, 4 Wend. 369-376; *Rockwell v. Hobby*, 2 Sand. Ch. 9; *Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 Id. 104; *Boyce v. Shiver*, 3 S. C. 523. Thus it is held in *Carey v. Rawson*, 8 Mass. 158, that a sealed agreement that a deed should be executed and deposited with a third person until money borrowed by the grantee from the grantor should be repaid or until a day specified, and upon default that it should be delivered to the grantor with right of entry, constitutes an equitable mortgage. And again it was said, in *Jarvis v. Dutcher*, 16 Wis. 308, that the deposit of title deeds of an equitable or legal estate creates an equitable mortgage, which must be foreclosed in equity to establish the lien, and for a sale if the debt and interest are not paid by a certain day. See also *Mowry v. Wood*, 12 Id. 413. The deposit and assignment of land certificates made absolute in form, but in fact as security for debts owing and advances made, constitute an equitable mortgage, which may be foreclosed and the certificates sold to satisfy the claim: *Case v. McCabe*, 35 Mich. 100. The deposit of title deeds as security for money owing creates an equitable mortgage in Pennsylvania, as between the parties to the deposit, but if not recorded, it amounts to nothing but an

unrecorded mortgage: *Luck's Appeal*, 44 Pa. St. 519; and will be postponed to a subsequent mortgage in favor of a mortgagee without actual notice: *Edwards v. Trumbull*, 50 Id. 509.

Conditional Sale. — A court of equity will often pronounce that to be an equitable mortgage which the parties have put in the form of a conditional sale, and if the transaction resolves itself into a security, no matter what its form may be, nor by what name the parties may choose to call it, it is in equity a mortgage: *Flagg v. Mann*, 2 Sum. 490; *Dunman v. Coleman*, 59 Tex. 199; *McNamara v. Culver*, 22 Kan. 661; *Davis v. Stonestreet*, 4 Ind. 101; *Dougherty v. McColgan*, 6 Gill & J. 275; *Palmer v. Howard*, 1 Am. St. Rep. 60, and note 63; *Conway v. Alexander*, 7 Cranch, 218. As was said in *Dunman v. Coleman*, *supra*, equity will sustain a contract creating a lien upon property as a mortgage, whenever it appears that the parties intended it as such, though neither the word "lien" nor "mortgage" appears in the contract, if from its character it is manifest that it was the intention of the parties that the specific property should constitute a security for the performance of the obligation. In all doubtful cases, the contract will be considered as a mortgage rather than a sale, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression: *Honore v. Hutchings*, 8 Bush, 688; *McNeill v. Norsworthy*, 39 Ala. 156; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Wilson v. Giddings*, 28 Ohio St. 554; *Trucks v. Lindsey*, 18 Iowa, 504; *Hickman v. Cantrell*, 9 Yerg. 171; 30 Am. Dec. 396; *Reed v. Reed*, 75 Me. 271; *Brant v. Robertson*, 16 Mo. 129; *Brown v. Dewey*, 2 Barb. 28; *Rich v. Doane*, 45 Vt. 125. The distinction between an equitable mortgage and a conditional sale is this: that where the debt forming the consideration for the conveyance still subsists, or the money is advanced as a loan, with a personal liability on the part of the borrower, and by the terms of the conveyance the land is to be reconveyed on payment of the money, equity will regard it as a mortgage. But where the relation of debtor and creditor is extinguished or never existed, and the grantor has the privilege of refunding by a given time if he pleases, and thereby entitling himself to a reconveyance, the agreement is a conditional sale: *Slowe v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251; *Saxton v. Hitchcock*, 47 Barb. 220; *Hoopes v. Bailly*, 28 Miss. 328; *Glover v. Payn*, 19 Wend. 518; *Henley v. Hotelling*, 41 Cal. 22; *Magee v. Catching*, 33 Miss. 672; *Alstin v. Cundiff*, 52 Tex. 453; *Hays v. Carr*, 83 Ind. 275; *Page v. Foster*, 7 N. H. 392; *Steele v. Steele*, 4 Allen, 417.

When any doubt exists whether the instrument creates a mortgage or is a conditional sale, the intention of the parties should govern, and should be ascertained by considering their situation, the surrounding facts, as well as from the face of the writing: *Cornell v. Hall*, 22 Mich. 377; *Stryker v. Hershby*, 38 Ark. 264; *Hughes v. Sheaff*, 19 Iowa, 335; *Brown v. Dewey*, 2 Barb. 28; *Heath v. Williams*, 30 Ind. 495; *Rich v. Doane*, 25 Vt. 125; *Brant v. Robertson*, 16 Mo. 129; *Oldham v. Halley*, 2 J. J. Marsh. 114. When the intention of the parties is not apparent from the face of the instrument, its construction should be left to the jury to be determined, under proper instructions, from all the facts and circumstances of the case: *Alstin v. Cundiff*, 52 Tex. 453; *Hudson v. Wilkinson*, 45 Id. 444. Adequacy or inadequacy of price paid, and the existence of an obligation to repay the purchase-money, are important facts to be taken into consideration, though they are not conclusive: *Brown v. Dewey*, 2 Barb. 28; *Brunfield v. Boutall*, 24 Hun, 451; *Horn v. Keteltas*, 46 N. Y. 695. When the price named is grossly inadequate, the conveyance will be considered a mortgage: *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Reed v. Reed*, 75 Me. 264; *Wilson v. Giddings*, 28

Ohio St. 554; *Bridges v. Linder*, 60 Iowa, 190; and see *Campbell v. Dearborn*, 109 Mass. 130; *Brant v. Robertson*, 16 Mo. 130. The character of the conveyance becomes fixed at its inception. If it was not then intended as a mortgage, it can never become such by any subsequent act of the parties: *Hale v. Jewell*, 22 Am. Dec. 212; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Swetland v. Swetland*, 3 Mich. 482. But if it is then a mortgage, the right of redemption cannot be restricted by any contemporaneous agreement by the mortgagor: *Reed v. Reed*, 75 Me. 264. Parol evidence is always admissible in equity to ascertain whether or not it was the intention of the parties that the instrument should constitute a mortgage or a conditional sale: *Reed v. Reed*, 75 Me. 264; *Alstin v. Cundiff*, 52 Tex. 452; *Trucks v. Lindsey*, 18 Iowa, 504; *McNamara v. Culver*, 22 Kan. 661; note to *Hale v. Jewell*, 23 Am. Dec. 215. The topic here under consideration is treated at considerable length in the note to *Chise's Case*, 17 Am. Dec. 300 et seq.

Agreement to Give Mortgage.—The doctrine is frequently asserted that an agreement to give a mortgage, based upon sufficient consideration, will be treated in equity as a mortgage, upon the theory that equity considers that done which by agreement is to be done: *Daggett v. Rankin*, 31 Cal. 321-326; *Remington v. Higgins*, 54 Id. 620; *Racouillat v. Sansevain*, 32 Id. 377; *Cotterell v. Long*, 20 Ohio, 464; *Delaire v. Read*, 3 Desaus. Eq. 74; *Boehl v. Wadgyman*, 54 Tex. 589; *Matter of Howe*, 1 Paige, 125; *Starks v. Redfield*, 52 Wis. 349; *Burdick v. Jackson*, 7 Hun, 448; *Rickardson v. Hamlett*, 33 Ark. 237; *Carter v. Holman*, 60 Mo. 498. It is not absolutely necessary that the agreement should be in writing, for if it is in parol and in respect to land, it cannot be avoided in equity when there has been a part performance of it: *Burdick v. Jackson*, 7 Hun, 488; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; and specific performance of such parol contract will be decreed in equity: *Dean v. Anderson*, 34 N. J. Eq. 496. In such cases the contract must be sufficiently clear and definite to enable the court to give effect to the understanding of the parties: *McClintock v. Laing*, 22 Mich. 212. Where in pursuance of the parol promise the promisor has in fact executed the agreement by the delivery of a formal mortgage, such agreement is not within the statute of frauds, but is as effectual for all intents and purposes as if it had been originally reduced to writing by the parties: *Burdick v. Jackson*, 7 Hun, 488; *Dodge v. Wellman*, 1 Abb. App. 512; *Carr v. Carr*, 4 Lans. 314; *McBurney v. Wellman*, 42 Barb. 390. An instrument cannot be held to be an equitable mortgage which contains a description totally insufficient, and which neither conveys nor purports to convey or mortgage the land. Such an instrument does not create any lien: *Langley v. Vaughn*, 10 Heisk. 553. The agreement must show an intention to create a lien, and such lien must have a specific reference, and must necessarily apply to some designated property in being or in expectancy, clearly and unmistakably; and unless such agreement clearly describes or designates particular lands, it will be regarded as a mere executory contract, and will be enforced as such: *Seymour v. Candauqua etc. Co.*, 25 Barb. 284. However, an equitable lien or mortgage may arise out of an agreement to give a mortgage on one of several houses to be built on certain land, although the particular house is not designated in the agreement: *Payne v. Wilson*, 74 N. Y. 348; *Kendall v. Niebuhr*, 13 Jones & S. 542.

An agreement to execute a mortgage *in presenti*, where the actual execution fails through inadvertence, does not constitute such equitable mortgage or lien as will prevail as against subsequent judgment creditors: *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52. But such an instrument will be enforced in

equity as a specific lien against the land as against the parties executing it, and third parties having actual notice thereof: *Racouillat v. Sansevain*, 32 Cal. 376. So, also, where the equitable owner of the land assents in writing that the holder of the legal title may hold it as security for the payment of money borrowed by such owner of a third person, this is sufficient to create an equitable mortgage on the land for the benefit of the creditor: *Chadwick v. Clapp*, 69 Ill. 119. And again, a mortgage executed by a party to himself as guardian, to secure moneys belonging to his ward, is regarded in equity as a valid security against the guardian, and is given effect for the purpose of protecting the interests of the wards; and after a sale of the mortgaged premises, a judgment of foreclosure estops the parties from questioning the mortgage, and vests the legal title in the purchaser: *Lyon v. Lyon*, 67 N. Y. 250. An agreement on the back of a note, making it a charge upon particular lands, is an equitable mortgage; and it was held that in this way an agreement intended as a revival of a mortgage note which had been paid may be rendered effectual, though not effectual to revive the mortgage lien: *Peckham v. Haddock*, 36 Ill. 38. In *Gilson v. Gilson*, 4 Allen, 115, it was held that an agreement under seal, but not acknowledged, by which the signer agrees to maintain his father and mother during their lives, and as security for the fulfillment of the agreement conveys to them a life lien or dower of maintenance in lands, constitutes an equitable mortgage. And again, where, upon receiving a grant of land, the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging the produce of the land, or in lieu thereof the land itself, this was held an equitable mortgage: *Chase v. Peck*, 21 N. Y. 581. A written agreement by the owner to pay the occupant of land a certain sum, provided that when the land was sold to realize the amount the occupant would surrender possession, and in the mean time giving him the occupancy in lieu of paying interest on the sum, is an equitable mortgage as to the parties and purchasers with notice: *Blackburn v. Tweedie*, 60 Mo. 505.

So an equitable mortgage is created by a provision in a deed that the grantee shall pay certain legacies which are a charge upon the property conveyed: *Stewart v. Hutchings*, 6 Hill, 143. So is an instrument by which a corporation pledges its real property for the fulfillment of a contract, and it is not rendered void because the property is pledged without specification, or the amount secured is not stated, nor the time for redemption fixed: *Mobile etc. R. R. Co. v. Talman*, 15 Ala. 472. The same is true of an instrument reciting that the maker had employed counsel to prosecute a claim to land, and promising the payment of certain money out of the land when the litigation was ended: *Jackson v. Carswell*, 34 Ga. 279. The same rule applies to an agreement in a lease creating a lien in favor of the lessor for the faithful performance of the obligation to pay rent: *Whiting v. Eichelberger*, 16 Iowa, 422. And an agreement by a debtor to execute to his creditor a mortgage upon the debtor's share under his father's will when division is made creates an equitable mortgage: *Lynch v. Utica Ins. Co.*, 18 Wend. 236.

Defective Mortgage. — A mortgage or trust deed which cannot be enforced because of some informality requisite to a perfect mortgage or trust deed will be regarded in equity as a mortgage, and the lien enforced. When the intent of the parties to form a lien upon specific property is evident, effect will be given to such intent in equity: *Blackburn v. Tweedie*, 60 Mo. 505; *Gale v. Morris*, 29 N. J. Eq. 222; *National Bank v. Lanier*, 7 Hun, 623; *Payne v. Wilson*, 74 N. Y. 348; *Daggett v. Rankin*, 31 Cal. 321; *Lake v.*

Dowd, 10 Ohio, 415. Thus a deed of trust which is inoperative at law on account of a failure to insert the name of the trustee, if the deed in other respects is perfect, will be considered in equity as a mortgage: *McQuie v. Peay*, 58 Mo. 56. So will a trust deed which is imperfectly acknowledged: *Black v. Gregg*, 58 Id. 565. And so will a mortgage from which the seal was omitted by mistake: *McClurg v. Phillips*, 49 Id. 315; *Dunn v. Raley*, 58 Id. 134; *Harrington v. Fortner*, 58 Id. 468; *Gill v. Clark*, 54 Id. 415; *McClurg v. Phillips*, 57 Mo. 214.

So will an unsealed mortgage, made in pursuance of an unsigned power of attorney: *Burnet v. Boyd*, 60 Miss. 627. And an instrument in the form of a mortgage, with power of sale and under seal, but not expressed to be sealed, is good as an equitable mortgage: *Jones v. Brewington*, 58 Mo. 210. So is an instrument in writing, intended by the parties as a mortgage, but not witnessed as required by law: *Abbott v. Godfroy's Heirs*, 1 Mich. 178. But it has been held that such effect will not be given to a mortgage witnessed, acknowledged, and recorded, but not signed by the mortgagor: *Goodman v. Randall*, 44 Conn. 321. Where an instrument purporting to be the mortgage of a corporation is not executed in the name of the corporation, and is therefore not a legal mortgage, equity will regard it as an equitable mortgage, and enforce it as such: *Miller v. Rutland etc. R. R. Co.*, 36 Vt. 452; *Love v. Sierra Nevada Min. Co.*, 32 Cal. 639; 91 Am. Dec. 602.

Assignment of Rents and Profits. — An assignment of the rents and profits of land to secure a debt creates an equitable lien, and the assignee is entitled to come into equity and have it enforced as a mortgage. *Ex parte Wills*, 1 Ves. Jun. 162; 2 Cox, 233; *Abbott v. Stratten*, 3 Jones & L. 603. This rule is denied, however, in *Alexander v. Berry*, 54 Miss. 422; and see also *Allen v. Montgomery*, 48 Id. 101. A formal mortgage of a leasehold constitutes only an assignment of the rents and profits for the term in those states where foreclosure cannot be effected by sale, the mortgage not conferring the power of sale, and where the mortgagee can only receive the rents and profits: *Hulett v. Soullard*, 26 Vt. 295. An irrevocable power of attorney to collect rents, given as security for money loaned, is, as between the parties, an equitable mortgage of the rents: *Smith Co. v. McGuinness*, 14 R. I. 59. So a covenant in a lease that a building to be erected by the lessee is mortgaged as security for the rent will be treated in equity as a mortgage thereof: *Barroillet v. Battelle*, 7 Cal. 450. And an assignment of a lease absolutely, accompanied by a bond stating the assignment to be made to secure a debt to the assignee, and an agreement to reassign the lease and land on payment of the debt and interest, is an equitable mortgage: *Jackson v. Green*, 4 Johns. 186. A contract in writing, whereby the contractor agrees to apply the rents and profits of particular land, or a portion thereof, to the payment of a debt, creates an equitable mortgage on such land which will be enforced against volunteers and purchasers with notice: *Smith v. Patton*, 12 W. Va. 541.

Statutory Mortgage. — An equitable lien or mortgage may exist by virtue of statute, and will be as effectual as a mortgage executed by deed: *Ketchum v. Pacific R. R.*, 4 Dill. 78; *Murdock v. Woodson*, 2 Id. 188; 22 Wall. 350. Thus a mortgage may be created by legislative act, as where a railroad company accepted bonds issued under an act declaring them to constitute a first lien and mortgage upon the road and property of the corporation: *Wilson v. Boyce*, 92 U. S. 320; 2 Dill. 539; *Whitehead v. Vineyard*, 50 Mo. 30. In order to create an equitable statutory mortgage, it is necessary that the statute in express terms show the intention to give a lien: *Cincinnati v. Morgan*, 3 Wall. 275. When such intention is shown, the mortgage may

embrace after-acquired lands: *Whitehead v. Vineyard*, 50 Mo. 30. The bonds of a corporation, pledging its real and personal property for the payment of a debt, will be treated in equity as a mortgage, and enforced according to the intent of the parties: *White Water etc. Canal Co. v. Vallette*, 21 How. 414. So a deed of trust executed by a railroad company to secure the payment of bonds and coupons will be treated as a mortgage in equity, and so enforced: *Coe v. Johnson*, 18 Ind. 218.

Assignment of Contract of Purchase. — An assignment of a contract for the purchase of lands as security for a debt due the assignee, upon condition that if the debt is paid at the time stipulated the assignee will reassign the contract, is an equitable mortgage, giving the assignor the right of redemption: *Brockway v. Wells*, 1 Paige, 617. In other words, a contract in writing whereby the contractor agrees to purchase certain land, and executes a mortgage thereon to secure a debt, creates an equitable lien on such land when purchased as will be enforced in equity against the contractor, volunteers, and purchasers with notice: *Smith v. Patton*, 12 W. Va. 541; *Fitzhugh v. Smith*, 62 Ill. 486; *Fenno v. Sayre*, 3 Ala. 458; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Northrup v. Cross*, Seld. Notes, 111. A party who holds real estate under a bond for a deed from the owner of the legal title has such an interest as he can convey by equitable mortgage: *Jones v. Lapham*, 15 Kan. 540; *Button v. Schroyer*, 5 Wis. 598; *Anderson v. Ames*, 6 Md. 52; *Gilkerson v. Connor*, 24 S. C. 321-324. This is especially so where the party in possession has made valuable improvements: *Bull v. Sykes*, 7 Wis. 449; *Jones v. Lapham*, *supra*. And his assignee will succeed to all his rights and equities: *Lewis v. Boskins*, 27 Ark. 61; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Steinkemeyer v. Gillespie*, 82 Id. 253; *Alden v. Garver*, 32 Id. 32. Where land is sold upon credit, and a bond given to make title upon the payment of the purchase-money, the effect of the contract is to create a mortgage as if the vendor had conveyed by deed and taken a mortgage back for the payment of the purchase-money, and the lien so created is a charge or encumbrance upon the land against the purchaser and his privies and all subsequent purchasers: *Lewis v. Boskins*, 27 Ark. 63; *Smith v. Robinson*, 13 Id. 533; *Moore v. Anders*, 14 Id. 628; 40 Am. Dec. 551; *Graham v. McCampbell*, Meigs, 52; 33 Am. Dec. 126; *Tanner v. Hicks*, 4 Smedes & M. 294; *Shall v. Biscoe*, 18 Ark. 142; *Pintard v. Goodloe*, 11 Emp. 502; *Thredgill v. Pintard*, 12 How. 24; and see *Curtis v. Buckley*, 14 Kan. 449. The assignment of a partial interest in a contract for purchase of land as security for debt is an equitable mortgage, which may be enforced against the assignor and those claiming under him with notice: *Northrup v. Cross*, Seld. Notes, 111. An assignment of a certificate of purchase of land issued by the state by way of security for a debt due by the assignor to the assignee is an equitable mortgage of the assignor's interest in the land by virtue of his certificate: *Hill v. Eldred*, 49 Cal. 398; *Gunderman v. Gunnison*, 39 Mich. 313; *Case v. McCabe*, 35 Mich. 100; *Ross v. Mitchell*, 28 Tex. 150; *Crunbaugh v. Smock*, 1 Blackf. 305.

The same rule applies to a pre-emptor's certificate of location: *Wright v. Shimway*, 1 Biss. 23; *Christy v. Dana*, 34 Cal. 548. And a subsequent assignee, or purchaser of the certificate, takes it subject to the terms of the first assignment, if he has notice thereof: *Dodge v. Silverhorn*, 12 Wis. 644; *Stover v. Bounds*, 1 Ohio St. 107. Though an equitable mortgage so created is subject to the payment of the amount due on the certificate, still when that is paid, the amount is a prior lien upon the proceeds of a foreclosure sale of the land: *Dodge v. Silverhorn*, *supra*. An assignment of school-land certificates, which are by their terms transferable by assignment and

delivery, creates an equitable mortgage: *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Id. 307. Certificates of stock in a joint-stock company, they representing an interest in land, may be mortgaged in equity, subject to the debts of the company and other stockholders' equities: *Durkee v. Stringham*, 8 Id. 1. A settler upon public lands, claiming under the United States homestead act, after making his proof of compliance with all the requirements of the law so as to entitle him to a patent, may make a valid mortgage of the land: *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487. And such mortgage is valid, notwithstanding it was given to secure a debt contracted before such proof was made: *Jones v. Yoakam*, 5 Neb. 265. But if the mortgagor sells the same land to another, who afterwards gets a pre-emption title, the mortgagee cannot enforce his mortgage against the latter's title, and his right is lost: *Bull v. Shaw*, 48 Cal. 455. The transaction amounts to an equitable mortgage where the holder of land warrants has them entered in the name of his creditor as security for the payment of a debt: *Duen v. Blake*, 44 Ill. 135. In conclusion, it may be added that when one who holds the title to land by agreement and part payment secures from a third party the money to pay the balance due on the purchase, and the latter takes the title, agreeing to convey it in a certain time on repayment of his advance money, the transaction is an equitable mortgage as against the parties, their privies, and subsequent purchasers with notice: *Fessler's Appeal*, 75 Pa. St. 483; *Purdy v. Bullard*, 41 Cal. 444; *McClintock v. McClintock*, 3 Brewst. 76; *Chadwell v. Wheelless*, 6 Lea, 312; *King v. McVickar*, 3 Sand. Ch. 192.

LIEN FOR UNPAID PURCHASE-MONEY. — The doctrine prevails in England, and also in the greater portion of the states in the United States, that a vendor of land, though he has made a deed absolute in form, and expressing the consideration as having been fully paid, has an equitable lien on the land for his unpaid purchase-money as against the vendee and his privies, though he has taken no distinct agreement or separate security: See *Macreth v. Symmons*, 15 Ves. 329; *Moshier v. Meek*, 80 Ill. 79; *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Smith v. Smith*, 9 Abb. Pr., N. S., 420; *Cardova v. Hood*, 17 Wall. 1; *Sparks v. Hess*, 15 Cal. 186; *Smith v. Price*, 42 Ill. 399; *Hill v. Grigsby*, 32 Cal. 56; *Beal v. Harrington*, 116 Ill. 113; *Senter v. Lambeth*, 59 Tex. 259; *Barrett v. Lewis*, 106 Ind. 120; *Bennett v. Shipley*, 82 Mo. 448; *Phillips v. Schall*, 21 Mo. App. 38; *Joiner v. Perkins*, 59 Tex. 300; *Wilkinson v. May*, 69 Ala. 33. Mr. Jones, in his work on mortgages, severely criticises the principle which creates such a lien; and deplores the fact that it so generally prevails. He says: "The doctrine of a vendor's lien for the purchase-money prevails in upwards of half in number of the states, and in the other states the doctrine has either been rejected from the beginning, or having prevailed at one time has since been expelled by statute, although it may be that in a few states the question of its existence has not been definitely decided. In the courts of the United States the doctrine has never been affirmed, except where established by the local law of the states. The doctrine even in those states that have adopted it has been frequently criticised and deplored, as inconsistent with the general policy prevailing in this country to make all matters of title depend upon record evidence. . . . From the nature of the equity, there could be but few fixed rules regarding it, but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject which has not been somewhere denied; that hardly any two states can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions

in the same state are irreconcilable. . . . This is eminently a subject of case-law, and to a large degree each case is a law unto itself and unto no other case": 1 Jones on Mortgages, sec. 191, where the states and cases are enumerated in which the doctrine has been applied, doubted, or not adopted. The lien exists in California by virtue of section 3046, Civil Code; and see *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Gallagher v. Mars*, 50 Cal. 23. In those states in which the doctrine has been adopted it exists unless there has been an express or implied waiver of it: *Moshier v. Meek*, 80 Ill. 79; *Short v. Battle*, 52 Ala. 456; *Wilson v. Lyon*, 51 Ill. 166; *Dodge v. Evans*, 43 Miss. 570; *Allen v. Bennett*, 8 Smedes & M. 672-681; *Gilman v. Brown*, 1 Mason, 191; *Dunton v. Outhouse*, 31 N. W. Rep. 411-413.

The lien exists to the extent of the unpaid purchase-money against the vendee, his heirs, privies in estate, and subsequent purchasers with notice; also against those who take a conveyance of the land without advancing any new consideration, so as to make them in equity purchasers for value, and against voluntary assignees who are not *bona fide* purchasers for value: See the cases cited immediately *supra*, and *Warner v. Van Alstyne*, 3 Paige, 513; *Croft v. Russell*, 67 Ala. 9; *Rice v. Wilburn*, 31 Ark. 108; 25 Am. Rep. 549; *Poe v. Parton*, 26 W. Va. 607; *Dickerson v. Carroll*, 76 Ala. 377; *Senter v. Lambeth*, 59 Tex. 259; *Dunton v. Outhouse*, 31 N. W. Rep. 411-413; *Wilkinson v. May*, 69 Ala. 33; *Carver v. Eads*, 65 Id. 191. The presumption exists that the unpaid purchase-money is a lien upon the land, and it is upon the purchaser to rebut the presumption by proof of waiver or otherwise, for the lien does not exist under express contract, but is implied from the presumed intention of the parties at the time of executing the deed: *Wilson v. Lyon*, 41 Ill. 166; *Truebody v. Jacobson*, 2 Cal. 269; *Gilman v. Brown*, 1 Mason, 191; *Mayruder v. Campbell*, 40 Ala. 611; *Dodge v. Evans*, 43 Miss. 570; *Fry v. Prewett*, 56 Id. 783; *Burks v. Watson*, 48 Tex. 107; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Id. 33. But whenever circumstances exist from which the inference can be drawn that the parties did not intend to create the lien, it will be held not to exist. This inference arises from the taking of a distinct and independent security: *Parker County v. Sewell*, 24 Tex. 238; or a mortgage upon the property sold: *Stuart v. Harrison*, 52 Iowa, 511; *Neal v. Speigle*, 33 Ark. 63; or from an assignment of the debt absolutely, without in terms assigning the equitable lien: *Smith v. Smith*, 9 Abb. Pr., N. S., 420. As between such lien and a mortgage lien accruing at the same time, the legal lien created by mortgage will prevail: *Fisk v. Potter*, 2 Abb. App. 138. Where the vendor of land executes his bond, agreeing to make title on payment of the purchase-money remaining unpaid, the contract is considered in equity as a mortgage, with all of its equitable rights and incidents, and the vendor's assignee of a note, or other security given for such purchase-money, becomes entitled to the lien: *Connor v. Banks*, 18 Ala. 42; *Moore v. Anders*, 14 Ark. 628; 40 Am. Dec. 551; *Hutton v. Moore*, 24 Id. 382; *Sparks v. Hess*, 15 Cal. 186; *McConnell v. Beattie*, 34 Ark. 113; *Lewis v. Hawkins*, 23 Wall. 119; *Schearff v. Dodge*, 33 Ark. 346.

All subsequent purchasers and encumbrancers from the vendee are bound to take notice of such lien when so created, for it has none of the odious characteristics of the lien of a vendor who has parted with the title absolutely, acknowledging the receipt of the purchase-money in full; but is wholly different in this, that its effect is of a conveyance and mortgage back for the purchase price: *Moore v. Anders*, 14 Ark. 128; 40 Am. Dec. 551; *Hines v. Perkins*, 2 Heisk. 395; *Dukes v. Turner*, 44 Iowa, 575; *Merritt v. Judd*, 14 Cal. 59; *Masterson v. Pullen*, 62 Ala. 145; *Scroggins v. Hoadley*, 56 Ga. 165.

Where the lien is expressly reserved in the deed, which is recorded, it creates a clear equitable mortgage, of which every one is bound to take notice, and such lien passes to the vendor's assignee of the notes for the purchase-money, and may be enforced by him as against subsequent purchasers or encumbrancers: *Blaisdell v. Smith*, 3 Ill. App. 159; *Davis v. Hamilton*, 50 Miss. 213; *Smith v. Rowland*, 13 Kan. 245; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Stratton v. Gold*, 40 Id. 778; *Webster v. Mann*, 52 Tex. 416; *Hall v. Mobile etc. R. R. Co.*, 58 Ala. 10; *Stanhope v. McLaughlin*, 52 Md. 483; *Mitchell v. Wade*, 39 Ark. 377; *Carpenter v. Mitchell*, 54 Ill. 126; *Bradley v. Curtis*, 79 Ky. 327. The express reservation of such lien in the deed is equivalent to a mortgage taken for the purchase-money contemporaneously with the deed, and gives the purchaser the right to redeem upon foreclosure: *King v. Young Men's Ass'n*, 1 Woods, 386; *Chitwood v. Trimble*, 2 Baxt. 78; *Materson v. Cohen*, 46 Tex. 520; *Pierce v. Gardner*, 83 Pa. St. 211. And in such case the rights of the parties depend on their contract, and not upon the mere implication of law: *Harvey v. Kelley*, 41 Miss. 490; 93 Am. Dec. 267; *Stratton v. Gold*, 40 Id. 778. Nor is it deemed to be waived by taking other security, as it would be if it were merely the lien not reserved and arising by implication: *Carpenter v. Mitchell*, 54 Ill. 126; *Lewis v. Pusey*, 8 Bush, 615; *Dunlap v. Shanklin*, 10 W. Va. 662; *Warren v. Branch*, 15 Id. 21; *McCaslin v. State*, 44 Ind. 151; *Strickland v. Summerville*, 55 Mo. 164; *Bozeman v. Ivey*, 49 Ala. 75; *Whitehurst v. Yandall*, 7 Baxt. 228; *Hurley v. Hollyday*, 35 Md. 469. The grantee cannot show a contemporaneous contract by the grantor not to look to the land for payment when the lien is expressly reserved: *Hutchinson v. Patrick*, 22 Tex. 318; otherwise when it is not: *Warren v. Branch*, 15 W. Va. 21.

Registry Acts.—Equitable mortgages are generally held within the provisions of registry acts as well as legal mortgages: *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 49 Am. Dec. 174; *Parker v. Alexander*, 1 Johns. Ch. 394; *Jarvis v. Dutcher*, 16 Wis. 307; *Dodge v. Silverhorn*, 12 Ill. 644; *Boyce v. Shiver*, 3 S. C. 515; *Hunt v. Johnson*, 19 N. Y. 279. The cases above cited support and establish the doctrine that all rights, encumbrances, and conveyances touching or in any manner concerning lands should appear of record, and that therefore the mortgage of an equitable interest therein, if first recorded, always takes priority over a mortgage of the legal estate. The very early decisions seem to have been averse to this rule, and maintained the contrary doctrine as to purchasers of the legal estate. Thus it is held in *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554, that, the law not requiring it, the registration of an equitable mortgage will not operate as constructive notice to a subsequent purchaser from the person who holds the legal title. And to the same effect, *Doswell v. Buchanan*, 3 Leigh, 377; 23 Am. Dec. 280. Generally, however, the registration of an equitable mortgage is notice to subsequent purchasers of the legal estate: *Jarvis v. Dutcher*, 18 Wis. 307; *Dodge v. Silverhorn*, 12 Id. 644; *Hunt v. Johnson*, 19 N. Y. 279; *Parkhurst v. Alexander*, 1 Johns. Ch. 394. Still it is held, in a late case, that the record of a mortgage given by one who has only an unrecorded equitable mortgage is not notice to a subsequent purchaser of the legal title from the one in possession of the land; for as the purchaser does not derive title through the mortgagor, he does not take subject to the recorded mortgage: *Irish v. Sharp*, 89 Ill. 261. An equitable mortgage under a contract of purchase is within the operation of the registry acts, although no legal estate passes by it; and if first recorded, it takes priority over a subsequent mortgage of an equitable interest;

and an assignment of the contract of sale, as security for debt, is regarded as a mortgage: *Bank of Greensborough v. Clapp*, 76 N. C. 482. So one in possession of land under a parol contract of sale has a mortgageable interest therein, and the mortgage, when executed, being legally recordable, it is notice to a subsequent mortgagee, who is bound thereby: *Crane v. Turner*, 7 Hun, 357.

Deed Absolute in Form. — The subject as to when a deed absolute in form will be treated in equity as a mortgage has already been discussed in the note to *Chase's Case*, 17 Am. Dec. 300, and no effort will be here made to enlarge upon the authorities there collected, but merely to cite the late cases bearing upon this branch of the subject of equitable mortgages. It is a rule well settled in equity that an absolute deed for land, executed solely to secure a debt due to the vendee, will be treated as a mortgage. Among the late cases holding this doctrine may be cited *Robinsons v. Lincoln Savings Bank*, 85 Tenn. 363; *McBurney v. Wellman*, 42 Barb. 390; *Union Mut. Ins. Co. v. Slec*, 110 Ill. 35; *Lucas v. Hendrix*, 92 Ind. 64; *Johnson v. Smith*, 39 Iowa, 548; *French v. Burns*, 35 Conn. 358; *Stinchfield v. Milliken*, 71 Me. 567; *Klinck v. Price*, 6 Am. Rep. 268; *Fredericks v. Corcoran*, 100 Pa. St. 417; *McLaughlin v. Shepherd*, 52 Am. Dec. 646; *Graham v. Graham*, 55 Ind. 23; *Frink v. Adams*, 36 N. J. Eq. 485; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Bettis v. Townsend*, 61 Cal. 333. Equity always looks beyond the form of the instrument to the real transaction, and when that is shown to be one of security merely, and not of sale, it will give effect to the actual contract of the parties, and treat it as a mortgage: *Peugh v. Davis*, 96 U. S. 336; *Nichols v. Reynolds*, 1 R. I. 30; *Tappan v. Aylsworth*, 13 Id. 582; *Montgomery v. Spect*, 55 Cal. 552; *Freeman v. Wilson*, 51 Miss. 329; *McNamara v. Culver*, 22 Kan. 661. But its character must be determined by the mind of the parties at the time of its execution, and not at a subsequent date: *Frink v. Adams*, 36 N. J. Eq. 485; *Reed v. Reed*, 75 Me. 264. Though the deed is absolute in form, the actual intent and contract of the parties, that it should be considered merely as security for debt, and therefore a mortgage, may be shown in equity, not only by a written defeasance, but also by parol evidence: *Smith v. Cremer*, 71 Ill. 185; *Hurford v. Harned*, 6 Or. 365; *Freeman v. Wilson*, 51 Miss. 329; *McNamara v. Culver*, 22 Kan. 661; *Pierce v. Robinson*, 13 Cal. 116; *Montgomery v. Spect*, 55 Id. 352; *Campbell v. Dearborn*, 109 Mass. 130; *Barber v. Milner*, 43 Mich. 248; *Horn v. Keteltas*, 46 N. Y. 605; *McClurkan v. Thompson*, 69 Pa. St. 305; *Umbenhouwer v. Miller*, 101 Id. 71; *Nicolls v. McDonald*, 101 Id. 514; *Perkins v. West*, 55 Vt. 265. Parol evidence is thus admissible to show the deed a mortgage as between the parties, and as against those who have derived title through the grantee who are not purchasers in good faith for value and without notice, and such persons have the rights, liabilities, and remedies incident to the relation of mortgagor and mortgagee: *Beatty v. Brummett*, 94 Ind. 79; *King v. Warrington*, 2 N. Mex. 318. Such evidence is admissible for all purposes. It is not confined to a mere inspection of the papers, but may be received to show all the material facts and circumstances attending the transaction, and whatever form such instruments may have assumed may be shown by parol evidence: *Reed v. Reed*, 75 Me. 264. Thus it may be received to show that, as between the parties, the deed was intended as a mortgage, and that such mortgage was afterwards extended to cover new debts: *Walker v. Walker*, 17 S. C. 328; or that an instrument subsequently executed in relation to the property was void for want of consideration: *Ingalls v. Atwood*, 53 Iowa, 283. As the equity upon which the court acts in such cases arises from the real character

of the transaction, any evidence, written or oral, tending to show this is admissible: *Peugh v. Davis*, 96 U. S. 336; *Montgomery v. Spret*, 55 Cal. 352; *Bartling v. Brasuhn*, 102 Ill. 441. But whenever it is sought to show that a deed absolute on its face is a mortgage by parol evidence, it must be clear and convincing, and of the strongest possible kind: *Low v. Graff*, 80 Ill. 360; *Hancock v. Harper*, 86 Id. 445; *Bartling v. Brasuhn*, *supra*; *Matthews v. Porter*, 16 Fla. 466; *Tilden v. Streeter*, 45 Mich. 533; *Howland v. Blake*, 97 U. S. 624; *Stewart's Appeal*, 98 St. 377.

In determining the question whether a deed absolute on its face is what it purports to be or a mortgage, the fact that the parties, after its execution, still understood the relation of creditor and debtor to exist between them in respect to the debt on which the deed is founded, must generally be regarded as decisive in showing that the instrument was intended as a mortgage: *Budd v. Van Orden*, 33 N. J. Eq. 143; *Ruffier v. Womack*, 30 Tex. 333; *Hoffman v. Ryan*, 21 W. Va. 415; *Klein v. McNamara*, 54 Miss. 90; *Westlake v. Horton*, 65 Ill. 228. If any doubt exists respecting the nature of the transaction, it will be considered a mortgage: *Trucks v. Lindsey*, 18 Iowa, 504.

So where the deed is given as security, with a contract unsealed, showing the transaction, it will be regarded as an equitable mortgage and so enforced: *Lewis v. Small*, 71 Me. 552; *Rowell v. Jewett*, 69 Id. 293. If the deed is accompanied by a lease of the lands, with a covenant to redeem within a certain time, the deed and lease constitute an equitable mortgage, and the grantor's rights are not destroyed by his failure to pay within the time specified, though the grantee took possession at the expiration of the lease. In such case the time for making payment may be extended by parol: *Vliet v. Young*, 34 N. J. Eq. 15; *Stryker v. Hershey*, 38 Ark. 264. Thus where the grantees in the deed execute an instrument providing that if the grantor pays them for legal services rendered and to be rendered they will reconvey to him, the transaction is an equitable mortgage: *Scott v. Mewhirter*, 49 Iowa, 487. When the deed is determined to be an equitable mortgage, it always remains a mortgage: *Ruffier v. Womack*, 30 Tex. 332; *Youle v. Richards*, 23 Am. Dec. 723; *Bunacleugh v. Poolman*, 3 Daly, 236; *Reed v. Reed*, 75 Me. 265; no matter what changes the parties may afterwards make in the conveyance: *Wilson v. Giddings*, 28 Ohio St. 554. But if when the deed is executed the parties contract for a resale, the contract does not divest the title acquired by the deed or convert it into a mortgage: *Randall v. Sanders*, 87 N. Y. 578; *Estate of Callahan*, 13 Phila. 581. So after an absolute deed as security for debt, the grantee may abandon the payment of the debt, cancel the secret agreement, and treat the conveyance as absolute, and he will be bound by his election: *Carpenter v. Carpenter*, 70 Ill. 457.

An absolute deed intended as a mortgage is not fraudulent and void as to creditors. Under the weight of authority, such conveyance is an indication of fraud merely as against existing creditors, but not conclusive, and the implication of fraud may be repelled by proof of an honest intent: *Ross v. Duggan*, 5 Col. 85; *Gibson v. Seymour*, 4 Vt. 518. A deed made to secure a debt, but void as title on account of usury, cannot be foreclosed as an equitable mortgage: *Broach v. Smith*, 75 Ga. 159.

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PEOPLE *v.* O'BRIEN.

[111 NEW YORK, 1.]

Dissolution of Corporations.





CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. O'BRIEN.

[111 NEW YORK, 1.]

CORPORATIONS. — THE PEOPLE OF THE STATE HAVE NO AUTHORITY, UPON THE DISSOLUTION OF A CORPORATION and the appointment of a receiver, to maintain a supplementary action against the receiver, the corporation, and others, for the purpose of obtaining a declaration of the rights and liabilities of the several parties, determining what were the assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation. Per Ruger, C. J.

CONSTITUTIONAL LAW — CORPORATIONS. — THE POWER TO REPEAL ACTS OF INCORPORATION, though reserved in such acts, must be exercised in subjection to the provisions of the federal constitution.

CORPORATION MAY ACQUIRE THE FEE IN PROPERTY, though created for a limited period only.

AN INTEREST IN THE STREETS OF THE CITY OF NEW YORK MAY BE GRANTED IN PERPETUITY, and irrevocably, by the city authorities.

GRANT OF FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY WILL BE CONSTRUED AS AN IRREVOCABLE GRANT IN PERPETUITY, though the corporation to which it is granted was created for a limited period only.

FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY is not a mere license or privilege enjoyable only during the life of the grantee, and revocable at the will of the state. It has been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

CORPORATIONS. — REPEAL OF A LAW AUTHORIZING CORPORATIONS does not destroy organization formed under it.

DISSOLUTION OF A CORPORATION DOES NOT TAKE AWAY OR DESTROY ITS PROPERTY OR ANNUL ITS CONTRACTS. Such dissolution has no other operation upon its contracts or property rights than the death of a natural person has on his.

RESERVATION OF RIGHT TO REPEAL THE CHARTER OF A CORPORATION enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business; but personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their general nature depend upon the powers conferred by the charter, are not destroyed by such repeal.

FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY SURVIVES THE DISSOLUTION of the corporation grantee, resulting from the repeal of its charter enacted pursuant to a right of repeal reserved by the legislature.

UPON THE REPEAL OF AN ACT OF INCORPORATION, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees.

CONSTITUTIONAL LAW. — STATUTE ATTEMPTING TO TAKE FROM THE BROADWAY SURFACE COMPANY, ITS STOCKHOLDERS and creditors, its franchise and property, and bestow them upon the municipality of New York, or to direct a sale of such franchise, and the payment of the purchase price to such city, is unconstitutional, and therefore void.

STATUTE MUST NOT BE GIVEN RETROACTIVE EFFECT unless its language expressly requires it.

CHARACTER OF A STATUTE IS NOT DETERMINED BY ITS TITLE, but by its provisions, unless its language is ambiguous, in which event its title and the occasion of its enactment may be considered to assist a correct understanding of its terms.

STATUTE PROVIDING PROCEEDINGS TO BE TAKEN ON THE DISSOLUTION OF A CORPORATION BY ACT OF THE LEGISLATURE MUST BE GIVEN A PROSPECTIVE OPERATION, and cannot be applied to a corporation so dissolved prior to the enactment of the statute.

CONSTITUTIONAL LAW. — WHEN, BY REASON OF THE DISSOLUTION OF A CORPORATION, ITS PROPERTY HAS VESTED IN ITS DIRECTORS, in trust for its stockholders and creditors, the legislature has no power to subsequently provide for the appointment of a receiver and the transfer of the corporate assets to him; such appointment to be made by a court in an action to which such directors are not parties, and in which the court has no other judicial discretion or authority than to designate such receiver.

STATUTE FORBIDDING A STREET-RAILWAY COMPANY from leasing its rights or franchises to any person or company operating a road parallel thereto does not inhibit traffic contracts with parallel roads for the partial use of their respective routes beyond the line of parallelism.

ACTION by the attorney-general in the name of the people against John O'Brien, receiver of the Broadway Surface Railroad Company, the mayor of the city of New York, the Broadway and Seventh Avenue Railroad Company, the Twenty-third Street Railway Company, Francis A. Palmer and William H. Hayes, trustees under certain mortgages. The president and trustees of the Broadway Surface Railroad Company, at the

time of its dissolution, were also parties defendant, as were several other persons.

Charles H. Tabor, attorney-general, and William A. Poste, for the people.

Denis O'Brien, for the receiver.

James C. Carter and Elihu Root, for the Broadway and Seventh Avenue Railroad Company.

Albert Stickney and Nelson S. Spencer, for Jacob Sharp and the Twenty-third Street Railway Company.

Edward W. Paige, for the mortgage trustees.

Thomas Allison, for the mayor of New York.

William C. Gulliver, for James A. Richmond and others.

RUGER, C. J. It will not be unprofitable, at the outset, to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action.

On May 13, 1884, that company filed articles of association, and became incorporated as a street-railroad company under the provisions of chapter 252 of the Laws of 1884, a general act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

The framers of the constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the high-

est price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality: *In re Cable Co.*, 109 N. Y. 32; *Mayor etc. v. T. & L. R. R. Co.*, 49 Id. 657. The subsequent legislation of the state confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886 makes it obligatory upon the municipalities to dispose of such right by public auction to the highest bidder.

Previous to December 5, 1884, this company applied to the municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth Street, and on that day, by resolution of the common counsel, the consent of the city was given upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface company duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein, to entitle it to acquire, construct, and operate its road. We know, not only from contemporary history, but from cases which have already reached this court, that serious questions have arisen, with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities, but they are not involved in this case, and have no bearing upon the questions presented for discussion by the record. They were neither alleged in the complaint, supported by proof, or presented in the arguments of counsel. The company subsequently obtained the favorable report of a commission duly appointed by the supreme court in lieu of the consent of abutting property owners, and the order of the court confirming the action of the commissioners.

After its incorporation the Broadway Surface company mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street-railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface company, and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large

present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations.

It is not disputed but that upon the entry of the order of confirmation the Broadway Surface Railroad Company became vested with the right of constructing a railroad on Broadway, and running cars thereon, to as full an extent as it had power to acquire, or the state and city authorities had authority to grant.

In the spring of 1885 the company caused its track to be constructed over the route authorized, and from that time to the fourth day of May, 1886, when it was dissolved by an act of the legislature, in connection with other railroad companies, ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the people, as plaintiff, and James A. Richmond, the former president of the Broadway Surface Railroad Company, as sole defendant, upon the application of the attorney-general, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface company, by a justice of the supreme court of the third judicial district, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 310 of the Laws of 1886.

The present action was a supplementary action brought July 8, 1886, by the attorney-general in the name of the people of the state against the city of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stockholders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation, determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation.

It is not claimed that the state has any legal interest in the determination of these questions, or that the receiver has not ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the provisions of section 1 of chapter 310

of the Laws of 1886, by virtue of the provision making it the duty of the attorney-general, upon the dissolution of a corporation by legislative action, "immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation."

The complaint shows that previous to the commencement of this action the attorney-general had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein, and that such action was still pending undetermined. It then proceeds to allege that in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought "in aid of the former action to prevent a multiplicity of suits, and to carry out the provisions of chapter 310 of the Laws of 1886."

It is not easy to see on what theory such an action can be maintained. The state has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper in aid of the former action.

The mode by which the provisions of chapter 310 are to be carried out are specially provided by that act to be through the instrumentality of a receiver, and it is not claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint. The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the state has no such interest, and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party: *People v. Booth*, 32 N. Y. 397; *People v. Ingersoll*, 58 Id. 13; 17 Am. Rep. 178; *Matter of N. Y. Elevated R. R.*, 70 N. Y. 339; *People v. B., F., & C. I. R. R. Co.*, 89 Id. 93; *People v. A. & S. R. R. Co.*, 57 Id. 161.

It is claimed that this court held in *People v. O'Brien*, 103 N. Y. 657, that the action was maintainable. We think that claim is unfounded. The question was not involved in the motion there considered. That was a motion to change the place of trial of the action. Whether the complaint stated a good cause of action or not, could not have been properly considered or decided on such a motion.

This action is certainly unusual, and is believed to be unprecedented in its scope and design; and if held to lie at

all, presents a strong and unfavorable contrast to the mode in which legal controversies are usually brought to the attention of judicial tribunals. Some members of the court, however, are of the opinion that the right of the people to maintain the action depends wholly upon the question of the constitutionality of chapter 310 referred to, and requiring the consideration of that question.

Considering, therefore, the magnitude of the interests affected, and the importance to the public generally of a speedy determination of the questions, involving the right of operating a street-railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon the ground referred to, and proceed to an examination of the questions upon which such right depends.

Their determination involves an inquiry into the rights secured by the mortgagees and bond-holders through the mortgages upon the property and franchises of the railroad company; the validity of the traffic contracts made by it with other street-railroad corporations, and the effect which the legislation of 1886, comprised in chapters 268, 271, and 310, had upon such questions. In other words, we think the material question for discussion here is, whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and if so, upon whom the right of administering its affairs devolved.

Upon the trial of the action, a judgment was rendered in favor of the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company, and survived the dissolution of the corporation; that the traffic contracts were made by authority of law, and could be enforced notwithstanding the dissolution of the corporation; and that chapter 271, and parts of chapter 310, of the Laws of 1886, were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law."

The court also held that this action was maintainable in the name of the people; that a receiver of the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property, and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction restraining all of the defendants, except the receiver,

from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain, or assert any of the claims, demands, or rights of action affecting in any manner the affairs, property, rights, and privileges of the Broadway Surface Railroad Company which have been tried and determined in this action. Not only the plaintiff, but each of the defendants except the Broadway and Seventh Avenue Railroad Company, appealed from this judgment to the general term. That court affirmed the judgment of the trial court.

The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment.

A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but because their determination will affect great public questions arising out of the limitations imposed by the constitution upon the legislative power, over the property of corporations lawfully acquired.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises, to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is therefore urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street-railroads for the mutual use of their respective roads, fell with the repeal, and could not be enforced.

If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or

destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even of the framers of our constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the federal constitution.

Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations, but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.

It is not perhaps strange in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts, that *dicta*, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the state, it is contended that the stated term of one thousand years prescribed in its charter for the duration of the company constitutes a limitation upon the estate granted, and that therefore the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850) and the constitution to alter, amend, and repeal the charters or laws under which corporations might be organized, also

constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the state accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

It will be convenient, in the first instance, to consider the nature of the right acquired by the corporation under the grant of the common council with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city in trust for the people of the state, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street-railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable: *Yates v. Van de Bogert*, 56 N. Y. 526; *In re Cable Co.*, 109 Id. 32.

Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street-railroad: *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *Davis v. Mayor etc. of New York*, 14 N. Y. 506; 67 Am. Dec. 186; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Mayor etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261; *Sixth Ave. R. R. Co. v. Kerr*, 72 Id. 330.

Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

In *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314, Judge Selden said, with reference to a grant from the common coun-

oil of New York in no material respect differing from this: "It amounted to an immediate grant of an interest, and, it would seem, of a freehold in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. . . . The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution."

Judge Comstock, in *Davis v. Mayor of New York*, 14 N. Y. 506, 67 Am. Dec. 186, said: "As the consideration for constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. These rights are, in effect, granted in perpetuity."

In the case of *Mayor etc. v. Second Avenue R. R. Co.*, 32 N. Y. 272, it was said: "Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise which the common council could not take away or impair by any subsequent act of its own."

The resolution of the common council in this case expressly provided for traffic contracts by which the Broadway and Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface railroad, and no conditions upon the right granted to the Broadway Surface Railroad Company, in respect to the duration of such contract rights or otherwise, were imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation, or those who might lawfully succeed to its rights.

When we consider the mode required by the statutes and the constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it

cannot be supposed that either the legislature or the framers of the constitution intended to offer for public sale property the title to which was defeasible, at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done.

Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage, and otherwise dispose of, to the destruction of interests created therein by their consent.

We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word: *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 Id. 263; 59 Am. Dec. 536.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indescrutable by legislative authority, and as constituting property in the highest sense of the term.

It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally.

We will refer to a few only of the statutes on this subject from which the implication arises, not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and

assigns to enjoy their use under an indefeasible title. Thus railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties: Laws of 1839, c. 218; Laws of 1872, sec. 2, c. 1843; Laws of 1884, sec. 15, c. 252; to pledge them by way of mortgage as security for loans: Laws of 1850, subd. 10, sec. 28; to consolidate with other companies owning connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors: Laws of 1875, c. 108; *Shields v. Ohio*, 95 U. S. 319. Mortgagees and others have been authorized to purchase such franchises upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter: Laws of 1857, sec. 1, c. 444; Laws of 1873, c. 469, 710; Laws of 1880, c. 113; Laws of 1874, c. 430. Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad with all its powers, privileges, and franchises: Laws of 1873, sec. 1, c. 469, 710; Laws of 1854, sec. 1, c. 282. The sale of such franchises has been authorized by the municipality where located to parties proposing to build street-railroads: Constitutional Amendment of 1875; Laws of 1884, sec. 7, c. 252; Laws of 1886, c. 62, 66. And by section 15 of the act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street-railroad corporations. Indeed, it is matter of public history that one half of the railroads of the state are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution through transfers effected by the foreclosure of mortgages and otherwise.

The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the life of the original corporation and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider: *People v. Brooklyn, F., & C. I. R. R. Co.*, 89 N. Y. 84.

In *Mayor etc. v. Second Avenue R. R. Co.*, 32 N. Y. 261, Judge Brown said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for

the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property."

The same learned judge said in *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364: "The grant to the city railroad company and its acceptance on the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise of which it cannot be deprived without its consent or against its will."

It was held by this court in *Langdon v. Mayor etc.*, 93 N. Y. 129, that a grant from the city, of land to be used as a wharf, carried with it, as a necessary incident and appurtenance, a right of way for vessels over adjoining waters to the wharf, and that under such grants the property granted can only be resumed by the grantor when needed for public use by the exercise of the right of eminent domain.

The court also held in *People v. Brooklyn etc. R. R. Co.*, 89 N. Y. 75, that upon a foreclosure of the property and franchises of a railroad corporation, an individual could lawfully become their purchaser, and could hold and transfer them to any corporation having or acquiring the right to exercise such franchises.

In *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330, it was held that the right of a street-railroad company in the use of a street for the purpose of its business was a property right, subject to condemnation for public use. As we have already seen, the cases of *People v. Sturtevant*, *Mayor etc. v. Sixth Avenue R. R.*, *Davis v. Mayor etc.*, and *Milhau v. Sharp*, hereinbefore referred to, sustain the same views.

The case of *N. O., S. F., & Lake R. R. Co. v. Delamore*, 114 U. S. 501, is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city under general laws authorizing the formation of street-railroad corporations. It was held, "where there has been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of

the railroad pass to the purchaser. . . . It follows that if the franchises of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and pass to the purchaser at the bankruptcy sale."

In *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619, it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bond-holders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road."

These rights of property having been acquired and created under the express sanction and authority of the state, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the state to alter, amend, and repeal laws or charters.

The reservations applying to this case are claimed to be as follows: 1. Section 1, article 8, title "Corporations, how Created," Constitution of 1846, providing that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed"; 2. Section 8, title 3, chapter 18, of the Revised Statutes, seventh edition, providing that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature"; 3. Section 48, chapter 140, Laws of 1850, providing that "the legislature may at any time annul or dissolve any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders, or officers, for any liability which shall have been previously incurred"; and 4. Chapter 282, Laws of 1884, under which this corporation was organized, giving it all the powers and privileges granted, and subject to all of the liabilities imposed by chapter 140, Laws of 1850, and the several acts amendatory thereof, and further providing that "the legislature may at any time alter, amend, or repeal this act": Sec. 19.

The constitution of 1846 for the first time introduced restrictions upon the power of legislatures to grant special charters, and required that provisions for corporations, save in exceptional cases, should thereafter be made by general

laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes, in relation to reserved power over charters, in full force and effect

It will be observed that the constitution and the act of 1884 provide specially for the amendment and repeal of statutes alone, but the Revised Statutes and the act of 1850 are addressed specially to the subject of the annulment and repeal of charters created under such statutes.

It seems to us that these provisions relate to different subjects, viz., the repeal of laws, and the annulment of charters formed under such laws, and that the power to do one does not naturally or properly include the power to do the other: *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

Certainly the repeal of a law authorizing corporations would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly that which they were precluded from doing directly. It must be assumed that the framers of the constitution, as well as the legislature, used the language employed by them intelligently, and according to its common and customary signification, and when they spoke of the annulment and repeal of acts and laws alone, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative action, and since the restrictions upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects were immediately within the contemplation of the law-makers.

In considering this question, the provisions of the Revised Statutes may be laid out of view, for if they contain any broader power than the act of 1850, they must be deemed to have been repealed by the provisions of the latter act, as inconsistent therewith. The reservations, therefore, which apply to this case are contained in the acts of 1850 and 1884, which constitute a part of the railroad charter.

These acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend, and repeal these acts, and may also annul and dissolve charters formed thereunder, but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the state was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property, in the event of dissolution. By virtue of this contract, the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation,—whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation, we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to being personal in character, and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise

made: *People v. B., F., & C. I. R. R. Co.*, 89 N. Y. 84; *People v. Metz*, 50 Id. 61.

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise: *Gue v. Tide Water Canal Co.*, 24 How. 257; and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our state authorizing the sale of the franchise and property of a railroad company on execution seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his: *Mumma v. Potomac Co.*, 8 Pet. 281, 285.

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred: *Butler v. Palmer*, 1 Hill, 335.

The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business: *People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590; and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal constitution upon legislation impairing the obligation of contracts: *Munn v. Illinois*, 94 U. S. 113, 123.

We think no well-considered case has gone further than

this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 135: "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only could not be made the foundation of an authority to do that which is expressly inhibited by the constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power.

Since the decision of the celebrated *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518, the doctrine that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract, within the meaning of the federal constitution prohibiting state legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several states as the law of the land, and may be regarded as too firmly established to admit of question or dispute: *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364. The intimation by Judge Story in that case that the rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption by the legislatures of the various states of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the constitution. In either case they operate upon the contract according to the language of the reservation: Morawetz on Corporations, 464. It is manifest, therefore, that in the absence of such reserved power legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by

virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract with such effect upon the rights of the parties thereto as the law ascribes to it: *Sinking Fund Cases*, 99 U. S. 700, 748; *Tomlinson v. Jessup*, 15 Wall. 454, 457. In speaking of the exercise of this power by Congress in the *Sinking Fund Cases*, *supra*, Chief Justice Waite says: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. . . . Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so, it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant

to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract, it is not sustainable."

This dissent proceeded upon the ground that the acts of Congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the constitution for the protection of life, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create.

If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void.

In *People v. National Trust Co.*, 82 N. Y. 287, the question was raised that a dissolved corporation was discharged from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge Rapallo said: "This claim is not founded upon the allegation of any payment, release, or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation, the lease was terminated, and the covenant to pay rent ceased to be obligatory. We do not regard the dissolution as

having any such effect. Under the statutes of this state, on the dissolution of a corporation, its assets become a trust fund for the payment of its debts, and these include debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or canceled."

In *Commonwealth v. Essex Co.*, 13 Gray, 239, Justice Shaw said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted": *Albany R. R. Co. v. Brownell*, 24 N. Y. 345.

The case of *City of Detroit v. Detroit etc. Plankroad Co.*, 43 Mich 140, is not only in point, but entitled to high consideration on account of the distinction as a constitutional lawyer of the learned judge who wrote the opinion of the court. The question was, whether the legislature had power to compel the defendant to remove its toll-gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge Cooley says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times, such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the state; it is enough that it has become private property, and it is thus protected by the 'law of the land.'"

And, finally, upon this branch of our subject, we are unable to see why section 48 of the Law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the contract between the state and corporations organized thereunder, and specially provides for the effect which an exercise of the reserved power of repeal by the state shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors or officers, upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged

its franchises, entered into traffic engagements, and contracted debts. Creditors, contractors, and stockholders had a right to rely upon the promise of the state, that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation; and this promise is a contract, protected by the provisions of the federal constitution.

In the absence of any constitutional provision prescribing the effect of such repeal, it was competent for the legislature to declare what that should be, and for the state to contract with reference to such a declaration. The right of repeal, as provided by the constitution, is fully recognized by the act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby is clearly defined.

We are therefore of opinion that the statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the state of the power of repeal, but it also correctly formulates the principle of law applicable to the situation. We think it necessary to refer only to some of the leading cases cited by the plaintiff's attorney in support of his argument, and are of the opinion that they are not controlling authorities upon the case under consideration. That of *Greenwood v. Freight Co.*, 105 U. S. 13, was an action by a stockholder in the Marginal Company against the Freight Company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was therefore allowed to bring his suit to protect his interest in its property. Judge Miller says in that case: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the share-holders of such a corporation to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the

provisions requiring compensation to be made therefor under the power of eminent domain.

Neither has the case of *People v. Globe M. L. Ins. Co.*, 91 N. Y. 174, any bearing upon the questions involved in this discussion. It was held in that case that contracts for personal services contemplated the continued existence of the parties, and when either of them died it necessarily effected a termination of such contracts.

So, too, cases depending upon the effect of conditions in a grant to the creation of corporate life, or the acquisition of property rights thereunder, are, for obvious reasons, foreign to the questions involved here.

Here the grantee has performed every condition essential to its creation as a corporate being, and its capacity to acquire and hold property, and the only question is as to the effect of a power to extinguish the corporate life, reserved in its charter, upon its property rights.

In *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. St. 287, 301, the question arose under a statute which specially provided that the state might resume all rights conferred in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of power, the legislature repealed the charter and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation in the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees, or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question.

We are therefore of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street-railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution providing for such an event.

Sections 9 and 10, title 3, chapter 18, part 1, of the Revised Statutes, seventh edition, 132, 153, seem to furnish a conclu-

sive solution to the inquiry. They read as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and other necessary expenses. Sec. 10. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, . . . and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands."

From these sections it would seem that upon the dissolution of this corporation, its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By operation of law a vested right of action accrued to all creditors and stockholders immediately on the dissolution against such trustees for the value of all property which did or might, by the exercise of reasonable diligence, come into their hands. This was a liability which after it once attached was beyond the constitutional power of the legislature to release or discharge: *Dash v. Vankleeck*, 7 Johns. 577; 5 Am. Dec. 291.

The evidence is undisputed that upon the dissolution, declared by the legislature, the trustees took possession of the railroad property, and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders by virtue of such possession, and their authority to administer the assets of the corporation for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred. The cases in this state fully support these propositions. As was said by the chancellor in *Kane v. Bloodgood*, 7 Johns. Ch. 90, 128, 11 Am. Dec. 417: "The reasonable construction of the act is, that the trus-

tees succeeded to all the rights and privileges of directors, and to the same means of defense."

In *McLaren v. Pennington*, 1 Paige, 102, it was held, as stated in the head-note, that "where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees."

In *Heath v. Barmore*, 50 N. Y. 305, Judge Rapallo said: "Under the provisions of 1 Revised Laws, 248, and 1 Revised Statutes, 600, sections 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed) for the purpose of paying the debts of the corporation, and dividing its property among its stockholders, and these provisions apply as well to the real estate as to the personal property of corporations. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor."

Allen, J., in *Central City Savings Bank v. Walker*, 66 N. Y. 428, speaking of the ownership of property and the property rights of a corporation, said: "During the life of the corporation, the body corporate was the legal owner, and upon the expiration of the charter, the legal title vested in the trustees in office, at the time, in trust for the creditors and stockholders."

There can be no valid distinction between property held in trust and that owned by individuals in respect to the protection afforded to it by the constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is in both cases beyond the reach of legislative action: *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518.

It then remains for us to consider the validity of the provisions of chapters 271 and 310 of the Laws of 1886. We are fully impressed with the importance of this question, and the well-settled principles of construction which require every statute to be so construed as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language.

Another rule, equally well settled, precludes courts from inquiring into the motives of legislatures in making laws, and

to consider them simply with reference to their legal effect, upon the rights of persons subjected to their operation.

If, however, upon such examination it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of courts to protect them by declaring the invalidity of the statute.

Upon such examination, we are of the opinion that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface company and its stockholders and creditors its property, and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation, notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase price to the city.

These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence or transferred, except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law: *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717.

Such legislation has been frequently and emphatically condemned: *Taylor v. Porter*, 4 Hill, 147; 40 Am. Dec. 274; *Wynehamer v. People*, 13 N. Y. 434; *Westervelt v. Gregg*, 12 Id. 202; 62 Am. Dec. 160; *Kilbourn v. Thompson*, 103 U. S. 168.

In speaking of the reserved power to alter, amend, and repeal laws authorizing incorporations, in *People v. Boston and Albany R. R. Co.*, 70 N. Y. 570, Judge Earl says: "Under this reserved power, the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot be doubted that it may do all that is required by the act of 1874."

Judge Thompson said, in *Dash v. Van Vleeck*, 7 Johns. 477, 5 Am. Dec. 291: "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by

law the property of an individual without his consent, and give it to another."

The main argument presented to maintain the constitutionality of this act is the assertion that these consents do not constitute property within the usual signification of that term. We have considered that question, and do not agree with the claim. In view of the fact that the statute expressly contemplates their sale, transfer, and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to chapter 310. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface Railroad Company, and should control the proceedings to wind up its affairs. That company was, however, dissolved on January 4th, and the act now under consideration was not passed until January 11th thereafter, and could not have retroactive effect unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the act and speculate as to the motives of the legislature in passing it. The act does not purport, in terms, to have a retroactive operation, and it is contrary to settled principles to give it such, unless there is something in the language of the act requiring this to be done.

Section 1 provides: "Whenever any corporation organized under the laws of this state shall be annulled and dissolved by an act of the legislature, it shall be the duty of the attorney-general . . . to bring a suit . . . to wind up the affairs of the corporation."

This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished.

The character of a statute is to be determined by its provisions, and not by its title: *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642; but when its language is ambiguous and doubtful, resort may be had to its title and the occasion of its enactment to explain an ambiguity in its terms. There is no ambiguity in the terms of this act, and nothing to indicate an intention to give it retroactive operation. The application of the act to the Broadway Surface Company can be sustained only upon the theory that such act applies to all corporations whatsoever, theretofore dissolved by legislative act, however

remote in point of time such dissolution may have been effected. Whether there are such cases or not, we are not informed, but we are invited to adopt a rule which would relate back and cover such cases if they exist.

We think such a decision would conflict with settled rules of construction. In *New York etc. R. R. Co. v. Van Horn*, 57 N. Y. 473, it was held that a legislative intent to violate the constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect when it is capable of any other construction; and that if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it.

In the case of *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton v. Wickwire*, 54 N. Y. 229, the court declared that neither original statutes nor amendments can have any retroactive effect, unless, in exceptional cases, the legislature so declare: *People v. Supervisors*, 43 Id. 130; *People v. McCall*, 94 Id. 587; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 Id. 473. The power of the legislature to give retroactive operation to a statute in some cases is conceded, but we believe that, to have such effect, it should declare its purpose in plain and unmistakable language, and that so unusual a signification should not be attributed to it by resorting to vague and equivocal inferences which have no support in the language employed. Such an interpretation would most emphatically be forbidden when it would interfere with vested rights. If we were at liberty to inquire into the circumstances under which this act was passed, and its connection with other legislation of the same period, we might conjecture that the legislature designed it to apply to the Broadway Surface Railroad Company; but it has not so expressed itself in the act, and the rules of construction to which we have referred forbid us from supplying the language necessary to give it such effect: *Benton v. Wickwire*, 54 N. Y. 226. But, assuming that the act was intended to apply and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections which cannot be obviated or reconciled with the provisions of the fundamental law.

A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and

reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case, and it is immaterial whether he is a party in his own right or as trustee of an express trust; in either event he is a party to the action, interested therein and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse judex in propria causa.* This law is objectionable also because it makes proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract. And, again, it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contract, and we know of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract, and perform it according to its terms. But an objection to this act, even more serious than those considered, is found in the provision for the appointment of a receiver of the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors.

It will not be claimed that the appointment of such a receiver by the court in an action against a stranger, without notice to the trustees, in the absence of the authority conferred by chapter 310, would confer upon him title to property previously vested in others: *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717. We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this act, and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust in order to avoid a failure thereof; but we know of no authority

for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession. As was said by Judge Earl in *Stuart v. Palmer*, 74 N. Y. 184, 30 Am. Rep. 289: "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing and an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." And the chancellor had previously said in *Verplanck v. M. Ins. Co.*, 2 Paige, 450: "Another fatal objection to the regularity of these proceedings is, that the appellants were deprived of the possession of their property without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights": *Devoe v. Ithaca etc. R. R. Co.*, 5 Paige, 521; *Ferguson v. Crawford*, 70 N. Y. 256; 26 Am. Rep. 589. As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations, is indisputable, and if it had done so in the act of dissolution, or previously, it would undoubtedly have prevented the vesting of the property in trustees; but this it did not do, and it had no authority, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another: *McLaren v. Pennington*, 1 Paige, 102; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518.

These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the attorney-general to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme that it cannot be supposed it would have been enacted except in connection with the

other provisions of the act. We therefore think this law is obnoxious to the objection that it assumes to take property without due process of law, and impairs the obligation of contracts. The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. The plaintiff has not alleged any want of power on the part of the defendant corporations to run cars over the Broadway Surface railroad under their respective charters, and that question must be left until the attorney-general arraigns them in a direct action for usurpation: *People v. B., F., & C. I. R. R. Co.*, 89 N. Y. 93; *Denike v. New York & R. L. & C. Co.*, 80 Id. 599.

It is claimed that the contract with the Broadway and Seventh Avenue railroad is void because it is made with a company owning a parallel railroad. The trial court found that it was parallel to the Broadway Surface railroad. Assuming, for the purposes of this decision, that this was a question of fact and not of law, and that we are bound by the finding, we do not conceive that fact to be conclusive on the question. The material ground upon which the contention is based is the proviso to section 15, chapter 252, Laws of 1884, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad tracks to any other street surface railroad company authorized to run upon such route. The proviso is, that the section should not be construed to authorize any of such companies "to lease its rights or franchises" to any other company owning and operating a road parallel thereto.

By these contracts, the Broadway Surface railroad acquired the right from the Broadway and Seventh Avenue railroad, and from the Twenty-third Street Railroad Company, to run cars, and make a continuous trip for a single fare, to the termination of their respective roads, over the tracks of such roads; and such roads, from their respective points of connection, were thereby respectively authorized to run cars over the Broadway Surface railroad. That these rights were valuable and inured largely to the convenience and benefit of the traveling public, is not now denied.

The uniform course of legislation in reference to street-railroads shows a policy on the part of the state to facilitate

arrangements for the connection of continuous lines, and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. It can hardly be supposed that the legislature, while expressly making provisions for such facilities, intended to proscribe companies connecting with another road, which happened to own a line parallel for a certain portion of its length, but which also owned other lines extending beyond the parallel portion, from the benefits to be derived from a traffic contract. It seems to us that the obvious intent of this provision was to avoid the monopoly of parallel lines, and prevent the acquisition by one railroad company of the exclusive possession and control of such lines. It therefore prohibits leases to parallel roads. This does not, and in our judgment was not intended to, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. These contracts were not in terms or in effect leases of such rights, and did not surrender possession or control of the road by its original owner. Such contracts were also authorized by chapter 218 of the Laws of 1839, and we do not consider that statute to have been repealed by the proviso of the act of 1884, or other legislation on the subject.

There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties which it might be proper to discuss, were it not that the demands made by the claims of practical litigation upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occasions when parties actually aggrieved present them in a litigation where their consideration is essential to the determination of rights. The views expressed lead to a denial of the relief sought in the action by the plaintiff.

The judgments of the special and general terms should be reversed, and the complaint dismissed, with costs to the defendant other than the receiver.

ANDREWS and EARL, JJ., concurred in the result, upon these grounds: 1. The annulling act is constitutional and valid, and its effect was only to take the life of the corporation; 2. All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies, survived; 3. The act, chapter 271, is unconstitutional;

4. That act, and the act, chapter 310, are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation, and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation; 5. As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance, and therefore the judgment should be reversed, and complaint dismissed.

Judgment accordingly.

EFFECT OF DISSOLUTION OF CORPORATION, WHETHER BY REPEAL OF ITS CHARTER OR OTHERWISE. — In the notes to *State Bank v. State*, 12 Am. Dec. 239, *May v. State Bank of North Carolina*, 40 Id. 737, and *Miners' Ditch Co. v. Zellerbach*, 99 Id. 336 et seq., the subject of the dissolution of corporations has been treated at some length. In those notes it is shown that at common law, upon the dissolution or civil death of a corporation, its real estate reverted to the original owners or their heirs, its personal property vested in the state or sovereign, and all debts due to or from it were by operation of law extinguished. And, what is more remarkable, that there have been courts in this country, even since the adoption of the constitution of the United States, which have upheld this doctrine. It is difficult to comprehend how any American court could conceive that such a doctrine was in harmony with the provisions of the federal constitution and the principles of American jurisprudence. In two of the states whose courts at an early day recognized this rule of the English common law as in force, subsequent decisions have expressly overruled the earlier decisions on this point. In *State Bank v. State*, 1 Blackf. 267, 12 Am. Dec. 234, the supreme court of Indiana decided that the effects of a dissolution of a corporation at common law were: 1. That its lands and tenements reverted to the person by whom they were granted to the corporation; 2. Its goods and chattels vested in the crown; 3. The debts due to and from it were extinguished. But in the case of *State v. Bailey*, 16 Ind. 46, 52, 79 Am. Dec. 405, 411, Perkins, J., in delivering the opinion of the court said: "It may be observed, further, that the supreme court of the United States in *Bacon v. Robertson*, 18 How. 480, has held that on the dissolution of a once legal corporation, its personal and real property become assets for the payment of its debts and distribution among the stockholders, contrary to the doctrine asserted in most elementary works; and in *State Bank v. State*, *supra*. This doctrine seems to us to be right." In the cases of *Commercial Bank of Natchez v. Chambers*, 8 Smedes & M. 9, and *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168, the high court of errors and appeals held that this rule of the English common law, except as modified by statute, was in force in the state of Mississippi. But Campbell, J., delivering the opinion of the supreme court of that state in the case of *Bank of Mississippi v. Duncan*, 56 Miss. 173, said: "The injustice of the common-law rule, and its 'hostility to the more enlightened spirit of the age,' were urged upon the high court of errors and appeals by counsel, who insisted that it was condemned by reason and the principles of modern and enlightened jurisprudence; but the firm answer of the court was, that, except as modified by statute, the common-

law rule on this subject was in full force and operation in this state. We have no hesitation to declare our full concurrence with the views of counsel on this point, and our dissent from the view of the high court of errors and appeals announced in the case of *Coulter v. Robertson*, 24 Miss. 278." And the legislature of that state has enacted that, "on the final dissolution of any corporation, either by judgment or otherwise, all its real and personal estate shall be vested in the individuals who may have been members of the corporation, or stockholders, in their respective proportions, who shall hold the same as tenants in common; . . . and debts due to and from the corporation shall not be extinguished by its dissolution": Rev. Code Miss. 1880, sec. 1040. In the case of *Fox v. Horah*, 1 Ired. Eq. 358, 36 Am. Dec. 48, the supreme court of North Carolina held that the English common-law doctrine heretofore stated was in force in that state. And this decision has been approved in *Malloy v. Mallett*, 6 Jones Eq. 345. It would appear, however, that the injustice likely to result from the application of such a doctrine has been avoided by the interposition of the courts of equity in that state, for Smith, C. J., in delivering the opinion of the court in *Von Glahn v. De Rosset*, 81 N. C. 467, 473, referring to these cases, said: "These decisions were made and these conclusions reached after full discussion and careful consideration by as able jurists as ever presided in this court, and our reluctance to disturb them after so long an acquiescence by the profession could be overcome only by the clearest convictions of their error. They rest, however, upon strictly legal principles, well settled by authority, and carried to their logical results, the soundness of which, in their applications to the facts before the court, we are not disposed nor is it necessary to question or controvert. But a remedy has been suggested, and in numerous cases applied, which may seem to conflict with the decisions of this court, by calling into exercise on behalf of the creditors or others interested the equitable jurisdiction of the court, interposing and affording relief when none is admissible at law, and for the very reason that there is no legal remedy. While it is manifest that by its dissolution the corporation ceases to exist, and can sustain the relations of neither creditor nor debtor towards others, and hence debts to or from it become extinct at law, it is inequitable that creditors should go unpaid, when there are funds or debts of the defunct corporation which ought to be applied in payment, simply for want of some legal being intervening between the creditors and debtors of the corporation, with capacity to make the collection and adjustment. Accordingly, acting upon the maxim that trusts shall not fail for want of a trustee, and regarding the debts and other property of the dissolved corporation as the property of its creditors to the extent of their respective claims, the court of equity will stretch out its arms and gather up and collect the assets, though there be no strict legal owner to assert his right, and will appropriate and distribute them among the creditors, and subordinate thereto, among its secondary creditors, the stockholders themselves. The exercise of this equitable power, though not adverted to in the cases cited, is not denied, nor is it inconsistent with the principle therein declared. The remedy suggested grows out of those rigorous rules of the common law, and is the offspring of necessity to prevent a failure of justice."

These are the principal states in which the common-law doctrine on this subject has been recognized. There are to be found in the reports of other states statements of this doctrine of the English common law, but many of them are rather a display of the writer's common-law learning than a statement of the legal principles to be applied in the practical determination of

the questions involved in the cases. We doubt very much if any modern American case can be found in which, by the judgment of the court, the property, either real or personal, of a corporation has been taken from its creditors and stockholders and transferred to other persons or corporations, or appropriated to the use of the state, without provision made for compensation. The supreme court of the United States has never recognized the existence in this country of any such rule of law as that claimed to have been the rule of the English common law in reference to the property of a dissolved corporation. On the contrary, that tribunal has uniformly held that the property of such a corporation constitutes a trust fund for the payment of its creditors, and for distribution among its stockholders. Mr. Justice Miller, in delivering the opinion of the court in *Greenwood v. Freight Co.*, 105 U. S. 13, 19, said: "Personal and real property, acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the share-holders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." In the case of *Curran v. Arkansas*, 15 How. 304, 312, Mr. Justice Curtis, delivering the opinion of the court, said: "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied. . . . And, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." Mr. Justice Story, in delivering the opinion of the court in *Terrett v. Taylor*, 9 Cranch, 43, 52, said: "But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." And the same distinguished jurist, in delivering the opinion in *Mumma v. Potomac Company*, 8 Pet. 281, 285, said: "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

The just and reasonable doctrines enunciated in the foregoing extracts are firmly established by the great weight of authority in this country: *Lum v. Robertson*, 6 Wall. 277; *Shields v. Ohio*, 95 U. S. 324; *Wood v. Dunmer*, 3 Mason, 308; *Lothrop v. Stedman*, 13 Blatchf. 134; *Curry v. Woodward*, 53 Ala. 371; *Howe v. Robinson*, 20 Fla. 352; *Robinson v. Lane*, 19 Ga. 337; *Mining Co. v. Mining Co.*, 116 Ill. 170; *Powell v. Railroad Co.*, 42 Mo. 63; *McCoy v.*

Farmer, 65 Mo. 244; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Newfoundland etc. Co. v. Schack*, 40 Id. 222; *Towar v. Hale*, 46 Barb. 361; *Lea v. American etc. Canal Co.*, 3 Abb. Pr., N. S., 1; *Heath v. Barmore*, 50 N. Y. 302; *Hastings v. Drew*, 76 Id. 9; *Moore v. Schoppert*, 22 W. Va. 282; *Lumber Co. v. Ward*, 30 Id. 43. And it is now provided by statute in most if not all of the states, that, upon the dissolution of a corporation, its property of every kind shall be a fund for the payment of its debts, and that the balance remaining after meeting all its legal obligations shall be divided among its stockholders in proportion to their respective interests. And this would seem to be the only disposition of the property of a dissolved corporation that can be made in harmony with the principles of justice and in accordance with the provisions of the constitution of the United States. The property of a corporation belongs to its stockholders. In delivering the opinion of the court in *Moore v. Schoppert*, 22 W. Va. 291, Snyder, J., said: "In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by the courts of equity." The effect of the dissolution of the corporation is to change the form, but not to destroy this ownership. As was said by Lowrie, C. J., delivering the opinion of the court in *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685: "The act of dissolution works a change in the form of the interests of its members, by destroying the stock, and substituting the thing which the stock represented, that is, a legal interest in the property, and leaves the members to such a division of this." This property no law can take from its owners and transfer to another without compensation, nor appropriate to the use of the state without due process of law. Said Shipman, J., in delivering the opinion of the court in *Lothrop v. Stedman*, 13 Blatchf. 143: "A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights." And Mr. Justice Story, in delivering the opinion of the court in *Wilkinson v. Leland*, 2 Pet. 658, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced." Where lands are conveyed to a corporation by an absolute grant, it would seem that, in this country, there can remain in the grantor no reversion or possibility of a reverter: *Fletcher v. Peck*, 6 Cranch, 87; *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y. 121; *Heath v. Barmore*, 50 Id. 302; *Yates v. Van de Bogert*, 56 Id. 526; *Erie etc. R. R. Co. v. Casey*, 56 Pa. St. 287. Chief Justice Marshall, in delivering the opinion of the court in *Fletcher v. Peck*, 6 Cranch, 137, said: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right." And Black, J., delivering the opinion of the court in *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 325, said: "The suggestion that the repealing act will have the effect of putting the road into the possession of the persons whose lands were taken to build it

on is entitled to still less regard. In the first place it is founded in manifest error." And in *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 128, Parker, J., delivering the opinion of the court, said: "It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute." By the civil law also the property of a dissolved corporation belongs to its members, and must be divided among them: *Stark v. Burke*, 5 La. Ann. 740; *Citizens' Bank of Louisiana v. Levee S. C. P. Co.*, 7 Id. 286.

WHAT FRANCHISES, RIGHTS, AND CONTRACTS OF CORPORATION SURVIVE ITS DISSOLUTION. — A grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred, and that when they are abused or misemployed, they may be withdrawn by proceedings consistent with law: *Mumma v. Potomac Co.*, 8 Pet. 281; *Chicago L. I. Co. v. Needles*, 113 U. S. 574. Story, J., delivering the opinion of the court in *Mumma v. Potomac Co.*, *supra*, said: "A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them." And as the various states of the Union have, since the decision in the celebrated case of *Dartmouth College v. Woodward*, 4 Wheat. 518, either by statutes or in their constitutions, reserved the right to alter, amend, or repeal charters of corporations at the pleasure of the legislature, it becomes an important practical question to determine what franchises, rights, privileges, and contracts of the corporation survive its dissolution by the repeal of its charter or otherwise. The effect of the reservation of the right to alter, amend, or repeal a charter of incorporation is to prevent the charter from becoming what it otherwise would be, a contract with the state, to qualify the grant, and to prevent the exercise of the reserved power from falling within the prohibition of the federal constitution, as an act impairing the obligation of a contract: *West Wisconsin R'y Co. v. Supervisors of Trempealeau Co.*, 35 Wis. 257; affirmed 93 U. S. 595; *Mayor etc. of Worcester v. Norwich etc. R. R. Co.*, 109 Mass. 103; *State v. Commissioners of R. R. Taxation*, 37 N. J. L. 228; *Read v. Frankfort Bank*, 23 Me. 318; *McLaren v. Pennington*, 1 Paige, 102; *New York Cable R'y Co. v. Chambers Street etc. R. R. Co.*, 40 Hun, 29; *Suydam v. Moore*, 8 Barb. 358; *White v. Syracuse etc. R. R. Co.*, 14 Id. 559; *Tomlinson v. Jessup*, 15 Wall. 454; *Beer Co. v. Massachusetts*, 97 U. S. 25. Mr. Justice Field, in delivering the opinion of the court in *Tomlinson v. Jessup*, *supra*, said: "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." Property or rights which have become vested in a corporation under a legitimate exercise of the powers granted to it cannot be taken away from it by any legislative act: *Railroad Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 Id. 700; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Detroit v. Detroit etc. Co.*, 43 Mich. 140; *Attorney-General v. Railroad Companies*, 35 Wis. 425. And when a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights: *Fletcher v. Peck*, 6 Cranch, 87; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358.

But there are franchises and privileges of a corporation which do not survive its dissolution. The franchise of becoming and being a corporation is

one of these. This is a franchise in its nature incapable of transfer or assignment: *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609; *Willamette Mfg. Co. v. Bank of British Columbia*, 119 Id. 191; *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 613; *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672. Curtis, J., in delivering the opinion of the court in *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 615, said: "The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected." Mr. Justice Miller, in delivering the opinion of the court in *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 197, said: "But there were franchises created by the act of incorporation which would be of no value to the purchaser, which, in the nature of things, could not be transferred to it, and which were not intended to be transferred to it. Obviously, among these was the right to exist as a corporation." And Mr. Justice Matthews, delivering the opinion of the court in *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 620, said: "If, as required by the argument of the plaintiff in error, we regard and treat the franchise of being a corporation as an incorporeal hereditament, and an estate capable of passing between parties by deed, or of being charged by way of mortgage, and of being sold under a power by virtue of judicial process, the logical consequences will be found to involve insuperable difficulties and contradictions. . . . A conception which leads to such incongruities must be essentially erroneous."

This franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation: *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Adams v. Boston etc. R. R. Co.*, 4 Nat. Bank. Reg. 99; *Sweatt v. Boston etc. R. R. Co.*, 5 Id. 234; *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609. A corporation may exist before it has acquired any other franchises, property, or privileges. And it may continue to exist as a corporation after it has lost or disposed of all its property: See note to *Miners' Ditch Co. v. Zellerbach*, 99 Am. Dec. 336, and cases cited. In the case of *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, the corporation acquired a franchise of taking tolls by grant from a local board, and not directly from the state, and it was held that its estate in that franchise ceased upon the expiration of the period for which it was granted, and to which it was expressly limited, and that the failure of the state to institute proceedings to dissolve the corporation could not keep this franchise alive, or restore it to life. Cooley, C. J., who delivered the opinion in that case said: "The grant may cease and the corporate existence remain untouched." So a mortgage executed by a corporation does not cover its corporate life or right to be a corporation. And when a corporation mortgages its property and franchises, and the same are sold under proceedings to foreclose the mortgage, or when the property and franchises of a corporation are sold at a bankrupt sale, the purchasers at such sales do not become the corporation, but are simply joint owners of the property. They do, however, acquire all the property, rights, and franchises of the corporation, except the franchise to be a corporation: *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609; *New Orleans etc. R. R. Co. v. Delamore*, 114 Id. 501; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Metz v. Buffalo etc. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201; *People v. Brooklyn etc. R'y Co.*, 89 N. Y. 75; *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21; *Wellsborough etc. Co. v. Griffin*, 57 Pa. St. 417. Mr. Justice Woods, in delivering the opinion of the court in *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 510, said: "When there

has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers."

In the case of *Wellsborough etc. Co. v. Griffin*, 57 Pa. St. 417, an act of the legislature had provided that a sale under a mortgage which a plank road company was authorized to make should pass to the purchasers at the foreclosure sale all the corporate rights, franchises, etc., as fully as if they had been the original corporators. It was held that the purchaser at the foreclosure sale did not become the corporation or acquire its name, and his duties could not be enforced by a suit against the company; even if he had done business as the company, he should have been sued in his own name. In some of the states it has been provided by statute that when the property and franchises of a corporation have been sold under foreclosure proceedings, the purchaser may form a corporation for the purpose of carrying on the business. A right to charge such rates of freight and tolls as the directors of the corporation should deem reasonable is not a right that survives the dissolution of the corporation: *Shields v. Ohio*, 95 U. S. 319.

The privilege of immunity from taxation granted to a corporation is not, it seems, one that will survive the dissolution of the corporation. Such immunity is not, properly speaking, a franchise of the corporation. It is in its nature personal and incapable of being transferred: *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. County of Hamblen*, 102 Id. 273; *State v. Maine Central R. R. Co.*, 66 Me. 488. Mr. Justice Field, in delivering the opinion of the court in *Morgan v. Louisiana*, 93 U. S. 223, said: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." Where, therefore, a new railroad company is formed out of two other companies which had by their charters a right of exemption from taxation, the new company will not be entitled to such exemption: *Railroad Co. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 Id. 359. But where the new corporation is by statute expressly invested with all the property, rights, and privileges of the old one, the exemption will accompany the property: *Tomlinson v. Branch*, 15 Wall. 460; *Humphrey v. Pegues*, 16 Id. 244.

It may perhaps be stated as a general rule, that in cases where there is a reservation of the right to alter, amend, or repeal the charter of a corporation, whatever rights, franchises, or powers in the corporation depend for their existence upon the granting clauses of the charter are lost by its repeal: *Greenwood v. Freight Co.*, 105 U. S. 13; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Co. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 Id. 359;

Sinking Fund Cases, 99 U. S. 700; *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 287. In the case of *Greenwood v. Freight Co.*, *supra*, the legislature of Massachusetts, by an act passed in the year 1867, made certain persons, their associates and assigns, a corporation under the name of the Marginal Freight Railway Company, subject to the duties, restrictions, and liabilities imposed by the general laws relating to street-railway corporations, so far as they might be applicable, and granted to this corporation by its charter the right, in such manner as might be prescribed and directed by the board of aldermen of the city of Boston, to construct, maintain, and use a street-railway in certain enumerated streets of the city of Boston. In the year 1872, the legislature repealed this act by another act which incorporated the Union Freight Railroad Company, to which company it gave authority to run its track through the same streets and over the same ground covered by the track of the former company, and to take possession of that track upon payment of compensation. The complainant sought to enjoin the carrying out of the provisions of this latter act, and Mr. Justice Miller, in delivering the opinion of the court in the case, said: "It results from this view of the subject that whatever right remained in the Marginal company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter."

It is not easy in the present state of the law to determine with exactness what are the rights and powers that remain to the creditors and stockholders of a dissolved corporation after the repeal of its charter, made pursuant to a reserved right of repeal. Mr. Justice Miller, in the case last referred to, said on this subject: "We are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and creditors of such a corporation after the act of repeal." In the case of *Shields v. Ohio*, 95 U. S. 325, Mr. Justice Swayne said: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith; and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases." Chief Justice Waite, in the *Sinking Fund Cases*, 99 U. S. 718, said: "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." And Shaw, C. J., in delivering the opinion of the court in *Commonwealth v. Essex Co.*, 13 Gray, 253, said: "Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business, and they purchased such lot from a third party, could the legislature prohibit the company from holding it? If so, in whom should it vest? or could the legislature direct it to re-vest in the grantor, or escheat to the public? or how otherwise? Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract

of meadow, and the owners claim gross damages, which are assessed and paid, can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases, — for extreme cases are allowable to test a legal principle, — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." In that case it was decided that a company which had accepted the provisions of a statute making it liable for all damages occasioned by its dam to fish rights above the dam, and paid large sums for such damages, could not afterwards be required by the legislature to make different fish-ways, notwithstanding the general law reserving to the legislature the right to alter, amend, or repeal charters of corporations.

From the foregoing extracts may be deduced the general principles by which to determine the rights and powers of a corporation which remain to its creditors and stockholders upon its dissolution. It is clear that all the real and personal property belonging to the corporation at the time of its dissolution remain to the creditors and stockholders, and that they cannot be taken away from them, or diverted to any other use or purpose: *Terrett v. Taylor*, 9 Cranch, 43; *Curran v. Arkansas*, 15 How. 304; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Orleans etc. R. R. Co. v. Delamore*, 114 Id. 501; *Detroit v. Detroit etc. Co.*, 43 Mich. 140. So do its rights of contract and choses in action properly acquired by it during its lawful existence: *Mumma v. Pottomac Co.*, 8 Pet. 281; *New Jersey v. Yard*, 95 U. S. 104; *Greenwood v. Freight Co.*, 105 Id. 13. A franchise to build, own, and operate a railroad is property of a corporation, and will remain to its creditors and stockholders after dissolution: *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 613. The right of a street-railway company to the use of the streets of a city for the purpose of its business, whether acquired by gift or purchase from the city authorities, is a property right which survives to the creditors and stockholders after the dissolution of the corporation: *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501; *Milbau v. Sharp*, 27 N. Y. 611; *Sixth Avenue R. R. Co. v. Kerr*, 72 Id. 330; *State v. Mayor etc. of New York*, 3 Duer, 119. Unpaid subscriptions to the capital stock of a corporation are corporate property, and may be reached by its creditors: *Hightower v. Thornton*, 8 Ga. 486. The right given by statute to a county to subscribe to the capital stock of a corporation is a right or privilege of the corporation which may be transferred to another corporation or to a consolidated corporation into which the former corporation has passed: *County of Scotland v. Thomas*, 94 U. S. 682; *Hannibal & St. Jo. R. R. Co. v. Marion Co.*, 36 Mo. 294; *Smith v. Clark Co.*, 54 Id. 58. In *Hastings v. Drew*, 50 How. Pr. 254, it was held that if the property of a dissolved corporation be divided among its stockholders, leaving debts unpaid, every stockholder receiving his share of the property is liable *pro rata* to contribute to the discharge of such debts out of the property in his hands, or its proceeds. And in *People v. National Trust Co.*, 82 N. Y. 283, it was decided that a lease to a corporation is not terminated by its dissolution, and that its covenant to pay rent does not thereupon cease to be obligatory; that its debts included those to mature as well as accrued indebtedness, and all engagements entered into by it which have not been fully satisfied or canceled.

EFFECT OF DISSOLUTION UPON SUITS PENDING BY OR AGAINST CORPORATION. — This subject is considered at length in the note to *May v. State Bank*, 40 Am. Dec. 737.

CORPORATION — MODES OF DISSOLVING: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note 756; *Germantown Railway v. Fidler*, 60 Pa. St. 124; 100 Am. Dec. 546; effect of dissolution on property and rights of corporation: *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 746.

CORPORATION — CAPACITY TO TAKE TITLE IN FEE TO REAL PROPERTY: *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; may acquire the title in fee, though the period of its existence is limited, when such power is given by its charter: *Rives v. Dudley*, 3 Jones Eq. 126; 67 Am. Dec. 231.

GRANT OF FRANCHISE BY MUNICIPAL CORPORATION, AS AGENT OF STATE, implies contract not to reassert the right to what was granted: *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *Stein v. Mobile*, 49 Ala. 362; 20 Am. Rep. 283; *Burlington v. Burlington etc. R'y Co.*, 49 Iowa, 144; 31 Am. Rep. 145. But it was held that an irrevocable grant by a city of the exclusive privilege to construct and operate a street-railway is unconstitutional: *Birmingham etc. R'y Co. v. Birmingham St. R'y Co.*, 79 Ala. 405; 58 Am. Rep. 615.

RIGHT TO CONSTRUCT AND MAINTAIN HORSE-RAILWAY IN PUBLIC STREETS OF CITY by authority of the legislature and the city council: See *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Linchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252, and note 253.

CONSTRUCTION OF STATUTES. — RETROSPECTIVE CONSTRUCTION of a statute is never allowable, unless the intent that it shall so operate plainly appears upon its face, and this rule applies even to remedial statutes: *Richmond v. Henrico Co.*, 83 Va. 204.

BYAM v. COLLINS.

[111 NEW YORK, 143.]

FROM LIBELOUS PUBLICATION THE LAW IMPLIES MALICE and infers damages.

A LIBELOUS COMMUNICATION IS REGARDED AS PRIVILEGED, if made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.

WHETHER A LIBELOUS COMMUNICATION IS PRIVILEGED IS A MATTER OF LAW.

IF LIBELOUS COMMUNICATION IS PRIVILEGED, THE PLAINTIFF MUST ASSUME THE BURDEN of establishing, as a matter of fact, and to the satisfaction of the jury, that it was maliciously made.

LIBEL. — COMMUNICATION IS NOT PRIVILEGED BECAUSE MADE BY THE MALIGNER in the conviction that he owed a social duty to give currency to libelous rumors, that the victim of them may be avoided.

A LIBELOUS COMMUNICATION IS NOT PRIVILEGED when made to an unmarried woman concerning her suitor, by the fact that she, some years before, had requested to be informed of anything the defendant knew

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CEN. UN. TEL. CO., *v.* FALLEY.

[118 INDIANA, 194.]

Law of Telephone.

child was not able to help itself: *State v. Behm*, 72 Iowa, 533. There is no element of manslaughter where the evidence shows that the defendant was asked by the deceased if the defendant did not have a man, who was with him, under arrest, and thereupon defendant shot him and killed him, for such evidence proves murder; nor is there any element of manslaughter where the evidence shows that deceased met defendant and called him a d—n horse-thief, and at the same time dropped the muzzle of a loaded rifle upon defendant's bowels; that defendant endeavored to take the rifle away from deceased, and not succeeding, shot him in the scuffle, while deceased was trying to shoot defendant; for such evidence, if true, proves innocence and self-defense: *State v. Byers*, 100 N. C. 512. But even though there exists no element of manslaughter in a criminal case, yet if the jury find a defendant guilty of manslaughter, it is proper to sentence him therefor: *Fagg v. State*, 50 Ark. 506.

CENTRAL UNION TELEPHONE CO. v. FALLEY.

[118 INDIANA, 194.]

TELEPHONE, AS THE WORD IS USED IN THE STATUTES OF INDIANA, means an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages.

TELEPHONE COMPANIES ARE COMMON CARRIERS OF NEWS, AND AS SUCH SUBJECT TO PROPER REGULATIONS requiring them to conduct their business in a manner conducive to the public benefit.

TELEPHONE COMPANY MAY BE COMPELLED BY MANDAMUS to furnish any person or company the like service which it furnishes to others, and on like terms.

THE PRICE TO BE CHARGED FOR THE USE OF TELEPHONES AND TELEPHONIC CONNECTIONS may be regulated by the legislature relative to business conducted within the state.

TELEPHONE COMPANIES MUST FURNISH EACH PERSON, under the statutes of Indiana, with a telephone and with telephonic communications and connections; and cannot relieve themselves from their liability so to do by abandoning what is known as the exchange and rental system, and substituting therefor another system, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon the payment of a certain toll.

FACT THAT A TELEPHONE COMPANY HAS EXTENDED ITS LINES THROUGH DIFFERENT STATES, and is engaged in interstate commerce, will not relieve it from the operation of state statutes, upon business conducted wholly within the state, nor justify its refusal of a telephone and the best telephonic connections and facilities to a person doing business in such state, on the terms prescribed by such statute.

THE RIGHT TO A WRIT OF MANDATE TO COMPEL THE FURNISHING OF TELEPHONIC FACILITIES IS NOT TAKEN AWAY by a statute imposing a penalty for refusing such facilities. The statutory remedy is cumulative merely.

J. R. Coffroth, T. A. Stuart, and A. A. Thomas, for the appellant.

W. D. Wallace, S. P. Baird, and F. S. Chase, for the appellee.

OLDS, J. This is an action brought by the relatrix to compel the appellant, by mandate, to furnish her, at her place of business in the city of Lafayette, a telephone and telephonic connections and facilities. The petition is in one paragraph, averring the following facts: That the defendant, the Central Union Telephone Company, is a corporation duly organized under the laws of the state of Illinois; that it is now, and was at the time of the doing of the acts and things hereinafter complained of, and for three years last past has been, owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, county of Tippecanoe, state of Indiana; that the relatrix, Susana B. Falley, is now, and for more than three months last past has been, carrying on business under the name and style of the "Falley Hardware Company," and the occupant of a business-room in said city, at Nos. 37 and 39 on South Third Street therein, and her business-room is within the limits of the defendant's telephone business in said city; that the relatrix did, on the twenty-fifth day of October, 1887, demand of the defendant that said relatrix be furnished by said defendant with a telephone and telephonic connections and facilities necessary to place the relatrix, at her said business-room, in telephonic connection with the patrons of defendant in said city; that the relatrix did then, and at the time of making said demand, tender to the defendant the sum of nine dollars, lawful currency of the United States, as a rental in advance for such telephone, telephonic connections, and facilities for the first three months' use thereof, and at the same time relatrix offered to comply with the reasonable rules and regulations of said defendant not inconsistent with the laws of this state; that the defendant at the time said demand was made refused, and ever since has willfully, wrongfully, and without cause, failed and refused, and still fails and refuses, to furnish to said relatrix, at her said business-room, the use of such telephone and telephonic connections and facilities; that the defendant is a common carrier of telephonic messages between its patrons within the limits of said city of Lafayette; and that said relatrix, under the laws of the state of Indiana, is entitled to demand and receive from the defendant the use of the telephone and telephonic connections, facilities, and service necessary to place the relatrix, at her said business-

room, in telephonic communication with the patrons of defendant in said city for the compensation of three dollars per month, as fixed and prescribed by the statute of said state, and for such compensation she is entitled to receive from the defendant the use of a telephone, and the highest and best grade of telephonic connections, facilities, and service, used and furnished by said defendant in carrying on its business in said city. Prayer for an alternative writ of mandate, and, on final hearing, a peremptory writ compelling defendant to furnish relatrix with such telephone and telephonic connections, facilities, and service, which petition was duly verified. Alternative writ of mandate issued upon the complaint in due form, setting forth the filing of the complaint and the allegations of the complaint, and concluding by commanding the appellant to furnish the relatrix with a telephone and telephonic connections and facilities as asked, or in default thereof, to appear before the court and show cause.

In answer to the writ, appellant appeared by attorneys and demurred to the writ for the cause that the writ did not state facts sufficient to constitute a cause of action, which demurrer was overruled, to which ruling of the court on the demurrer appellant excepted. Appellant then filed an answer in five paragraphs. The first is a general denial, and the other paragraphs allege the following facts:—

2. The defendant avers that it is a corporation under the laws of Illinois; that for several years prior to the demand by plaintiff, as alleged in the complaint, defendant had been engaged in carrying on its business as a telephone company in the states of Indiana, Ohio, Illinois, and Iowa; that long before and at the time of the happening of the things complained of in plaintiff's complaint, defendant had, ever since had, and now has its lines and wires on its poles in the city of Lafayette, and in various cities and towns in the states aforesaid, and during all of said time and still has offices in said various cities and towns in each of said states connected with each other, and many of its offices and telephones in this state are connected by means of its wires with defendant's offices and instruments in the states of Ohio, Illinois, and Iowa; that defendant during all of said time was, has been, and is engaged in transmitting messages for the public for hire over its said wires, not only between towns and cities in each of said states, but also between the several states aforesaid; and during all of said time defendant has been

and is engaged in and carrying on interstate commerce; that it admits that plaintiff, claiming that, under the act of the general assembly of the state of Indiana, she was entitled to have a telephone in her store, and to be furnished with telephonic service under said law, tendered defendant nine dollars, and demanded to have a telephone in her store; and defendant admits that it refused to furnish relatrix with a telephone, and with telephonic connections and service, because if defendant had complied with said request and demand she would thereby be furnished facilities for transmitting messages from Lafayette to various places in the states of Ohio and Illinois, where defendant had and has its wires and offices, as aforesaid, for said sum of money, which was unreasonable and greatly less than defendant charges its other customers, and which, as defendant was engaged in carrying on interstate commerce, could not be required of it.

3. The third paragraph states that it, defendant, is a corporation under the laws of Illinois, and is engaged in carrying on a general telephone business in the city of Lafayette; that, on the second day of March, 1886, it in good faith announced to the public and it was then its intention from and after the second day of March, 1886, not to furnish telephones under a rental system, except as it did so until its contracts then in existence expired; that at said time it had a large number of contracts with its various subscribers in the city of Lafayette for the use of its telephones, by the terms of which defendant was compelled to maintain its exchange in said city, and furnish telephone facilities to said persons until the thirtieth day of September, 1886; that defendant treated all applications for telephones and telephonic service alike; that, in good faith, and without discrimination, having determined to cease doing a general rental telephone exchange business in this state, it refused to furnish telephones and telephonic connections under a general rental telephone exchange system, except to those with whom it had contracts, as aforesaid; that it admits the demand and tender by relatrix and the refusal by defendant to furnish her with a telephone, because it had determined to cease, and had in fact ceased, doing a general rental telephone exchange business in said city, and so informed relatrix, and since that time has not been and is not engaged in a general telephone business under a rental system in said city; that after it had announced its determination to cease doing a general rental telephone ex-

change business, it, in June, 1886, determined to offer to the public, and did in fact offer to the public, to furnish telephonic service and connections by means of public toll-stations at various points in said city, which system of public toll-stations defendant had in operation at and long before the time of the demand by relatrix for telephone and telephonic connections.

Defendant denies that it owns or operates a telephone exchange under the rental system in said city of Lafayette, Indiana, or that it did at the time of the commencement of this action; that although it had formerly conducted a telephone exchange under the rental system, it abandoned and terminated the same as soon as its contracts in existence were terminated. The defendant avers that what is known as a telephone exchange under a rental system is, where lines and telephone instruments are furnished to subscribers for private use, under contracts limiting the use of the facilities furnished to such subscribers and their employees, for a stipulated rental per month, quarter, or year, and in which the instruments furnished pass into the possession of such subscribers; the lines so furnished to subscribers center at a switching-station, where the line of any subscriber is connected with that of any other subscriber, on request, for purposes of communication authorized by the contract. In the exchange system, a set of telephone instruments, connected by a wire with the central station, is furnished to any reputable person who desires to become a subscriber to the exchange, and signs the usual form of contract, and complies with its conditions. A public toll system of telephone service is one where the telephone company furnishes no instruments or lines for private use for a rental charge, but establishes stations of its own, for the accommodation of the public, in such places as may appear to it necessary to furnish telephonic facilities and connections to the public, charging a toll for each use of its instruments and lines, such toll-stations being in charge of agents selected, appointed, and paid by the telephone company, the instrument at such station remaining in the possession and control of the company, through its agents; the lines from such stations extend to a switching-station, where one is connected with another upon the order of any agent, which agent collects from the user the toll charged for each and every connection, and accounts for the same to the company; that such toll system is simply an extension of the toll system which the

defendant, since its organization for some years past, and prior to the enactment of the telephone statutes in this state, was maintaining, and has maintained, in various towns of this state, providing telephonic facilities between individuals residing in different towns where toll-stations are established; that at the time of the commencement of this suit it did not, does not now, nor does it intend to, discriminate against the relatrix, and is still and now is ready and willing to supply the relatrix and all applicants with such facilities as it has in said city.

The paragraph further sets out in detail the manner of operating and conducting the toll-station system, and alleges that all its business in the city of Lafayette, at the time of the commencement of this suit, and ever since, has been conducted on that system, and that it was not at that time nor since doing, and does not intend to do, a telephone business under the rental system; that notices of the rates and fees charged for the use of the telephones are posted in each station. A copy of the contract that it enters into with its agent is set out. The answer denies any discrimination against the relatrix, or any intention to discriminate, and alleges that the toll-stations are so distributed as to accommodate the general public, and that there are a number in the vicinity of the place of business of the relatrix, and denies being a common carrier, and denies being bound to rent telephones at all, or as demanded by relatrix; that defendant offered to establish a toll-station on relatrix's said premises, and she refused to allow it to be done, or to sign a contract of agency.

The following is a copy of the contract set out with this paragraph of answer:—

“CENTRAL UNION TELEPHONE COMPANY—STATION CONTRACT
—CENTRAL STATION.

“This agreement, made this —— day of ——, 188—, by and between the Central Union Telephone Company, its successors or assigns, party of the first part, and ——, party of the second party, witnesseth: The second party agrees: 1. To permit the party of the first part to place its wires, fixtures, telephone instruments, and apparatus in and upon the premises of the second party, located on —— street, in the —— of ——, county of ——, in the state of Indiana, for the purpose of doing a general telephone and telegraph business; that he, ——, said second party, is to furnish proper office-

room, rent, light, and fuel, and necessary employees to transact all business of the party of the first part, at said station, in a prompt and business-like manner; to collect for all such business such regular rates as may be fixed from time to time by the party of the first part, and the same to account for to the said first party; and further, to observe and conform to such rules and regulations touching said business as may from time to time be prescribed by said first party. In consideration thereof, and in full payment therefor, the first party agrees to pay to the second party five per cent commission upon the receipts at said station for business with regular stations within — miles of the county court-house in said —, and — upon receipts for business going over to extra-territorial lines of the first party. It is further mutually agreed that should the telephone or telegraph station herein referred to fail to be sufficiently remunerative, or its management by the party of the second part prove to be unsatisfactory to the party of the first part, the right to terminate this agreement at any time is reserved by the party of the first part; but otherwise, this agreement is to be in force and effect until the last of —, 188—, and thereafter until the party of either part shall have given the party of the other part ten days' written notice of his or its desire to discontinue the same. Witness the hands of the parties," etc.

4. The fourth paragraph alleges the ceasing to do business by the defendant under the rental system and conducting the same under a toll-station system, as alleged in the third paragraph, and avers that one Edward E. Falley is a partner of relatrix, and that they are trading under the name of Falley Hardware Company, and that prior to the demand by relatrix for a telephone, as set out in the complaint, defendant had a telephone in their place of business under the toll-station system, and said firm acted as the agent of defendant in the operation of the telephone; that said firm terminated said contract of agency, and the relatrix then made the demand as alleged, and defendant refused for the reasons as stated in the third paragraph of answer.

The fifth paragraph is not in the record.

Appellee filed separate demurrers to the second, third, fourth, and fifth paragraphs of answer for the cause that neither of said paragraphs stated facts sufficient to constitute a defense or return to said alternative writ of mandate.

The first paragraph of answer was withdrawn by appellant,

and the court sustained the demurrers to the second, third, fourth, and fifth paragraphs; to which ruling of the court in sustaining the demurrers to the several paragraphs of answer appellant duly excepted, and appellant failure to amend or plead further, the court rendered judgment on said demurrers, ordering and adjudging that a peremptory writ of mandate issue, commanding appellant to forthwith furnish and supply relatrix, at her business-rooms, Nos. 37 and 39 South Third Street, in the city of Lafayette, Indiana, with a telephone, and with the highest and best grade of telephonic connections and facilities and service used, furnished, and employed by said appellant in carrying on its said business in said city, and that might be necessary to place her, at her said place of business, in telephonic communication with all persons in said city having at their places of business or residences telephones placed and maintained there by said appellant; and that said appellant continue to supply and furnish the same, etc., so long as appellant continued to carry on a general telephone business in said city, and so long as relatrix shall continue to observe the reasonable rules, etc., and pay the compensation of three dollars per month. To the rendering of which judgment the appellant excepted. Appeal prayed and granted to this court. Errors are properly assigned on the rulings of the court.

This action is brought under the acts of 1885 prescribing the duties of telephone companies, and to regulate the rental to be paid for the use of telephones, and requires a construction of these acts. On April 8, 1885, the following law was enacted:—

“An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.”

Section 1 relates exclusively to telegraph companies.

“Sec. 2. Every telephone company with wires wholly or partly within this state, and engaged in a general telephone business, shall, within the local limits of such telephone company's business, supply all applicants for telephone connections and facilities with such connections and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in

like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.

"Sec. 3. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offense, to be recovered in a civil action in any court of competent jurisdiction; provided nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise": Acts of 1885, p. 151.

On the 13th of April, 1885, another law was enacted, which is as follows: —

"An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation.

"Section 1. That no individual, company, or corporation now or hereafter owning, controlling, or operating any telephone line in operation in this state shall be allowed to charge, collect, or receive as rental for the use of such telephones a sum exceeding three dollars per month where one telephone only is rented by one individual, company, or corporation. Where two or more telephones are rented by the same individual, company, or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"Sec. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company, or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected, or received.

"Sec. 3. Any owner, operator, agent, or other person, who shall charge, collect, or receive for the use of any telephone any sum in excess of the rates fixed by this act shall be deemed guilty of a public offense, and on conviction shall be fined in any sum not exceeding twenty-five dollars": Acts of 1885, p. 227. This act took effect July 22, 1885.

It is insisted by appellant that the act of April 8th is simply an act prohibiting discriminations by telephone companies,

and providing a penalty for any discrimination by such companies, and that the act of April 13th prescribes the price which may be charged for the rental of telephones when the same are rented, and prescribes penalties for asking or taking a greater rental, and that unless they inhibit all other systems or methods of telephony other than the rental, this case was decided wrongly by the court below; and that the title to the act of April 8th declares it to be an act prohibiting discrimination between patrons, and prescribing penalties therefor.

It is further claimed by appellant that the answers show that appellant was not engaged in a general telephone business at Lafayette at the time of appellee's demand, but was engaged only in a limited business, and that it offered to furnish appellee such limited service, and has in all respects offered to treat her in the same manner as it was treating its other patrons, but that she wanted a different service than that in which appellant was engaged; in other words, she wanted appellant to discriminate in her favor, and to grant her demand would make appellant amenable to the law against discrimination.

In determining this case, it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists to send, receive, and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "an instrument for conveying sound to a great distance."

In the case of *Central Union Telephone Co. v. Bradbury*, 106

Ind. 1, the word "telephone," as used in the act of April 13, 1885, was held to mean "an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons, and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or

company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the cases of *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404; *Vincent v. Chicago etc. R. R. Co.*, 49 Ill. 33; *People v. Manhattan Gas Light Co.*, 45 Barb. 136. And the principle held in these cases is in accordance with the well-settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities, and service; and even if it were controverted, it is well settled by authorities that the legislature has the right to do so, relative to the business conducted within the state: *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; *Central U. Tel. Co. v. Bradbury*, *supra*, and authorities cited in those cases; *Johnson v. State*, 113 Ind. 143; *Munn v. Illinois*, 94 U. S. 113; *Ouachita Packet Co. v. Aiken*, 121 Id. 144; *Patterson v. Kentucky*, 97 Id. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telephone company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation, or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the legislature that where a telephone company was doing a general telephone business in this state, any person within the local limits of its business in a town or city should have the right to demand and receive

a telephone and telephonic connections, facilities, and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the state. The legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual and gave him the right to demand and receive such service within the limits of the company's business, in any town or city where such company is doing a general telephone business.

It is insisted, as it appears by the answer that the lines of the appellant extended through the states of Ohio, Indiana, and Illinois, that appellant was engaged in interstate commerce; that it was a common carrier of news between the states, and that therefore such statutes are an interference with interstate commerce. We cannot agree with that theory. These statutes simply provide that telephone companies shall provide persons within this state with certain service, and for such service shall receive a certain compensation. They only seek to control the service within this state. If section 2 of the act of April 13th, providing for the price to be paid for connections between two cities or villages, should be construed to apply to two cities or villages one of which was without this state, then there would be some question as to the validity of that section, or the power of the legislature to control the price to be paid for a message or the use of the telephone for communicating with a person beyond the limits of the state; but that question is not involved in this case, as one section of a statute may be valid and another not. Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been granted some rights and privileges by acts of Congress which cannot be abridged or interfered with. In the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, referred to by counsel for appellant, it was held that the act was void in so far as it sought to govern the delivery of messages outside of the state: *State v. Newton*, 59 Ind. 173.

It is also contended by counsel for appellant that as the statute provides a remedy other than that by mandate for a violation of the statute, the writ of mandate is not a proper remedy.

The right to have the telephone and telephonic connections

and facilities is a right given by the statutes. It is a legal right, which may be enforced by mandate. No remedy is adequate which does not give the person that to which he is entitled by law; the penalty of one hundred dollars is cumulative, and does not abridge or take away the right to a writ of mandate. The statute itself provides that the act shall not be so construed as to "abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise." The statute should be so construed as that the penalty shall not take away any of the other remedies the aggrieved person may have, one of which remedies is by writ of mandate. This court held, in the case of *Central Union Tel. Co. v. Bradbury*, *supra*, that Bradbury was entitled to his remedy by writ of mandate compelling the company to furnish him with a telephone and telephonic service. The right to a writ of mandate requiring telephone companies to furnish telephonic service to persons entitled thereto has been held in *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583; also by the supreme court of Pennsylvania, in *Bell Telephone Co. v. Commonwealth*, 59 Am. Rep. 172. In this case the complaint states a good cause of action under the statutes.

The second paragraph of the answer alleges the conducting of the defendant's business in the several states, and that it is engaged in interstate commerce, and that to furnish relatrix with an instrument and connection with its lines would put her in connection with its offices outside of the state, and furnish her facilities for transmitting messages from Lafayette to various places in Ohio and Illinois, where the appellant has its wires and offices. This paragraph does not controvert the facts alleged in the complaint, that appellant, at the time of the acts and things complained of, etc., was owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, and that the place of business of the relatrix is within the limits of the appellant's telephone business in said city; and it must also be remembered that the demand, as alleged in the complaint, was only that she be furnished with a telephone and telephonic connections and facilities necessary to place her, at her said store, in telephonic communication with patrons of appellant in said city. The statutes contemplate two kinds of service, and different compensations for each; one, connections and facilities for conversing with patrons of

the company within any city or town where an exchange is maintained; the other, for conversing between two towns or cities.

The other paragraphs show the appellant to have been engaged in a general telephone business in said city, operating the same under a toll system at the time of the demand and tender by relatrix, and do not controvert the allegations in complaint that the plaintiff's place of business is within the local limits of appellant's business in said city. Neither of the paragraphs of answer is sufficient.

Under the construction we have given the statutes, there was no error committed by the court below in overruling the demurrer to the complaint, sustaining the demurrers to the answers, or in granting the writ of mandate.

The judgment is affirmed, with costs.

LAW OF THE TELEPHONE. — Probably no invention or implement which has come into so general use as the telephone has, in the same period of time, ever occasioned so small an amount of litigation. Even such litigation as has arisen has been mainly devoted to the determination of questions of a public character, and has rarely been carried on by private individuals asserting or defending what they believed to be their private rights. In considering such questions as have been presented to them, the courts have almost uniformly regarded the telephone and the public and private rights and duties growing out of it as similar in character and extent to the telegraph, and the public and private rights growing out of its invention and general use. Thus in England, the term "telegram" has been adjudged to include a conversation by means of a telephone, and the telephone business to be within the statute giving to the postmaster-general the exclusive control of the transmission of messages by telegraph: *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. D. 244. In Iowa, telephone companies are classed with telegraph companies, for the purpose of determining the jurisdiction of justices of the peace over them: *Franklin v. N. W. Telephone Co.*, 69 Iowa, 97; and of deciding where and how they and their property shall be assessed: *Iowa Union Telephone Co. v. Board of Equalization*, 67 Id. 250. So in discussing whether telephone corporations were entitled to use the public streets, or to exercise the right of eminent domain, and whether they were subject to legislative control for the purpose of preventing unreasonable discriminations and the imposition of exorbitant charges, the courts have generally proceeded upon the assumption that the rights, duties, and obligations of such corporations are analogous to those formed for the purpose of carrying on the business of transmitting messages and news by the use of the telegraph.

In Wisconsin, the statute regarding corporations provided, among other things, that corporations might be formed "to build and operate telegraph lines, or conduct the business of telegraphing, and to conduct and maintain such lines with all necessary appurtenances." It was held that this statute authorized the incorporation of a telephone company. The court, in considering the question, said: "It is urged that the powers thus expressly given

to form and organize corporations for the purpose of building and operating telegraph lines, or conducting the business of telegraphing in any way, includes the power of forming and organizing corporations for the purpose of building and operating telephone lines, or conducting the business of telephoning in any way. Of course there is a distinction between the two classes of business; but in almost every respect they are very similar, if not identical. Each of them must erect its poles or posts, and upon the tops of them attach its lines of wire from point to point. Each must almost necessarily enter upon, along, or across public roads, highways, streams, bodies of water, and upon the lands of individuals, for the purposes mentioned. In these respects, they seem to be identical. One may require more lines of wire than the other; but we are not aware of any other distinction outside of their offices or places of operation distinguishable to the naked eye. It is these indistinguishable features alone that the city of Oshkosh had to deal with. Possibly there may be a marked distinction in the varying intensity of the electric currents in the one case, and in the other at the point of transmission or receiving, or even at the points along the line; but such difference, if it exists, hardly concerns the question here presented. As for the difference in the mode of communication by means of telegraphic and telephonic apparatus, see *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. D. 244. In that case, Mr. Stephen, one of the judges of the exchequer division of the high court of justice, who, unlike most American judges, seems to have sufficient time not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definite discussion of that subject. In that case, the court conclude that Edison's telephone was a telegraph within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere 'fact — if it is a fact — that sound itself is transmitted by the telephone establishes' no material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity. It is there further said that, 'of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented; but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing further discoveries as to the use of electricity for the purpose of conveying intelligence.' It is upon this theory of progressive construction that the powers conferred upon Congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service, known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of communications by telegraph: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. If there remains any doubts as to the power given to charter a telegraph company being sufficiently broad to include a telephone company, then it must be dispelled by the general clause above quoted from section 1771, to wit, 'for any lawful business or purpose whatever, except,' etc.; for by a well-settled rule of construction, these general words extend to things of a kindred nature to those specifically authorized by the section, and hence to whatever is of a kindred nature to telegraphing, which most certainly includes telephoning. *Noscitur a sociis*. We must conclude that, under the statute, it was competent to form, organize, and incorporate a telephone company pos-

sessing like powers with those given to telegraph companies": *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 36.

The statute of Pennsylvania controlling telegraphic corporations enacted that "the said telegraphic corporations shall receive dispatches from and for other telegraph lines and corporations, and from and for any individual; and on payment of their usual charges to individuals for transmitting dispatches as established by the rates and regulations of such telegraph line, transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do." On an application being made to the court of common pleas of the city of Philadelphia by the commonwealth on the relation of the Baltimore and Ohio Telegraph Company for a writ of mandate to compel the Bell Telephone Company to give the relator a telephone and the necessary wires, the court, by Arnold, J., in *Bell Telephone Co. v. Commonwealth ex rel. Baltimore & O. T. Co.*, 35 Alb. L. J. 4, reported also in note to *Chesapeake & P. Tel. Co. v. B. & O. Tel. Co.*, 59 Am. Rep. 172, which was adopted by the supreme court of the state, April 19, 1886, in disposing of the appeal in the same cause, determined that telephone companies were controlled by the provisions of this statute, and therefore could not withhold from one person or corporation the privileges which it conceded to another.

Among the obvious powers of telephone corporations is that of imposing reasonable rules for the transaction of their business, and for the observance of those using their telephones. As these implements are intended for general use by persons of all classes and of both sexes, those who use them may be required to conduct their conversations in a becoming manner, free from obscenity or profanity; and for a violation of this requirement may be denied the further use of the telephone: *Pugh v. City & S. Telephone Co.*, 9 Cincinnati Law Bulletin, 104; 27 Alb. L. J. 162. But no regulation will be tolerated which prevents the public from having a fair and reasonable use of the telephone and telephonic exchanges, or denies to any one the rights secured to him by any statute, or requires him to conduct his business with particular persons or agencies. Hence a regulation is unreasonable and invalid if it prohibits subscribers from calling a messenger otherwise than through the central office: *People v. Hudson River Telephone Co.*, 19 Abb. N. C. 466; 10 N. Y. Sup. Ct. 232.

A telephone corporation is, for many purposes, regarded as a common carrier; and it may, doubtless, like other common carriers, be authorized to exercise the power of eminent domain for the purpose of acquiring the right to maintain its poles, wires, and other necessary appliances upon and over private property: *State v. Am. & E. C. N. Co.*, 43 N. J. L. 381; *N. O. Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7. A more serious question has regard to what it may be authorized to do in and upon the public highways, without exercising the right of eminent domain, and without obtaining the assent of the adjacent proprietors. If the fee of a street or other highway is in the proprietor of the adjacent lands, subject to the easement which has been previously acquired in such street for public use, and the legislature undertakes to sanction the use of such street by a telephone corporation, the statute is clearly invalid unless the new use may fairly be regarded as one of the uses for which the street has been already appropriated, and not as a new appropriation or an additional burden. The public cannot be expected to continue using its streets in precisely the same manner or for the same purposes as when they were first dedicated to public use. Nor is the use which may be made of a street confined

to the passage of persons, animals, and vehicles over it. Sewers and gas and water pipes may be laid beneath its surface; and it may generally, under authority of the state or of the municipality, be devoted "to all such uses as are conducive to the public good, and do not interfere with its complete and unrestricted use as a highway": *Ferrenbach v. Turner*, 86 Mo. 426; 56 Am. Rep. 437. The passing and repassing along public highways must necessarily be diminished by the use of the telephone, and hence the burden of the public use is diminished rather than increased by the existence of telephonic facilities. It is true that one of the objects of the erection of poles, and the like, for the carrying on of the business of telephoning or telegraphing, is to make profit for private persons or corporations. This, however, cannot be made the test of a public use without excluding from the streets all private business. While the question is not yet free from dispute and doubt, a slight preponderance of the decisions sustains the validity of those statutes and municipal ordinances which authorize telephone and telegraph corporations to erect their poles in and to stretch their wires across the public highways without making compensation to adjacent proprietors: *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7; *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258; 57 Am. Rep. 398; *St. Louis v. Bell Telephone Co.*, 96 Mo. 628; 9 Am. St. Rep. 370; *contra*, *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Willis v. Erie T. & T. Co.*, 37 Minn. 347, in which the court was evenly divided on the question.

The right to use the street for the purpose of erecting and maintaining poles and wires for use in connection with telephones does not exist unless conferred by statute or ordinance; and even when granted by statute, will be prohibited by injunction unless the right is obtained in the manner pointed out by such statute: *Broome v. New Jersey Telephone Co.*, 42 N. J. Eq. 141; *New York and New Jersey Telephone Co. v. Township of East Orange*, 42 Id. 490. The location and maintenance of telephone poles, when authorized by law, should be in such a mode as not to needlessly incommode the public, and for any negligence from which a person in the use of the highway is injured, the telephone company is answerable in damages: *Sheffield v. Central Union Telephone Co.*, 36 Fed. Rep. 164; *Pennsylvania Telephone Co. v. Varman*, Sup. Ct. of Penn. A grant of the right to locate telephone poles in the streets, and to stretch wires thereon, does not include an authorization to enter upon private property, even for the purpose of cutting off the limbs of trees which overhang the street, if the line might have been located so as not to interfere at all with the trees, with but little additional expense: *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; 57 Am. Rep. 237.

The duties of telephone corporations to the public are very similar to those of common carriers and telegraph corporations. They are obliged to extend their facilities to all persons who are willing to comply with reasonable regulations, and to make such compensation as is exacted of others in like circumstances. The right to discriminate between persons and corporations, and to grant their facilities to some while they were denied to others, was attempted to be exercised in many instances, and was not relinquished until after the most persistent litigation. But from the very first, the courts interposed by writs of mandate in favor of persons to whom the use of the telephone had been denied: *State v. Bell Telephone Co.*, 10 Cent. L. J. 438; 11 Cent. L. J. 359; 22 Alb. L. J. 364; *State v. Bell Telephone Co.*, 23 Fed. Rep. 539; *Bell Telephone Co. v. Commonwealth*, 35 Alb. L. J. 4; also reported

in note to 59 Am. Rep. 172; *Louisville Transfer Co. v. American District Telephone Co.*, 14 Chic. L. N. 15; 24 Alb. L. J. 283.

About the time that telephones came into general use, the Western Union Telegraph Company secured a contract with the American Bell Telephone Company, the result of which was that the latter, in granting to other corporations and companies the right to use the telephone, and to establish telephonic exchanges, stipulated that they should not be used in receiving or delivering messages which had been sent over the wires of telegraph corporations other than the Western Union Telegraph Company. This stipulation was urged in many cases by local telephone companies as a reason why a writ of mandate should not issue to compel them to grant to telegraph companies other than the Western Union the telephonic facilities accorded to other corporations and individuals. In one state only was the defense sustained. The reasoning of the court in that state was as follows: "A statute of this state provides, in effect, that every telephonic company shall, with impartiality, permit persons and corporations to transmit speech through its wires by instruments. The utmost reach of this is to require of them to make an impartial use of such rights or privileges as they possess. If their system is carried into effect by instruments which are not the subjects of a patent, and they so conduct their business as to become common carriers of speech, they are to serve applicants with impartiality; or if it is carried into effect by patented instruments, of which patents they are the owners, the same result is to follow; but if it is carried into effect by instruments which are the subjects of a patent which is the property of a resident of another state, and from which they are able to purchase, not the instruments themselves, but only a right to a temporary use thereof, subject to conditions and limitations, they are only required to give impartially to applicants the use of the full measure of right they have been able to procure. The statute cannot confer power upon courts, either to order them to buy that which cannot be bought, or to use the property of another without his consent. The legislature may deny the use of highways for the erection of poles for the support of wires to any corporation which is not the full owner of telephonic patents by which its system is operated, and which is not able to give a perfectly unrestrained and impartial use of all their capabilities to applicants, or to any corporation which proposes to use telephonic patents under any restrictions whatever imposed by the owner, and so embarrass and hinder as to induce them to become full owners of such patents or retire from the service of the public. Legislatures, for reasons of public policy, in many ways put limitations upon absolute owners in the use of their property, but they cannot transfer the property of one to another without compensation, even for the public good": *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352; 44 Am. Rep. 237.

Before this decision had been pronounced, the same question had been determined in other jurisdictions adversely to the right to discriminate, even when founded upon reservations in the contract by which the defendant had secured the right to use the telephone: *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; 10 Cent. L. J. 438. In Ohio, it was declared by the highest court that the defendant corporation, after being incorporated under a statute requiring it to serve all persons impartially and in good faith, could not shield itself "by any self-imposed restrictions contained in the stipulations of a contract with the American Bell Telephone Company"; that letters patent did not authorize the patentee to vend or use his invention "in a manner which but for the letters patent would be unlawful";

and that "the use of tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation simply because the patentee acquires a monopoly in his discovery"; that "the property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by state laws, when the public welfare requires it": *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583. Like views were reaffirmed and enforced in *Chesapeake etc. Telephone Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; 35 Alb. L. J. 271; *Louisville v. American District Tel. Co.*, 24 Id. 283; *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; 25 Am. Law Reg. 325; *Bell Telephone Co. v. Commonwealth*, 59 Am. Rep. 172; *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404. In the case last named, the right of the applicant to have a telephone was not grounded upon any special statute of the state against discrimination; nor was any special contract between the defendant and the American Bell telephone urged in defense. The applicant was an attorney between whom and the local company a difficulty had arisen on account of its not furnishing him with a list of subscribers, and his consequent refusal to pay for his telephone during the period when such list was not to be had. The telephone was then taken away from his office, and he was refused another, on the claim that his conduct had forfeited his right to it. The court was of the opinion that if anything was due for the former use of a telephone, the company's remedy for its collection by an ordinary action was adequate, and therefore declined to consider that question. In affirming the applicant's absolute right to be furnished telephonic connections and facilities on the same terms as others, the court said: "It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there; that, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations; that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public. That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as common carrier. The views herein expressed are not new. Similar questions have arisen in and have been frequently discussed and decided by the courts; and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike

who are like situated, and not discriminate in favor of or against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public do not apply to telephones, for the reason that they are of recent invention, and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce, nor to the particular kind of service known or in use at the time when these principles were enunciated, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, and from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, and from the telegraph to the telephone, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

A question which has not yet been necessarily determined, except in one state, is, whether the general legislative control to which telephone corporations must submit includes the supervision by the legislature of the charges which may be exacted for the use of their telephonic facilities. If the state possesses an arbitrary power in this respect, it is clear that the grant of letters patent may be substantially annulled by statutes which withhold from inventors the profits for the better realization of which their patents were obtained. In Indiana, a statute enacted in 1885 fixed the maximum rental of telephones in that state at three dollars per month. All attempts at resisting or evading this enactment have so far proved futile. The general constitutionality of the statute was affirmed in *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201. It appeared in that case that the company had sought to evade the statute by making separate charges for the several instruments, all of which were necessary to be used with the telephone. But the court decided that in the term "telephone" was included the entire apparatus "ordinarily used in the transmission as well as the reception of telephonic messages." These views were reasserted by the same court in *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1. The next attempted evasion of the statute was the imposition of a charge for the use of the telephone by non-subscribers, which, with the amount charged the subscriber for his use of it by and for himself, exceeded the amount allowed by law. As the charge for non-subscribers was collected irrespective of the amount of use by such non-subscribers, and whether any non-subscriber used the telephone or not, it was treated as a violation of the statute, and as justifying the conviction and punishment of the offender: *Johnson v. State*, 113 Ind. 143. The latest method of escape from the statute is shown in the principal case, and consisted of the refusal to place telephones in the offices of subscribers, and requiring them to resort to the offices established by the telephone company for the purpose of sending or receiving messages. The right to do this was also denied, and the duty of the company to furnish telephonic facilities in the usual manner enforced. The result of the decisions up to the present time is, that to avoid legislative control the companies must withdraw their instruments from the state, in which event it has been held they might en-

join, as an infringement of the patent, any attempted use of them: *American Co. v. Cushman*, 36 Fed. Rep. 488.

The right of a city to regulate the charge for the use of telephones has been denied. The right was claimed to have been conferred by that part of the city charter which authorized the city to regulate the use of its streets, and "to license, tax, and regulate telegraph companies or corporations, and all other business, trades, avocations, or professions whatever"; and "finally, to pass all such ordinances, not inconsistent with the provisions of the charter or the law of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same": *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 628; 9 Am. St. Rep. 370.

As telephones are used by all classes of persons for business purposes, some legal effect must be given to conversations held over them; and to the existence of this legal effect it is essential that such conversations should, at least under some circumstances, be receivable in evidence. It is true that many objections to their reception exist. The person talking cannot be seen, nor is there any method of authenticating and preserving for future reference what he says. Yet where both parties resort to this method of communication, they must intend that some legal result shall follow. If they are not willing to assume the risks incident to the mode, they should decline to resort to it, or to permit others to communicate with them in that way. If the person receiving the message can recognize the voice of the sender, or testifies that he recognized it, there is but little objection to his being permitted to state the contents of the communication thus received: *People v. Ward*, 3 N. Y. Crim. R. 483, 511. If the voice is not recognized, but the conversation is held through a telephone kept in a business house or office, it is also admissible. "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as parts of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible": *Wolfe v. Missouri Pacific R'y Co.*, 97 Mo. 473; *post*, p. 331. The one to whom the message is sent may not be in direct communication with the telephone. The conversation may be conducted by an operator in charge of a public telephone station; in which event, as the message does not personally concern the operator, he will rarely remember its contents. In such a case it has been held, by a divided court, that the conversation was admissible in evidence, and that the person receiving the message may state its contents as detailed to him by the operator at the time, when it appears from other evidence that the person against whom the evidence was offered did in fact talk over the wire at that time. "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes

to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence": *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901.

In *Banning v. Banning*, Sup. Ct. Cal., September, 1889, an acknowledgment of a deed by a married woman was sought to be avoided on the ground that she was at the time the notary took such acknowledgment three miles distant from him, and communicated with him and he with her by telephone only. But the court disposed of the question as follows: "It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily and without the hearing of her husband acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception was practiced to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone. These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake." The court then proceeded to consider the authorities bearing upon the question whether a certificate of the acknowledgment of a deed by a married woman can be contradicted collaterally; and having reached the conclusion that such certificate could not be successfully assailed otherwise than by proving fraud, sustained the deed and acknowledgment in question. Hence while the court expressly withheld its opinion upon the question whether an acknowledgment by telephone is good "under any circumstances," the inevitable logical result of its decision is, that such acknowledgment, followed by a certificate in due form, is good under all circumstances, unless vitiated by fraud.

PENNSYLVANIA COMPANY v. STEGEMEIER.

[118 INDIANA, 305.]

DEMURRER TO PLAINTIFF'S EVIDENCE ADMITS the truth of all the evidence adduced by him, and all inferences that may be reasonably drawn therefrom, and withdraws from consideration all favorable evidence except upon points where there was no conflict.

ORDINANCE OF A MUNICIPAL CORPORATION REQUIRING A RAILWAY CORPORATION TO KEEP A FLAG-MAN to give warning to travelers at the crossing of its railroad track on a designated street, and to have gates erected at such crossing, is a valid local law.

CONTRIBUTORY NEGLIGENCE IN CROSSING RAILWAY—WHAT EXONERATES PERSON INJURED FROM CHARGE OF.—One who reaches a railway crossing in a city at which the railway company is required by municipal

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BEDELL T. HERRING.

[77 CALIFORNIA, 512.]

Negotiable Instruments.

ADVERSE POSSESSION SUFFICIENT TO DEFEAT A RIGHT OF ACTION OF THE HOLDER OF THE LEGAL TITLE must be hostile in its inception, and be continued as such, without interruption, for the statutory period. It must be actual, visible, exclusive, acquired and retained under claim of title inconsistent with that of the true owner; but it need not be under a rightful claim, nor even under a muniment of title: *Illinois Central R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581, and note 586. Title to realty acquired by open, uninterrupted, exclusive, and adverse possession, under claim of ownership, for more than twenty years, will defeat an action in ejectment by the holder of the paper title: *Riggs v. Riley*, 113 Ind. 208. Where plaintiff, to maintain his action to recover a tract of land, relies upon seven years' adverse possession under color of title, he must show that such possession was continuous and unbroken for the full period prescribed by the statute of limitations: *Scott v. Mills*, 49 Ark. 266. Prior to the amendment of 1878 to section 325 of the Code of Civil Procedure, one who, in good faith, entered into possession of real estate, claiming title thereto under a void tax deed, and under such claim of title, openly, notoriously, and visibly maintained the possession thereof for a sufficient length of time adversely as against the whole world, including the owner of the paper title, acquired title to the land by adverse possession: *Reynolds v. Lincoln*, 73 Cal. 191. And whether one claiming title by adverse occupancy had that kind of continuous, notorious, and hostile possession of the land in dispute as would give title under the statute of limitations, is a question of fact for the jury: *Mason v. Ammon*, 117 Pa. St. 127.

[IN BANK.]

BEDELL v. HERRING.

[77 CALIFORNIA, 572.]

PROMISSORY NOTE—MAKER SIGNING NOTE WITHOUT KNOWING ITS CONTENTS—BONA FIDE INDORSEE FOR VALUE AND BEFORE MATURITY. — Maker of a promissory note who signs the same without knowing its contents, because he cannot read or write, and relying on false representations by the payee that it was a mere memorandum of agency, is guilty of such carelessness and undue confidence that, as between himself and an indorsee in good faith for value and before maturity, he must bear the loss and pay the note.

PROMISSORY NOTE—FRAUD IS NO DEFENSE AGAINST BONA FIDE INDORSEE FOR VALUE AND BEFORE MATURITY. — Maker of a promissory note cannot defend, it seems, on the ground that the note was procured from him by fraud, as against an indorsee in good faith for value and before maturity.

ACTION on a promissory note. The facts are stated in the opinion.

M. E. Sanborn, for the appellant.

John T. Harrington, for the respondent.

McFARLAND, J. This is an action upon a promissory note for five hundred dollars, made by defendant, payable to the order of E. Jones, due in six months, and by the latter indorsed and delivered to plaintiff before maturity. Judgment went for plaintiff, and defendant appeals. The appeal is from the judgment, and upon the judgment roll alone. The defense relied on was, that said payee Jones procured defendant to sign the note by falsely and fraudulently representing that it was not a note, but a mere memorandum about a certain agency.

It appears from the findings that at the time defendant signed the note the said Jones and one Moss falsely represented to him that it was not a promissory note, or any contract for the payment of money, but was merely a writing by which he signified his willingness to act as agent for the sale of a certain patent hay-fork. Defendant could not read or write the English language, except that he could sign his name. He signed the note without knowing its contents, and believed the said representations of said Jones and Moss. Plaintiff purchased the note for four hundred dollars before its maturity, and had no notice or knowledge that it was procured as aforesaid, or of anything that affected its validity as between the original parties. It is also found that "plaintiff is the indorsee of said note in due course," and that "defendant signed said note voluntarily, and without exercising the ordinary care in regard to the character of the paper signed which a prudent business man would and should exercise."

The defense set up cannot be maintained; and the judgment of the superior court was right. It is found by the court (fully enough, we think) that the defendant, in signing the note, did not exercise ordinary care. Indeed, the act of signing the paper, as shown in the findings (and there is no evidence here), was itself intrinsically careless. Therefore, leaving other aspects of the case out of view, it is clear that the judgment was right upon the principle that when one by his carelessness and undue confidence has enabled another to obtain the money of an innocent third person, he must answer for the loss which he has thus caused.

2. It is not necessary here to pass definitely upon the broader question discussed in the briefs, whether or not payment of a negotiable note in the hands of an innocent indorsee, who received it before maturity, can be avoided, under any circumstances, on the ground that it was procured by fraud. It is

apparent that to apply to such an instrument the principles which establish the essentials of an ordinary contract as between the original parties,—as, for instance, that there must be consent of the parties and a sufficient consideration; that where there was no intention to sign there was, in law, no signature; that fraud vitiates a contract *ab initio*, etc.,—would be to undermine the whole structure of commercial law, and “shake paper credit to its foundation.” The former decisions of this court seem to be in the direction of holding that in such a case payment cannot be avoided for fraud in the original procurement of the note: *Mitchell v. Hackett*, 14 Cal. 666; *Hellmann v. Potter*, 6 Id. 14; *Rich v. Davis*, 4 Id. 22; *Haight v. Joyce*, 2 Id. 65; 56 Am. Dec. 311; *Rich v. Davis*, 6 Cal. 141; *Meyer v. Porter*, 65 Id. 67; *Fuller v. Hutchings*, 10 Id. 523; 70 Am. Dec. 746; *Poorman v. Mills & Co.*, 39 Cal. 345; 2 Am. Rep. 451; *Smith v. Silsby*, 55 Cal. 470. In *Shepherd v. Jones*, 71 Id. 225, it does not appear that the note there involved was negotiable or transferred before maturity; and there is no discussion in the opinion of the general question here under consideration. In Indiana a great many cases arose similar in their facts to those of the case at bar; and it was uniformly held there that the defense set up could not be maintained. The current of American authorities seems to be in the same direction.

Judgment affirmed.

THORNTON, J. I concur in the judgment on the ground that the defense here urged cannot be made against plaintiff, who is an innocent purchaser before maturity of the negotiable note in suit.

NEGOTIABLE INSTRUMENTS. — Promissory notes given for gambling debts are valid in the hands of innocent indorsees: *Haight v. Joyce*, 2 Cal. 64; 56 Am. Dec. 311, and note 313; as to the protection of a *bona fide* holder of negotiable paper before maturity, compare *Poorman v. Mills*, 39 Cal. 345; 2 Am. Rep. 451; *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746, and note. Compare *Corbin v. Wachhorst*, 73 Cal. 411; *Hoyt v. Cross*, 108 N. Y. 76.

FRAUD IN INCEPTION OF NEGOTIABLE INSTRUMENTS AS AFFECTING BONA FIDE HOLDERS. — Who are *bona fide* holders of negotiable paper, and their rights in general, will be found considered in the notes to *Ayer v. Hutchins*, 3 Am. Dec. 235; *Bay v. Coddington*, 9 Id. 272; *Sims v. Lyles*, 26 Id. 156; *Bailey v. Smith*, 84 Id. 401. It is now proposed to discuss particularly the effect of fraud in the inception of negotiable paper upon *bona fide* holders thereof.

BONA FIDE HOLDER TAKES INSTRUMENT UNAFFECTED BY FRAUD IN ITS ORIGIN. — The general rule is well settled that a holder of a negotiable instrument who acquires it *bona fide*, without notice, in the usual course of

business, for a valuable consideration, and before maturity, takes the paper unaffected by fraud in its origin: *Swift v. Tyson*, 16 Pet. 1, 15; *Goodman v. Sinonds*, 20 How. 343; *Brown v. Spofford*, 95 U. S. 474; *Cromwell v. County of Sac*, 96 Id. 51; *Slacom v. Wishart*, 3 McLean, 517; *Barney v. Earle*, 13 Ala. 106; *State ex rel. Plock v. Cobb*, 64 Id. 127; *Humphrey v. Clark*, 27 Conn. 381; *Von Windisch v. Klus*, 46 Id. 433; *Robinson v. Bank of Darien*, 18 Ga. 65; *Gridley v. Bane*, 57 Ill. 529; *Stoner v. Milliken*, 85 Id. 218; *Hereth v. Merchants' Nat. Bank*, 34 Ind. 389; *Woollen v. Vankirk*, 61 Id. 497; *First Nat. Bank v. Lotton*, 67 Id. 256; *Helms v. Wayne Agricultural Co.*, 73 Id. 325; 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 535; *Blair v. Buser*, 1 Wils. (Ind.) 333; *Temple v. Hays*, Morris, 9, 12; *Stein v. Keeler*, 4 G. Greene, 86; *Clapp v. County of Cedar*, 5 Iowa, 15; 68 Am. Dec. 678; *Sully v. Goldsmith*, 32 Iowa, 397; *Wait v. Chandler*, 63 Me. 257; *Farrell v. Lovett*, 68 Id. 326; 28 Am. Rep. 59; *Hobart v. Penny*, 70 Me. 248; *Burrill v. Parsons*, 71 Id. 282; *Crompton v. Perkins*, 65 Md. 22; *Thurston v. McKown*, 6 Mass. 428; *Smith v. Livingston*, 111 Id. 342; *Winstead v. Davis*, 40 Miss. 785, 787; *Corby v. Butler*, 55 Mo. 398; *Perkins v. Challis*, 1 N. H. 254; *Paige v. Chapman*, 58 Id. 333; *Dougherty v. Scudder*, 17 N. J. Eq. 248; *Holcomb v. Wyckoff*, 35 N. J. L. 35; 10 Am. Rep. 219; *Gould v. Segee*, 5 Duer, 230; *Clothier v. Adriaance*, 51 N. Y. 322; *Selser v. Brock*, 3 Ohio St. 302; *Farmers' etc. Bank v. Lucas*, 26 Id. 385; *Kingsland v. Pryor*, 33 Id. 19; *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; 14 Am. Rep. 651; *Craig v. Sibbett*, 15 Pa. St. 238; *Third Nat. Bank v. McCann*, 15 Phila. 326; *Powers v. Ball*, 27 Vt. 662; *Robinson v. Reynolds*, 2 Q. B. 196. Fraud, therefore, cannot be urged either defensively or affirmatively against a *bona fide* holder. This rule is but an application of the broader doctrine that such a holder is not, in general, subject to infirmities which may exist in the inception of the instrument, and which may be taken advantage of between the original parties. "If any rule of law in regard to negotiable paper is well established," says Redfield, C. J., in *Powers v. Ball*, *supra*, "it is that a *bona fide* holder for value will be able to shut out all defenses, except certain statutory ones, where the paper in its inception is declared absolutely void, as notes or bills given upon gambling and usurious considerations." Duress, even, in executing the paper, will not be a defense in his hands: *Farmers' etc. Bank v. Butler*, 48 Mich. 192.

It is not necessary, in order to entitle a holder to the protection of the rule, that he be a subsequent transferee from or through an original party to the instrument. The payee himself may be protected. Thus if a person is induced to sign a note as surety by the fraudulent representations of the principal maker, he will, notwithstanding, be liable to the payee, if it does not appear that the payee knew of the fraud: *Quinn v. Hard*, 43 Vt. 375; *Farmers' etc. Bank v. Lucas*, 26 Ohio St. 385. Even if the surety was induced to sign under the belief that forged names appearing on the paper were genuine, he will be bound to an innocent payee: *Selser v. Brock*, 3 Id. 302; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Stoner v. Milliken*, 85 Ill. 218; *Gridley v. Bane*, 57 Id. 529.

If the holder have notice of the fraud in the origin of the paper, or if he takes in bad faith, he, of course, can claim no recovery from the defrauded party: *Fisher v. Leland*, 4 Cush. 456; 50 Am. Dec. 805; *City Bank of Columbus v. Phillips*, 22 Mo. 85; 64 Am. Dec. 254; *Crompton v. Perkins*, 65 Md. 22; *Ormsbee v. Howe*, 54 Vt. 182; 41 Am. Rep. 841; and the same would be true if he paid no value, or if he took after maturity, unless, in any of these cases, he acquired the instrument from one in whose hands it is not subject

to the defense, obtaining thereby the title of such transferrer: *Commissioners of Marion County v. Clark*, 94 U. S. 278; *Cromwell v. County of Sac*, 96 Id. 51; *Simon v. Merritt*, 33 Iowa, 537; *Mornyer v. Cooper*, 35 Id. 257; *Hereth v. Merchants' National Bank*, 34 Ind. 380; *Riley v. Schuwacker*, 50 Id. 592; *Boyd v. McCann*, 10 Md. 118; *Merchants' Bank v. President etc. of Farmers' Bank*, cited 10 Id. 123; *Bassett v. Avery*, 15 Ohio St. 299; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59; *Gould v. Segee*, 5 Duer, 260, 268; *Woodman v. Churchill*, 52 Me. 58; *Masters v. Ibberson*, 8 Com. B. 100. If, also, the action is between the original parties, there can be no question as to the right of the defrauded party to set up the defense against the one who perpetrated the fraud, as in case of any other contract. And it is held a promissory note may be avoided *in toto* for fraud, in the hands of the payee, where the maker, who was an illiterate man, signed it after it was read over to him as bearing a different and less rate of interest than that expressed upon its face: *Stacy v. Ross*, 27 Tex. 3; 84 Am. Dec. 604. But if a note be given for the purpose of defrauding the maker's creditors, it has been held that it cannot be avoided by the maker for that fact, but may be enforced against him by the payee: *Carpenter v. McClure*, 39 Vt. 9; 91 Am. Dec. 370; and, at all events, such fraud would be no defense to an action brought by an indorsee who took the note for value, before maturity, and without notice of the fraud: *Potter v. Belden*, 105 Mass. 11.

Fraud perpetrated upon some other holder of a negotiable instrument with reference thereto will also be no defense to one sued thereon. Thus it is no defense to an action on a promissory note by an indorsee against the maker that the note was obtained from the payee by means of fraudulent representations of which the indorsee had knowledge when he received the note: *Prouty v. Roberts*, 6 Cush. 19; 52 Am. Dec. 761.

In some states, the question of fraud in the procurement or execution of negotiable instruments has been the subject of statutory regulation. Thus in Georgia a section of the code provides that "the *bona fide* holder for value of a bill, draft, or promissory note, or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defenses set up by the maker, acceptor, or indorser, except . . . fraud in its procurement." The words "fraud in its procurement" have been liberally construed to mean "fraud in the procurement by the holder of the paper"; and therefore a *bona fide* transferee of a promissory note, without notice, and before maturity, will be protected, although the note was procured by the payee from the maker by fraud: *Robenson v. Vason*, 37 Ga. 66; *Hogan v. Moore*, 48 Id. 156, 162; *Merritt v. Bagwell*, 70 Id. 578, 583; and such holder, having a good title, a transferee from him has the same, no matter at what time the transfer to the latter was made: *Hogan v. Moore*, *supra*. This construction, it is said, makes a party responsible for his own fraudulent conduct, but does not make an innocent person responsible for the fraudulent conduct of others of which he had no knowledge.

In Illinois, "if any fraud or circumvention be used in obtaining the making or executing" of any note, it is provided that the note shall be void, not only between the maker and payee, but also in the hands of every subsequent holder. Fraud or circumvention in procuring the execution of a promissory note is, therefore, under this statute, a good defense, whether the transferee took the paper with or without notice thereof: *Hewitt v. Jones*, 72 Ill. 218; *Hubbard v. Rankin*, 71 Id. 129. But the statute does not require both fraud and circumvention, if there be any distinction between the words, in obtain-

ing the making or executing of a note before the defense can be interposed; it is sufficient if either be practiced: *Hewett v. Johnson*, 72 Ill. 513. "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it when he did not intend to do such an act. Circumvention seems to be nearly, if not quite, synonymous with fraud": *Per Walker, C. J.*, in *Latham v. Smith*, 45 Id. 25, 27. It is a well-settled interpretation of this provision that the fraud or circumvention which will avoid a promissory note in the hands of an innocent holder for value, and before maturity, must be in the "making or executing" the same, and not in the contract or consideration upon which the note was given: *Woods v. Hynes*, 1 Scam. 103; *Mulford v. Shepard*, 1 Id. 583; 33 Am. Dec. 432; *Latham v. Smith*, 45 Ill. 25, 27; *Shipley v. Carroll*, 45 Id. 285; *Depuy v. Schuyler*, 45 Id. 306; *Murray v. Beckwith*, 48 Id. 391; *Culver v. Hide and Leather Bank*, 78 Id. 625; *Taylor v. Thompson*, 3 Ill. App. 109; *Hayden v. Olinger*, 5 Id. 632. To illustrate: It is no defense against such a holder that the note was given for the price of goods sold by the payee, who made false representations as to their quantity and quality: *Woods v. Hynes, supra*; or that the note was given for the purchase price of land about which the payee made false representations: *Mulford v. Shepard, supra*; nor is a misrepresentation by the payee in regard to the legal effect of the instrument—as that it would not become operative until the maker should put a revenue-stamp upon it, and the property for which it was given should be delivered—such fraud or circumvention in obtaining the note as will amount to a defense against an innocent transferee for value, before maturity: *Latham v. Smith, supra*; and the same is true of the violation of a promise by vendors to vendees, made as an inducement to the execution of the note for the balance of the price of goods sold, not to assign the same, and to allow the vendees on the note all damages to which they might be entitled by reason of a failure of warranty as to the quality of the goods: *Murray v. Beckwith, supra*; so the failure of consideration, in whole or in part, can plainly not be set up as a defense in the hands of such a holder: *Culver v. Hide and Leather Bank, supra*; *Taylor v. Thompson, supra*; and where certain persons were induced to sign a note as sureties, on the representations of the principal maker that certain others would also sign, but the note was delivered by the latter without such signatures, the payee, who did not participate in the representations, or have any notice of them, is not affected thereby: *Young v. Ward*, 21 Ill. 223; and it is also held that where a person, as a matter of amusement, and without any design of delivering the paper to the payee, signed her name to a promissory note, which was afterwards stolen by the payee, and transferred to one who paid value and without notice, that there was no "fraud or circumvention" in obtaining or executing the note, within the meaning of the statute, which would defeat an action by the holder against the maker: *Shipley v. Carroll*, 45 Ill. 285; but while this ruling may be correct, it would seem that the case should have been decided differently, because of the want of delivery. "It must be borne in mind," says Walker, C. J., in *Latham v. Smith, supra*, "that the fraud or covin must relate to the obtention of the instrument itself, and not to the consideration upon which it is based. It is not fraud which relates to the quality, quantity, value, or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character; such as giving a note or other agreement for one sum or thing, when it is for another sum or thing; or as giving a note under the belief that it is a receipt."

If, therefore, a person, through artifice, and without negligence on his part, is induced to execute a note as one payable absolutely, under the belief that it was payable only on a contingency, there is such fraud or circumvention as will bar an action under the statute, by any transferee whatsoever: *Munson v. Nichols*, 62 Ill. 111; or where through some false representations, device, or trick, and without negligence, a person signs a note for a larger sum than he intended: *Richardson v. Schirtz*, 59 Id. 313; *Auten v. Gruner*, 90 Id. 300; or where through some fraudulent representations, device, or trick, and in the exercise of reasonable prudence and care, he signs a note, supposing that he is signing an instrument of an entirely different character: *Taylor v. Atchison*, 54 Id. 196; 5 Am. Rep. 118; *Puffer v. Smith*, 57 Ill. 527; *Sims v. Bice*, 67 Id. 88; *Hubbard v. Rankin*, 71 Id. 129; *Vanbrunt v. Singley*, 85 Id. 281; compare *Anderson v. Warne*, 71 Id. 20; 22 Am. Rep. 83. But it is necessary in all such cases, notwithstanding the fraud or circumvention, that the maker should have exercised ordinary care and diligence to acquaint himself with the contents of the paper before executing it, or he will be bound to an innocent holder for value and before maturity: *Leach v. Nichols*, 55 Ill. 273; *Meal v. Munson*, 60 Id. 49; *Swannell v. Watson*, 71 Id. 456; *Homes v. Hale*, 71 Id. 552; *Auten v. Gruner*, 90 Id. 300; *Smith v. Culton*, 5 Ill. App. 422; and whether he was guilty of negligence or not in the execution of the note is held to be a question for the jury: Id.; *Munson v. Nichols*, *supra*.

INSTRUMENTS NEVER DELIVERED, BUT OBTAINED BY FRAUD OR CRIME.—There is no doubt that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. And, therefore, if the payee of a promissory note obtains possession thereof by fraud, he cannot maintain any action thereon: *Carter v. McClintock*, 29 Mo. 464. *A fortiori* would this be true if he obtained possession by stealth. But the authorities are conflicting as to whether a *bona fide* holder can recover on an instrument which has never been delivered by the maker or drawer to any one for any purpose. It has been broadly asserted that the fact there was no delivery of a promissory note to any person by or on behalf of the maker was no defense to an action on the note by a *bona fide* holder for value, who received it before maturity: *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 165. In two Illinois cases the same result was reached, under some novel conditions of fact. In one of them, a person, after signing a note, was about to insert a condition in it, when the payee snatched it from him and ran away, and transferred it to an innocent purchaser before maturity: *Clarke v. Johnson*, 54 Ill. 296. In the other, a person, as a mere matter of amusement, and without any intention of delivering the paper to the payee, signed her name to a promissory note, which was afterwards stolen by the payee, and transferred to an innocent purchaser: *Shipley v. Carroll*, 45 Id. 285. These are extreme cases, and of doubtful correctness. It is difficult to see upon what reason they can be sustained, unless upon the ground of the maker's negligence; but then the negligence was not a proximate cause of the notes getting into circulation.

On the other hand, it is maintained that delivery of a negotiable instrument, at least for some purpose, is essential to its validity, even in the hands of a *bona fide* holder for value, and before maturity. At all events, it would seem to be a sound conclusion that where paper requiring no indorsement is stolen from the maker or drawer by a stranger, it never having been voluntarily delivered to any one, there can be no recovery on it, even by an innocent purchaser, before maturity: *Hall v. Wilson*, 16 Barb. 548, 555; *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525; certainly this should be so if the

instrument is incomplete: *Ledwich v. McKim*, 53 N. Y. 307. But cases have gone further. Thus in *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497, the maker signed a promissory note, payable to the order of another, but did not deliver it, and while he was temporarily absent from the room, the payee, contrary to the maker's prohibition, took the note from the table where it had been left by the maker, and went away with it. It was held that the maker was not liable thereon, even to a *bona fide* indorsee for value, and before maturity. Again, in *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357, a person was induced by fraud to sign his name to a promissory note, when he supposed that he was writing his name on a blank piece of paper, to enable the payees to see how his name was spelled or written. The maker did not, after he discovered that he had so signed his name to a note, voluntarily deliver it to the payees; but it was wrongfully and forcibly taken possession of by them, and by them carried away against the maker's consent. It was held that these facts constituted a good defense to the note in the hands of an indorsee in good faith for value, and before maturity. In these cases, the notes were decided to be invalid for want of delivery; and furthermore, there was no negligence or estoppel on which the makers could be charged. But it is held that one who attempts to cancel negotiable paper which he has signed, but not put in circulation, may do it so ineffectually and negligently that if it be thereafter obtained and fraudulently transferred, he may be liable to a *bona fide* purchaser for value: *Ingram v. Primrose*, 7 Com. B., N. S., 82; compare *Schloey v. Ramsbottom*, 2 Camp. 485.

INSTRUMENTS PUT IN CIRCULATION IN VIOLATION OF INSTRUCTIONS OR CONDITIONS. — The case where a negotiable instrument is put in circulation in violation of instructions or conditions on which it is intrusted by the party signing to another, evidently differs from the case last considered, where the paper has never voluntarily been intrusted to any one, but the possession is at the outset wrongfully obtained. If the paper comes into the hands of a *bona fide* holder for value, and without notice, there is, in the former case, room for the operation of the principle, of two innocent persons, that one should suffer who placed it in the power of another to commit the wrong; and the right of such a holder to recover has been rarely denied. A recovery by the *bona fide* holder in this case is, we take it, more properly due to this principle than to any special doctrine appertaining to negotiable instruments. If, then, bonds of a corporation are wrongfully put in circulation by its agents or officers, an accommodation indorser, as well as the corporation itself, will be liable to an innocent holder for value: *Gilman v. New Orleans etc. R. R.*, 72 Ala. 566; *Grand Rapids etc. R. R. v. Sanders*, 17 Hun, 552. So a person will be liable to a *bona fide* holder for value on negotiable paper which he intrusts to an agent for negotiation, and which the agent misappropriates: *Goodman v. Simonds*, 20 How. 343; *Brush v. Scribner*, 11 Conn. 388; 29 Am. Dec. 303; *Fisher v. Fisher*, 98 Mass. 303; and a person is likewise liable where he indorses a note for accommodation, and intrusts it to his clerk to deliver it to a certain person, on the latter's signing it with the name of a firm as makers, and the clerk delivers the note before it is signed by any one: *Whitmore v. Nickerson*, 125 Id. 496; 28 Am. Rep. 257; or where one signs a note as surety, and delivers it to his agent with instructions to make inquiries of a certain person as to the solvency of the principal maker, and not to deliver it to the payee unless such person should be of the opinion that the principal maker was solvent, but the agent causes the note to be delivered to the payee without making the inquiries: *Taylor v. Craig*, 2 J. J. Marsh. 449.

The same result follows where an accommodation party intrusts the paper to the accommodated party for a specific purpose, and the latter wrongfully uses it for a different purpose: *President etc. of Chicopee Bank v. Chapin*, 8 Met. 40; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 568; *Woodruff v. Hill*, 116 Mass. 310; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Fanning v. Farmers' Bank*, 8 Id. 139. An innocent holder for value is likewise unaffected by the fact that the instrument was transferred by the payee in violation of a condition on which it was held by him: *Bush v. Peckard*, 3 Harr. (Del.) 385; and see *Kohn v. Watkins*, 26 Kan. 691; 40 Am. Rep. 336; or that the paper payable to one's own order was not to be used, but should operate as a receipt merely: *Redlich v. Dall*, 54 N. Y. 234; or that the party from whom he received the paper had possession of it for certain purposes, and misappropriated it: *Collins v. Gilbert*, 94 U. S. 753; or that the paper was negotiated in violation of a condition on which it was signed or indorsed by an accommodation party: *Gage v. Sharp*, 24 Iowa, 15; *Davis v. Lee*, 26 Miss. 505; *Small v. Smith*, 1 Denio, 583; and see *Watson v. Russell*, 3 Best & S. 34; affirmed in 5 Id. 968; *Clark v. Thayer*, 105 Mass. 216; and, consequently, one who signs or indorses a note as surety cannot defend an action thereon, either by the innocent payee or any other *bona fide* holder for value, on the ground that the principal maker, to whom he intrusted the note, delivered the same in violation of a condition that a certain other person or persons should also first sign or indorse as co-sureties: *Bonner v. Nelson*, 57 Ga. 433; *Clark v. Bryce*, 64 Id. 486; *Young v. Ward*, 21 Id. 223; *Deardorff v. Foresman*, 24 Ind. 481; *Smith v. Moberly*, 10 B. Mon. 266; 52 Am. Dec. 543; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Massman v. Holcher*, 49 Id. 87; *Merriam v. Rockwood*, 47 N. H. 81; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Dixon v. Dixon*, 31 Id. 450; *Farmers' etc. Bank v. Humphrey*, 36 Id. 554; but this rule was denied in *Awde v. Dixon*, 6 Ex. 869, and in *Perry v. Patterson*, 5 Humph. 133, 136; and a majority of the supreme court of Missouri refused to apply it to a non-negotiable note in *Ayres v. Milroy*, 53 Mo. 516; but the first two of these latter cases are opposed to the weight of authority; and the last case does not give a proper effect to the principle above noted, on which this question rests.

Finally, if a promissory note be deposited with a third person as an escrow, and it is delivered to the payee without the maker's knowledge and consent, and without the happening of the condition on which it was to be delivered, the maker is, nevertheless, liable to an innocent holder for value: *Vallett v. Parker*, 6 Wend. 615; *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394; *Graff v. Logue*, 61 Iowa, 704; Bigelow, C. J., saying, in *Fearing v. Clark*, *supra*: "It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note." But it has been otherwise held that where a promissory note and mortgage securing it were placed in the hands of a mere custodian, indifferent between the parties, to be delivered to the payee upon the happening of a certain event, and the custodian, without authority, delivered the papers to the payee without waiting for such event, the maker was not liable thereon, for want of a proper delivery, even to a *bona fide* holder for value: *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; and also where negotiable instruments, running to a railroad company, were depos-

ited by the makers with a third person, to be held by him subject to their order only, and an agent of the company fraudulently induced a clerk of the custodian to let him take the instruments for the purpose of making a schedule of them, promising to return them as soon as that was done, but such agent delivered them to the company, which negotiated them for value, before maturity, to persons who had no notice of the facts, it was held that there could be no recovery thereon against the makers, because there had been no valid delivery: *Roberts v. McGrath*, 38 Wis. 52; *Roberts v. Wood*, 38 Id. 60; and see *Andrews v. Thayer*, 30 Id. 228. These Wisconsin cases are, however, opposed both to principle and the weight of authority.

INSTRUMENTS EXECUTED IN BLANK AND WRONGFULLY FILLED UP. — Intimately connected with the last head is the case where one executes or signs negotiable paper in blank, and intrusts the same to another, with specific directions or on an express understanding as to the filling up of the blanks. It is well settled that such person is liable to a *bona fide* holder for value, whether the paper be for accommodation, or be intended to be used for his own benefit, if the blanks are wrongfully filled up, by the one to whom the paper is intrusted, for larger amounts, or on different terms, or they are filled up by the *bona fide* holder to whom the paper is transferred in blank by such person without notice of the limiting instructions or agreement, and the signer has been thereby defrauded. Negotiable instruments so executed carry on their face an implied authority to fill up the blanks, and perfect the paper in conformity with the apparent object of the blanks. And the signer cannot complain, as against the *bona fide* holder, that the person to whom he intrusted the paper violated the confidence reposed in him. Of the two innocent parties, the maker and the innocent holder, the former should bear the loss, because he placed it in the power of the third person to perpetrate the wrong: *Russel v. Langstaffe*, 2 Doug. 514; *Collis v. Emett*, 1 H. Black. 312; *Schultz v. Astley*, 2 Bing. N. C. 544; *Montague v. Perkins*, 22 Eng. L. & Eq. 516; *London etc. Bank v. Wentworth*, L. R. 5 Ex. Div. 96, 101; *Bank of Pittsburgh v. Neal*, 22 How. Pr. 96, 107; *Putnam v. Sullivan*, 4 Mass. 45; 3 Am. Dec. 206; *President etc. of Androscoggin Bank v. Kimball*, 10 Cush. 373; *Roberts v. Adams*, 8 Port. 297; 33 Am. Dec. 291; *Herbert v. Huie*, 1 Ala. 18; 34 Am. Dec. 755; *Huntington v. Branch Bank at Mobile*, 3 Ala. 186; *Marshall v. Drescher*, 68 Ind. 359; *Eichelberger v. Old Nat. Bank*, 103 Id. 401; *McDonald v. Muscatine Nat. Bank*, 27 Iowa, 319; *Joseph v. First Nat. Bank*, 17 Kan. 256; *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Fanning v. Farmers' etc. Bank*, 8 Id. 139; *Torrey v. Fisk*, 10 Id. 590; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Dull*, 54 Id. 234; *Fullerton v. Sturgis*, 4 Ohio St. 529; *Schryver v. Hawkes*, 22 Id. 308; *Diercks v. Roberts*, 13 S. C. 338; *Nichol v. Bate*, 10 Verg. 429; *Orrick v. Colston*, 7 Gratt. 189. "The indorsement on a blank note," says Lord Mansfield, in *Russel v. Langstaffe*, *supra*, "is a letter of credit for an indefinite sum."

As between the immediate parties to the transaction, the paper, of course, can only be filled up in conformity with the authority conferred, although if there are no restrictions the authority is general: *Davidson v. Lanier*, 4 Wall. 447, 456. And in no case is any implied authority conferred to fill up a blank with matter foreign to the apparent purpose for which it had been left: *McCoy v. Lockwood*, 71 Ind. 319; "the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to

what was plainly and clearly expressed in the instrument before delivery": *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 330; nor, of course, has the person intrusted with the instrument authority to alter a material stipulation not left blank: *Coburn v. Webb*, 56 Ind. 96. If the paper be taken with notice that the blanks have been filled up without authority, or in fraud, the defense can be maintained on that ground: *Davidson v. Lanier*, *supra*; *Goss v. Whitehead*, 33 Miss. 213; but in Mississippi it is held that a note will not be avoided *in toto*, but only as to the excess, where a person takes the paper with notice that an agent to whom it was intrusted in blank has exceeded his authority as to the amount to be inserted: *Johnson v. Blasdale*, 1 Smedes & M. 17; 40 Am. Dec. 85; *Goad v. Hart's Adm'rs*, 8 Smedes & M. 787.

It is an entirely different case, however, where one writes his name on a blank piece of paper, of which another takes possession without authority, and writes a promissory note above the signature. The signer cannot be held by a *bona fide* transferee: *Nance v. Lary*, 5 Ala. 370. No confidence is reposed by the signer in any one, for the violation of which he might be held, but the making of the note is a forgery. No instrument whatever was intended to be made by the signer which should be binding upon him. So where a person wrote his name on a blank piece of paper, for the purpose of identifying his signature, and the one to whom it was given, without the knowledge of the signer, wrote over the signature a promissory note, the instrument is a forgery, and an innocent holder for value is not entitled to recover: *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 236.

INSTRUMENT SO EXECUTED THAT A PORTION THEREOF MAY BE DETACHED OR ALTERED. — If a person signs a note to which a condition is so attached that it is perfectly apparent to him that the condition may be separated from the note, and the note left a perfect negotiable instrument without anything on its face to indicate that the condition had ever constituted a part of it, the maker will be guilty of such negligence that the wrongful separation of the condition will be no defense to an action against him on the note by a *bona fide* holder for value, and before maturity: *Cornell v. Nebeker*, 58 Ind. 425; *Zimmerman v. Rote*, 75 Pa. St. 188; compare *Cochran v. Nebeker*, 48 Ind. 459. "It is the duty of the maker of the note," says the court in *Zimmerman v. Rote*, *supra*, "to guard, not only himself, but the public, against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease, and without ready detection." If, however, there is no question of negligence on the part of the maker, the unauthorized separation of the condition would be such a material alteration as would avoid the note, even in the hands of the innocent purchaser: *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395. The case of *Stephens v. Davis*, 85 Tenn. 271, however, holds that where a promissory note, taken from a book of printed blank notes, was signed after a condition was written on the stub, and the stub was detached by the payee or his agent, the detachment of the stub avoided the note, even in the hands of an innocent holder, before maturity, and that an instruction that if the stub could be easily removed without defacing the note, the maker would not be entitled to relief on account of his own negligence, was erroneous. The decision is opposed to the cases first cited, and seems to be based upon a misapprehension of *Benedict v. Cowden* and *Wait v. Pomeroy*, *supra*, where the element of negligence was not really involved, although in *Wait v. Pomeroy* some of the observations of Chief Justice Campbell tend towards maintaining

the view that the maker would in no event be liable if the condition were detached. In *Palmer v. Largent*, 5 Neb. 223, it is held that while the fraudulent removal of a memorandum, written under a promissory note, and qualifying it, vitiates the instrument, even in the hands of a *bona fide* holder, yet where the words alleged to have been removed by the payee were "this note is given upon condition," and there is nothing to show what the condition was, the removal does not vitiate the instrument, inasmuch as the words were entirely immaterial.

For the same reason, if one signs an instrument which is apparent to him to be in such a form that a note included in it may be so detached from the rest of the instrument as to appear a simple promissory note, he will be liable thereon, if it is so detached, to a *bona fide* holder for value, and before maturity: *Woollen v. Ulrich*, 64 Ind. 120; *Woollen v. Whitacre*, 73 Id. 198; but here, again, the maker is held not liable in the absence of negligence, and that the question of negligence is for the jury: *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75; Sharswood, J., remarking: "If the maker of a bill, note, or check issues it in such a condition that it may be easily altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity." Likewise, where a person signed a printed note, in the blank of which was written "one hundred," leaving a space between these words and the printed word "dollars," which space was filled by the payee after delivery with the word "fifty," written in the same hand, and there being nothing suspicious in the appearance of the paper, it was held that the maker was liable for the face of the note to a *bona fide* holder for value, and before maturity: *Garrard v. Haddan*, 67 Pa. St. 82; 5 Am. Rep. 412.

INSTRUMENTS MISTAKENLY EXECUTED UNDER FALSE REPRESENTATIONS. — There is no doubt that if one signs a negotiable instrument without reading it, or if he cannot read, without asking to have it read to him, he cannot avoid the legal effect of his signature, even against an original party, by setting up his ignorance of the contents of the paper, in the absence of fraud, deceit, or misrepresentation: *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Id. 111; *Burroughs v. Pacific Guano Co.*, 81 Id. 255; *Pacific Guano Co. v. Anglin*, 82 Id. 492; *Cannon v. Lindsey*, 85 Id. 198; 7 Am. St. Rep. 38; *Rogers v. Place*, 29 Ind. 577. In the frequently quoted language of Gibson, C. J., in *Greenfield's Estate*, 14 Pa. St. 489: "If a party, who can read, will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law." Proof that the grantor of a deed was very ignorant and illiterate, and could not read writing, and that the deed was not read to him, is not sufficient to avoid the deed, unless he requested it to be read: *Hallenbeck v. Dewitt*, 2 Johns. 404.

It is quite a different matter, however, if one signs negotiable paper relying upon the false representations of another as to its contents. There are two classes of cases. He may intend to sign a negotiable instrument, but misrepresentations may be made as to its terms; or he may, through some fraudulent representation, device, or trick, have signed such an instrument supposing that it is an instrument of an entirely different character. As a general proposition, applicable to the first class, it may be stated that one who executes a promissory note, intending to sign it for a certain sum, or according to certain terms, cannot, in an action against him by an innocent holder for value before maturity, set up as a defense that, through the fraudulent repre-

sentations of the payee or his agent, or through the false reading of the paper to him by the latter, it was executed for a larger sum, or with different terms than he intended, if he was guilty of negligence in failing to use reasonable care to inform himself of the contents of the instrument: *Craig v. Hobbs*, 44 Ind. 363; *Dutton v. Clapper*, 53 Id. 276; *Yeagley v. Webb*, 86 Id. 424; *Wright v. Flinn*, 33 Iowa, 159; *Fayette County Savings Bank v. Steffes*, 54 Id. 214; *Griffiths v. Kellogg*, 39 Wis. 290; 20 Am. Rep. 48; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; and as heretofore shown, this rule is also true under the statutes of Georgia and Illinois: *Merritt v. Bagwell*, 70 Ga. 578, 583; *Leach v. Nichols*, 55 Ill. 273; *Richardson v. Schirtz*, 59 Id. 313; *Mead v. Munson*, 60 Id. 49; *Munson v. Nichols*, 62 Id. 111; *Homes v. Hale*, 71 Id. 552; *Auten v. Gruner*, 90 Id. 300. There is, however, some confusion among these cases in regard to the question how the negligence is to be determined. There seems to have been a tendency to submit the matter to the jury, and there is no doubt that, ordinarily, and when the facts are disputed, or there is room for a fair difference of opinion on the facts as shown, the question is one for the jury; but it would seem, at all events, that when it clearly appears that the maker signed the instrument without reading it, or if he could not read, without having it read over to him, relying instead upon the false representations of the payee or his agent, he is guilty of such negligence, as a matter of law, as will prevent the fraud from being an available defense as against an innocent holder for value, and before maturity. Under other special circumstances, the question might also be one of law.

More difficulty is encountered with the class of cases where the negotiable instrument was executed by the party through a false representation, device, or trick, under the belief that he was signing an instrument of a totally different character. The general rule has been well stated as follows: "The party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and who has no intention of signing it, and who is guilty of no negligence in affixing his signature or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included": *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 Id. 61; *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Webb v. Corbin*, 78 Ind. 403. It is thus observed that the negligence of the signer is the important factor in determining whether or not he may be held liable to an innocent holder for value before maturity. But it has been held by some cases that the one who executes the paper under such circumstances will be liable, irrespective of the question of negligence: *Rowland v. Fowler*, 47 Conn. 347; *First Nat. Bank v. Johns*, 22 W. Va. 520; 46 Am. Rep. 506; and, on the other hand, there are *dicta* and decisions to the effect that he incurs no liability at all, notwithstanding he may have been negligent: *Briggs v. Ewart*, 51 Mo. 245; 11 Am. Rep. 445; *Martin v. Smylee*, 55 Mo. 577; *Corby v. Weddle*, 57 Id. 452; *Gibbs v. Linbury*, 22 Mich. 479; 7 Am. Rep. 675; *Anderson v. Walter*, 34 Mich. 113, 119. These latter views, however, do not accord with either principle or authority. See the earlier Missouri cases, modified by *Shirts v. Overjohn*, 60 Mo. 305. The amount of care which the signer is required to exercise is generally expressed as "ordinary"; but in *Dinsmore v. Stinbert*, 12 Neb. 433, in an action on a promissory note by *bona fide* transferees for value before maturity, it was held that an instruction that the verdict should be for the defendant, if he, "before signing said note, used the diligence and care that a man of ordinary care and prudence would have used, under similar circumstances, to ascertain its contents, and was without

fault," was erroneous; and that the jury should have been told that to make such defense available, the defendant must not have been guilty of any negligence in signing the paper.

Generally speaking, the question of the signer's negligence is a fact to be submitted to the jury: See *Foster v. Mackinnon*, L. R. 4 Com. P. 704; *Webb v. Corbin*, 78 Ind. 403; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Fenton v. Robinson*, 4 Hun, 252; *Ross v. Doland*, 29 Ohio St. 473; *De Camp v. Hamma*, 29 Id. 467; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Sims v. Bice*, 67 Ill. 88; but where it is shown that he, being able to read, signed the instrument without reading it, or not being able to read, he signed it without having it read over to him, relying upon the false representations of the payee or his agent, especially if the latter be a stranger, that it was an instrument of a different character, or upon the false reading of it by such person, if he can himself read, he should be held to be negligent as a matter of law, and a recovery can consequently be had against him by a *bona fide* holder for value before maturity: See *Nebeker v. Cutsinger*, 48 Ind. 436; *Moon v. Vancuren*, 49 Id. 201; *Glenn v. Porter*, 49 Id. 500; *Kimble v. Christie*, 53 Id. 140; *Woollen v. Utrich*, 64 Id. 120; *Maxwell v. Morehart*, 66 Id. 301; *Thomas v. Ruddell*, 66 Id. 326; *Indiana Nat. Bank v. Weckerly*, 67 Id. 345; *Fisher v. Von Bekren*, 70 Id. 19; 36 Am. Rep. 162; *Ruddell v. Phalar*, 72 Ind. 533; 37 Am. Rep. 177; *Ruddell v. Dillman*, 73 Ind. 518; 38 Am. Rep. 152; *American Ins. Co. v. McWhorter*, 73 Ind. 136; *Williams v. Stoll*, 79 Id. 80; 41 Am. Rep. 604; *Baldwin v. Barrows*, 86 Ind. 351; *Doughess v. Matting*, 29 Iowa, 498; 4 Am. Rep. 238; *Loomis v. Metcalf*, 30 Iowa, 382; *McCormack v. Molbury*, 43 Id. 561; *Ort v. Fowler*, 31 Kan. 478; 47 Am. Rep. 501; *Kellogg v. Curtis*, 65 Me. 59; *Shirts v. Overjohn*, 60 Mo. 305; *De Camp v. Hamma*, 29 Ohio St. 467, 471; *Phelan v. Moss*, 67 Pa. St. 59; 5 Am. Rep. 402. On the other hand, where a party's signature to a promissory note was obtained by fraud as to the character of the paper itself, he being sick, and enfeebled in mind and body, and unable to read the paper, and there being no one to whom he could appeal for assistance, and the paper having been misread to him, it was held on demurrer to the answer setting forth these facts that he was guilty of no negligence, and was not liable to an indorsee before due, although it appeared that the persons who obtained the note were strangers to him: *Webb v. Corbin*, *supra*; and in an action by an indorsee against the maker of a note, an answer showing by proper averments that the note was without consideration, and the execution was obtained by fraud while the maker was so under the influence of medicines administered by the person who received the note that he was incapable of comprehending the nature of the transaction, is good on demurrer: *Mitchell v. Tomlinson*, 91 Ind. 167; so an answer to a complaint on a promissory note, brought by an indorsee before maturity against the maker, to the effect that the defendant had entered into a contract of agency with the payee, but that no note was shown or read to the defendant, or intended to be executed by him, but that if it was contained in the paper which he had signed it was so disguised and concealed that he could not with reasonable diligence have discovered the same, is also good on demurrer: *Detwiler v. Bish*, 44 Id. 70.

Whether an illiterate person is guilty of negligence in signing an instrument, which, through fraud, turns out to be negotiable paper, without first having had it read over to him by some one other than the payee or his agent, as by a member of his family, or a friend or neighbor, is also, in general, a question of fact for the jury: *Baldwin v. Bricker*, 86 Ind. 221, 222; *Hopkins*

v. *Hawkeye Ins. Co.*, 57 Iowa, 203; *Swannell v. Watson*, 71 Ill. 456; *Frederick v. Clemens*, 60 Mo. 313. In *Baldwin v. Barrows*, 86 Ind. 351, it appeared, in an action against the maker of a promissory note, by *bona fide* holders for value, and before maturity, that the maker, who could not read, signed the note upon a representation that it was a mere order for medicines, and without asking his wife, who was present and could read. It was held, on a review of the evidence, that he was liable. In a number of cases it has been held that where a person who could not read, or who could read only with difficulty, signed a note, relying upon the false reading or representations of it by the payee as an instrument of a different character, a verdict in his favor was sustained by the evidence: *Taylor v. Atchison*, 54 Ill. 196; 5 Am. Rep. 118; *Puffer v. Smith*, 57 Ill. 527; *Hubbard v. Rankin*, 71 Id. 129; *Vanbrunt v. Singley*, 85 Id. 281; *Soper v. Peck*, 51 Mich. 563; *First National Bank v. Deal*, 55 Id. 592. See also *Whitney v. Snyder*, 2 Lans. 477; *First National Bank v. Lierman*, 5 Neb. 247. But in *Mackey v. Peterson*, 29 Minn. 298, the extreme view was taken that where a person signed a promissory note, supposing it to be a mere receipt, and relying upon the false representations of the payee's agent, who was a stranger, that it was a receipt, and upon the false reading of the paper by the latter to him, he being unable to read English himself, and there being no one who could read English within half a mile, that he was guilty of negligence, and the facts furnished no defense as against a *bona fide* holder for value, and before maturity; while, on the other hand, the case of *Corby v. Weddle*, 57 Mo. 452, holds that where a person signed a promissory note without reading it, he reading writing with difficulty, believing it to be an instrument of a different character, and relying upon the representations of the payee, who was a stranger, that it was an instrument of a different character, a declaration, in an action by an innocent holder for value, and before maturity, to the effect that if the defendant's signature was procured under false pretenses that he was signing an instrument of a different character, he having no intention of making a note, there could be no recovery, thus excluding the question of his negligence, was correct; but more recently it has been decided, under similar circumstances, that the question of negligence should be left to the jury: *Frederick v. Clemens*, 60 Mo. 313; and see also *Shirts v. Overjohn*, 60 Id. 305.

AMOUNT OF RECOVERY BY BONA FIDE HOLDER AGAINST DEFRAUDED MAKER OR INDORSER. — There is no doubt that if a negotiable instrument is valid and binding between the original parties, the payee may sell it at any rate of discount he chooses, and the purchaser will have a right to recover the full face value of the paper: See *Durant v. Banta*, 27 N. J. L. 624, and cases cited; *National Bank v. Green*, 33 Iowa, 140. But if there was fraud in the inception of the paper, the authorities are not agreed as to the amount of recovery by a *bona fide* holder. If the paper was transferred as collateral security merely by one in whose hands the defense of fraud is available, it is clear that the *bona fide* transferee should recover thereon to the extent only of the amount secured, for the reason that as to any surplus over and above that sum he would be a trustee for his transferrer, who is entitled to nothing from the defrauded party: See *President etc. of Chicopee Bank v. Chapin*, 8 Met. 40; *Stoddard v. Kimball*, 6 Cush. 469; *Fisher v. Fisher*, 98 Mass. 303; *Allaire v. Hartshorne*, 21 N. J. L. 665; 47 Am. Dec. 175; *Union National Bank v. Roberts*, 45 Wis. 373; and the same result follows where accommodation paper is transferred as collateral security by the accommodated party, although no question of fraud is involved: *Williams v. Smith*, 2 Hill, 301; *Duncan v. Gilbert*, 29 N. J. L. 521; *Atlas Bank v. Doyle*, 9 R. I. 76; 93

Am. Dec. 368; *Vallette v. Mason*, 1 Ind. 89. If, however, a negotiable instrument is purchased before maturity by one who has no notice of fraud in its origin, he should be entitled to recover the full amount of the paper against the defrauded party, notwithstanding he may have paid less than its face value: *Cromwell v. County of Sac*, 96 U. S. 51; *Railroad Companies v. Schutte*, 103 Id. 118, 144; *Sully v. Goldsmith*, 32 Iowa, 397; *Lay v. Wissman*, 36 Id. 305; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Hobart v. Penny*, 70 Me. 248, 249; *Bange v. Flint*, 25 Wis. 544, 550; *Tod v. Wick*, 36 Ohio St. 370, 391; *Butterfield v. Town of Ontario*, 32 Fed. Rep. 891. There is evidently a distinction between the case where the transferee takes the paper as collateral security, and where he makes an out and out purchase of it. In the one case he is to account for a surplus, after satisfying the secured claim, to one against whom the defense of fraud may be maintained; in the other, he holds entirely for his own benefit. Presumably, the paper was sold for what it would bring in the market, and to allow a reduction in recovery from its full amount would be depriving the purchaser substantially of his rights as a *bona fide* holder, and permitting, after all, the defense of fraud to be successfully pleaded against him. These considerations apply with particular force to the securities of public and private corporations, which are constantly fluctuating in price; but there is no reason why the rule should not have a general application. A line of cases, notwithstanding, limits the amount of recovery to the price paid: *Stalker v. McDonald*, 6 Hill, 93, 96; 40 Am. Dec. 389; *Moore v. Ryder*, 65 N. Y. 438; *Youngs v. Lee*, 18 Barb. 187, 192; affirmed in 12 N. Y. 551; *Huff v. Wagner*, 63 Barb. 215; *Hurger v. Wilson*, 63 Id. 237; *Stevens v. Corn Exchange Bank*, 3 Hun, 147; *Todd v. Shelbourne*, 8 Id. 510; *Holcomb v. Wyckoff*, 35 N. J. L. 35; 10 Am. Rep. 219; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; and see *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 568; compare *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573; *Cardwell v. Hicks*, 37 Barb. 458; *Grand Rapids etc. R. R. v. Sanders*, 17 Hun, 552. Of course, if the transferee should receive notice of the fraud before making full payment, he should be protected only to the amount advanced previous to that time: *Dresser v. Missouri etc. R'y*, 93 U. S. 92; and see *Hubbard v. Chapin*, 2 Allen, 328; *Crandall v. Vickery*, 45 Barb. 156.

It might also be here noticed that there is no reason, on principle, why a purchaser of accommodation paper from an original party, at a discount, should not, independently perhaps of the usury laws, recover the full face value from the accommodating party. This would certainly seem to be true if he took without notice of the nature of the paper, and it is difficult to see why it should not be true even if he took with notice, provided he acts in good faith: See *Gaul v. Willis*, 26 Pa. St. 259; *Moore v. Baird*, 30 Id. 138; *Daniels v. Wilson*, 21 Minn. 530, 532; but some cases restrict the recovery to the amount paid: *Brown v. Mott*, 7 Johns. 361; *Holeman v. Hobson*, 8 Humph. 127; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbard*, 2 Stark. 304; *Simpson v. Clarke*, 2 Crompt. M. & R. 342; as also where the consideration for the paper has failed: *Petty v. Hannum*, 2 Humph. 102. Finally, it might be observed that the fact that less than the face value of the paper was paid by the purchaser might be an important element in determining the *bona fides* of the holder: See note to *Bailey v. Smith*, 84 Am. Dec. 403.

RIGHTS OF TRANSFEREE FROM BONA FIDE HOLDER. — The rule is well settled that one who acquires negotiable paper from a *bona fide* holder for value, and before maturity, acquires the title and rights of such holder. Therefore he will not be affected by the fact that he had notice of fraud in

the origin of the paper: *Cromwell v. County of Sac*, 96 U. S. 51; *Commissioners of Marion County v. Clark*, 94 Id. 278; *Simon v. Merritt*, 33 Iowa, 537; *Mornyer v. Cooper*, 35 Id. 257; *Hereth v. Merchants' Nat. Bank*, 34 Ind. 380; *Riley v. Schawacker*, 50 Id. 592; *Boyd v. McCann*, 10 Md. 118; *Merchants' Bank v. President etc. of Farmers' Bank*, cited 10 Id. 123; *Bassett v. Avery*, 15 Ohio St. 299; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59; *Butterfield v. Town of Ontario*, 32 Fed. Rep. 891; or that he took the paper after maturity: *Gould v. Segee*, 5 Duer, 260, 268; *Woodman v. Churchill*, 52 Me. 58; *Hogan v. Moore*, 48 Ga. 156, 162; or that he paid no consideration: *Masters v. Ibberson*, 8 Com. B. 100. The same rules exist where the paper was given on an illegal consideration: *Chalmers v. Lanion*, 1 Camp. 383; *Cotton v. Sterling*, 20 La. Ann. 282; or where it was given without consideration: *Smith v. Hiscok*, 14 Me. 449; *Hascall v. Whitmore*, 19 Id. 102; *Peabody v. Rees*, 18 Iowa, 571; *Howell v. Crane*, 12 La. Ann. 126; *Watson v. Flanagan*, 14 Tex. 354; *Bank of Sonoma v. Gove*, 63 Cal. 355. "The rule has been too long settled to be questioned now," says Field, J., in *Cromwell v. County of Sac*, *supra*, "that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition." Again, it is well said in *Bassett v. Avery*, *supra*, that "if a party holds a negotiable instrument discharged of defenses which may have existed between the antecedent parties, no reason is perceived why his right of sale should be any more restricted than his right to collect. The liability of the maker is then fixed. It is not increased by a subsequent sale or gift of the note to another; and it would be inconsistent that the law should recognize a perfect title in a party and yet limit his power of disposition in the manner claimed."

BURDEN OF PROOF AS TO BONA FIDE OWNERSHIP. — It is a well-established proposition that the mere possession of a negotiable instrument by the indorsee, or by the transferee where no indorsement is necessary, imports *prima facie* that he is the lawful owner, and that he acquired it before maturity, *bona fide*, for value, in the usual course of business, and without notice of any circumstance impeaching its validity: *Note to Bailey v. Smith*, 84 Am. Dec. 403; *Murray v. Lardner*, 2 Wall. 110; *Carpenter v. Longan*, 16 Id. 271; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 Id. 753; *Brown v. Spofford*, 95 Id. 474, 478; *In re Tallassee Mfg. Co.*, 64 Ala. 593; *McCann v. Lewis*, 9 Cal. 246; *Fuller v. Hutchings*, 10 Id. 523; 70 Am. Dec. 746; *Sperry v. Spaulding*, 45 Cal. 544; *Matthews v. Poythress*, 4 Ga. 287, 305; *Merchants' etc. Nat. Bank v. Trustees of Masonic Hall*, 62 Id. 271, 283; *Pettis v. Westlake*, 3 Scam. 535; *Mabley v. Ryan*, 14 Ill. 51; *Woodworth v. Huntton*, 40 Id. 131; *Depuy v. Schuyler*, 45 Id. 306; *Palmer v. Nassau Bank*, 78 Id. 380; *Hall v. Allen*, 37 Ind. 541, 542; *Baldwin v. Fagan*, 83 Id. 447; *Wilkinson v. Sargent*, 9 Iowa, 521; *Trustees of Iowa College v. Hill*, 12 Id. 462; *Lathrop v. Donaldson*, 22 Id. 234; *Union Nat. Bank v. Barber*, 56 Id. 559; *Rahn v. King Wrought-iron Bridge Manufactory*, 16 Kan. 530; *Euton v. Harlan*, 20 Id. 452; *Taylor v. Bowles*, 28 La. Ann. 294, 295; *Baxter v. Ellis*, 57 Me. 178; *Totten v. Bucy*, 57 Md. 446; *Conley v. Winsor*, 41 Mich. 253; *Cummings v. Thompson*, 18 Minn. 246; *Craig v. City of Vicksburg*, 31 Miss. 216; *Emanuel v. White*, 34 Id. 56; 69 Am. Dec. 385; *Winstead v. Davis*, 40 Miss. 785; *Harrison v. Pike*, 48 Id. 46; *Horton v. Bayne*, 52 Mo. 531; *Corby v. Butler*, 55 Id. 398; *Johnson v. McMurtry*, 72 Id. 278; *Duncan v. Gilbert*, 29 N. J. L. 521; *Conroy v. Warren*, 3 Johns. Cas. 259; 2 Am. Dec.

156; *Case v. Mechanics' Banking Ass'n*, 4 N. Y. 166; *First Nat. Bank v. Green*, 43 Id. 298; *Ross v. Bedell*, 5 Duer, 462, 467; *French v. Barney*, 1 Ired. 219; *Pugh v. Grant*, 86 N. C. 39; *Fredwell v. Blount*, 86 Id. 33; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. 221; *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 452; *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; *Jones v. Westcott*, 2 Brev. 166; 3 Am. Dec. 704; *Blum v. Loggins*, 53 Tex. 121; *Duerson's Adm'r v. Alsop*, 27 Gratt. 229, 245; *Middleton v. Barned*, 4 Ex. 241.

Nor is this presumption overcome by evidence that the paper was executed without consideration between the original parties, or that the consideration has failed: *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327; *Hinkley v. Fourth National Bank*, 77 Ind. 475; *Ross v. Bedell*, 5 Duer, 462, 467; *Albrecht v. Strimpler*, 7 Pa. St. 476; *Hutchinson v. Boggs*, 28 Id. 294; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Sloan v. Union Banking Co.*, 67 Id. 470; *Dingman v. Amsink*, 77 Id. 114; *Wilson v. Lazier*, 11 Gratt. 477; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Batley v. Catterall*, 1 Id. 379; *Jacob v. Hungate*, 1 Id. 445; *Lacey v. Forrester*, 2 Crompt. M. & R. 59; *Mills v. Barber*, 1 Mees. & W. 425; *Fitch v. Jones*, 5 El. & B. 238; but see *Heath v. Sansom*, 2 Barn. & Adol. 291; *Simpson v. Clarke*, 2 Crompt. M. & R. 342; nor by the fact that the maker of a note paid the amount thereof to the original payee, without notice that it had been transferred: *Emanuel v. White*, 34 Miss. 56; 69 Am. Dec. 385. The possession of a negotiable instrument, however, only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself: *Central Bank v. Hammett*, 50 N. Y. 159. It is held in a code state, where actions are to be brought in the name of the real party in interest, that the possession of an unindorsed promissory note, not payable to bearer, also raises a presumption that the person producing it on the trial was the real and rightful owner, and entitled to the money due from the maker: *Jackson v. Love*, 82 N. C. 405; *contra*, *Dorn v. Parsons*, 50 Mo. 601; and see *Gibson v. Miller*, 29 Mich. 355.

While the foregoing rule is well established, it is equally well settled that if the maker, acceptor, or other party bound by the original consideration of negotiable paper proves that there was fraud in the inception of the instrument, or circumstances raising a strong suspicion of fraud, the general presumption in favor of the holder is then overcome, and he is bound to show that he acquired the paper *bona fide*, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud: *Smith v. Sac County*, 11 Wall. 139; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, 94 Id. 753, 761; *McClintick v. Cummins*, 2 McLean, 98; *Wallace v. Branch Bank at Mobile*, 1 Ala. 565; *Thompson v. Armstrong*, 7 Id. 256; *Ross v. Drinkard's Adm'r*, 35 Id. 434; *Gilman v. New Orleans etc. R. R.*, 72 Id. 566; *Sperry v. Spaulding*, 45 Cal. 544; *Matthews v. Poythress*, 4 Ga. 287, 305; *Merchants' etc. National Bank v. Trustees of Masonic Hall*, 62 Id. 271, 283; *Hurbison v. Bank of Indiana*, 28 Ind. 133; 92 Am. Dec. 308; *Zook v. Simonson*, 72 Ind. 83; *Baldwin v. Fagan*, 83 Id. 447; *Mitchell v. Tomlinson*, 91 Id. 167; *Blair v. Buser*, 1 Wils. (Ind.) 333; *Lane v. Krekle*, 22 Iowa, 399; *Woodward v. Rodgers*, 31 Id. 342; *Rock Island National Bank v. Nelson*, 41 Id. 563; *Bank of Monroe v. Anderson Bros. Min. etc. Co.*, 65 Id. 692; *Morgan v. Yarrowborough*, 13 La. 74; 33 Am. Dec. 553; *Baxter v. Ellis*, 57 Me. 178; *Roberts v. Lane*, 64 Id. 108; 18 Am. Rep. 242; *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Rep. 273; *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327;

Totten v. Buey, 57 Md. 446; *Crompton v. Perkins*, 65 Id. 22; *Bissell v. Morgan*, 11 Cush. 198; *Tucker v. Morrill*, 1 Allen, 528; *Smith v. Livingston*, 111 Mass. 342; *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192; *Wright v. Irwin*, 33 Mich. 32; *Conley v. Winsor*, 41 Id. 253; *Cummings v. Thompson*, 18 Minn. 246; *Horton v. Bayne*, 52 Mo. 531; *Hamilton v. Marks*, 63 Id. 167; *Johnson v. McMurry*, 72 Id. 278; *Perkins v. Prout*, 47 N. H. 387; 93 Am. Dec. 449; *Duncan v. Gilbert*, 29 N. J. L. 521; *Woodhull v. Holmes*, 10 Johns. 231; *Vallett v. Parker*, 6 Wend. 615; *Wardell v. Howell*, 9 Id. 170; *Case v. Mechanics' Banking Ass'n*, 4 N. Y. 166; *Farmers' etc. Nat. Bank v. Noxon*, 45 N. Y. 762; *Ross v. Bedell*, 5 Duer, 462, 467; *Holme v. Karsper*, 5 Binn. 469; *Beltzhoover v. Blackstock*, 3 Watts, 20, 26; 27 Am. Dec. 330; *Albrecht v. Strimpler*, 7 Pa. St. 476, 477; *Hutchinson v. Boggs*, 28 Id. 294; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Albietz v. Mellon*, 37 Id. 367; *Maples v. Browne*, 48 Id. 458; *Dingman v. Amsink*, 77 Id. 114; *Pugh v. Grant*, 86 N. C. 39; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. 221; *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 452; *Blum v. Loggins*, 53 Tex. 121; *Vathir v. Zane*, 6 Gratt. 246; *Wilson v. Lazier*, 11 Id. 477; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Mills v. Barber*, 1 Mees. & W. 425; *Smith v. Baine*, 16 Q. B. 244; *Harvey v. Towers*, 6 Ex. 656; *Berry v. Alderman*, 14 Com. B. 95; *Mather v. Lord Maidstone*, 1 Com. B., N. S., 273; *Hall v. Featherstone*, 3 Hurl. & N. 284; compare *Terry v. Taylor*, 64 Iowa, 35.

The reason of this rule is the presumption that the guilty party transferred the paper merely that he might recover on it in the name of a third person. And this being the reason of the rule, it would seem to be plain that the fraud to cast the *onus* on the holder need not necessarily have been in procuring the execution of the paper, or in putting it in circulation, but that it might have been a fraud subsequently committed in obtaining possession of the paper from the defendant, if he is sought to be held liable thereon, or from the plaintiff, if he is seeking to assert his title to the paper, as the case might be: See *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513; see, however, *Sloan v. Union Banking Co.*, 67 Pa. St. 470; but it would seem to be equally true, in the language of Chief Justice Dixon in *Kinney v. Kruse*, 28 Wis. 183, that "the fraudulent putting in circulation of a negotiable instrument, which operates to change the burden of proof, and call upon the plaintiff to prove his title as a *bona fide* holder, is where this is done fraudulently as to the defendant or maker, and not where it is so done as to the payee or some intermediate holder or party to the paper"; but compare *President etc. of Fulton Bank v. President etc. of Phoenix Bank*, 1 Hall, 562; *Hart v. Potter*, 4 Duer, 458.

It makes no difference, in the application of the rule requiring the holder to make this showing, what the form of the transfer to him may have been; that is, whether the paper was specially indorsed, or whether it was indorsed in blank: *Morgan v. Yarrowborough*, 13 La. 74; 33 Am. Dec. 553. The rule, however, is a rule of evidence, and not of pleading; and it is, notwithstanding, necessary for one who relies upon the element of fraud to make the appropriate allegations showing that the holder is not a *bona fide* holder, or that he gave no value, or took after maturity, or with notice: See *Clapp v. County of Cedar*, 5 Iowa, 15; 68 Am. Dec. 678; *Lane v. Krekle*, 22 Iowa, 399. In accordance with the proposition heretofore considered, it is sufficient for the holder to show either "that he himself, or any prior holder whose rights he has, came by the note fairly, for value, before maturity, without knowledge of the fraud, in the due course of business, unattended with any circum-

stances justly calculated to excite suspicion"; for "if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity between the original parties": *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242.

It might be here noticed that the holder of a negotiable instrument is not only required to show that he took the paper *bona fide*, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the infirmity, where fraud in executing, obtaining, or circulating the paper is set up against him, but he must make a like showing when there is evidence that the instrument was given upon an illegal consideration: *Sistermans v. Field*, 9 Gray, 331; *Holden v. Cosgrave*, 12 Id. 216; *Smith v. Edgeworth*, 3 Allen, 233; *Emerson v. Burns*, 114 Mass. 348, 349; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Swett v. Hooper*, 62 Me. 54; *Baxter v. Ellis*, 57 Id. 178; *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327; *Horton v. Bayne*, 52 Mo. 531; *Garland v. Lane*, 46 N. H. 245; *Whittaker v. Edmunds*, 1 Moody & R. 366; *Mills v. Barber*, 1 Mees. & W. 425; *Edmonds v. Groves*, 2 Id. 642; *Bailey v. Bidwell*, 13 Id. 73; *Bingham v. Stanley*, 2 Q. B. 117; *Fitch v. Jones*, 5 El. & B. 238; also in case of duress: *Clark v. Pease*, 41 N. H. 414; *First Nat. Bank v. Green*, 43 N. Y. 298; and see *Beltzhoover v. Blackstock*, 3 Watts, 20, 26; 27 Am. Dec. 330; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Albrecht v. Strimpler*, 7 Pa. St. 476, 477; *Gray's Adm'r v. Bank of Kentucky*, 29 Id. 365, 367; *Cummings v. Thompson*, 18 Minn. 246; and where the paper is shown to have been lost by or stolen from the true owner: *Devlin v. Clark*, 31 Mo. 22; and see *Beltzhoover v. Blackstock*, *Knight v. Pugh*, *Albrecht v. Strimpler*, *Gray's Adm'r v. Bank of Kentucky*, *Cummings v. Thompson*, *supra*.

It has been intimated by some authorities that under any of the foregoing exceptional circumstances the holder is also bound to prove affirmatively his want of notice of the infirmity: *Munroe v. Cooper*, 5 Pick. 412; *Aldrich v. Warren*, 16 Me. 465; *Perrin v. Noyes*, 39 Id. 384; 63 Am. Dec. 633; *Cottle v. Cleaves*, 70 Me. 256; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; *Eichelberger v. Old Nat. Bank*, 103 Ind. 401; *Nickerson v. Ruger*, 76 N. Y. 279; *McKesson v. Stanberry*, 3 Ohio St. 156; but this is requiring him to prove a negative; and while it must not appear from the showing he makes that he was chargeable with notice, yet the fact that he had actual notice must, according to the better opinion, be proved by the opposite party: *Hapgood v. Needham*, 59 Me. 442; *Swett v. Hooper*, 62 Id. 54; *Davis v. Bartlett*, 12 Ohio St. 534; 80 Am. Dec. 375; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Catlin v. Hansen*, 1 Duer, 309; *Hart v. Potter*, 4 Id. 458; *Ross v. Bedell*, 5 Id. 462, 467; *Kelly v. Ford*, 4 Iowa, 140; *Lake v. Reed*, 29 Id. 258; 4 Am. Rep. 209; compare *Union Nat. Bank v. Barber*, 56 Iowa, 559, 563.

It has been denied that any presumption at all is raised against the holder of a bank bill by a showing that it was stolen, or fraudulently put into circulation, such instruments passing from hand to hand as money, and not ordinarily subject to be identified by one who receives or passes them: *Worcester County Bank v. Dorchester etc. Bank*, 10 Cush. 488, 490; 57 Am. Dec. 120; *Wyer v. Dorchester etc. Bank*, 11 Cush. 51; 59 Am. Dec. 137.

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HAGERMAN v. BUCHANAN.

[45 NEW JERSEY, EQ. 292.]

Fraudulent Conveyances.

HAGERMAN v. BUCHANAN.

[45 NEW JERSEY EQUITY, 292.]

VOLUNTARY CONVEYANCE, WHEN VOID AS TO SUBSEQUENT CREDITORS. — A voluntary conveyance or settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the minds of the parties, at the time of the execution of the conveyance, to thereby hinder, delay, or defraud the creditors of the grantor.

VOLUNTARY CONVEYANCE, BURDEN OF PROOF. — A subsequent creditor who seeks to attack and avoid a voluntary conveyance made by his debtor must assume the burden of proving an actual fraudulent intent on the part of the grantor to defraud some creditor.

VOLUNTARY CONVEYANCE, FRAUDULENT INTENT FROM WHAT PRESUMED. — In an attack upon a voluntary conveyance by a subsequent creditor, the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent.

VOLUNTARY CONVEYANCE, PRESUMPTION FROM GRANTOR'S EMBARKING IN HAZARDOUS BUSINESS. — The fact that the grantor enters into a hazardous business or engages in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent. This intent will not be inferred, however, if it appears that the grantor earnestly examined and sought to inform himself regarding the business into which he entered, and was led to believe that it was entirely safe.

Samuel A. Patterson and Henry G. Clayton, for the appellants.

Hawkins and Durand, for the respondents.

REED, J. The complainants below furnished lumber to J. H. Hagerman and Son between the dates of July 24, 1886, and November 29, 1886. On March 4, 1887, a judgment was recovered in the supreme court for the sum of \$958.53, the price of said lumber. Under a *fieri facias* issued thereon, a certain house and lot in Asbury Park was levied upon. The title to this property stood in the name of Sarah Hagerman, the wife of the defendant John H. Hagerman. It was conveyed to her by her husband, through an intermediate person, on July 17, 1883. The bill in this case was filed by Buchanan & Co., the judgment creditors, for the purpose of having the conveyance made by Hagerman to his wife declared void, upon the ground that it was made to hinder and delay creditors, and to have the property sold, and the proceeds applied to the payment of their judgment. The court below advised that the case stood in the same posture as that of *Demarest v. Terhune*, 18 N. J. Eq. 532, and that the rule adopted in that case was properly applicable to this. A decree was accord-

ingly made that the deed made by Hagerman to his wife should be regarded only as a security for the consideration actually paid by her.

It is perceived that the debt of the complainant was contracted over three years after the conveyance was made which is attacked. If the conveyance is to be regarded as in a degree voluntary, the creditor has a burden imposed upon him which would not exist had his debt antedated the deed. The character of a voluntary conveyance, when attacked by a creditor having a pre-existing claim, is definitely settled in this court. In the case of *Haston v. Castner*, 31 N. J. Eq. 697, after an elaborate review of the course of judicial sentiment in this state, it was decided that, in respect to debts existing at the date of a voluntary conveyance, the deed was void by force of the statute relating to frauds and perjuries. Against the attack of a creditor belonging to this class, neither the motive which induced the deed, nor the solvency of the grantor at the time of its execution, nor any other circumstance which might bear upon the *bona fides* of the parties to the conveyance, is important. Fraud is the legal conclusion arising from the contemporaneous concurrence of the two facts, namely, a voluntary deed and an existing debt due by the grantor.

In respect to the attitude which subsequent creditors bear towards a voluntary conveyance, there has not been, so far as I recall, a deliverance by this court. But the sentiment, both judicial and professional, is hardly less doubtful upon this than upon the former question. The rule which has been recognized is, that a voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the mind of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means of the deed. In the case of *Ridgway v. Underwood*, 4 Wash. C. C. 129, Judge Washington, after stating that he had examined the numerous cases which related to the operation of the statute (13 Elizabeth), remarked that, with entire satisfaction to himself, he had reached the following result: "A voluntary deed by a person indebted at the time to any amount is fraudulent and void as to such prior creditors, merely upon the ground that he was so indebted. But as to subsequent creditors, the deed is not void for that reason, because it does not necessarily or even rationally follow that the conveyance was fraudulently made with intent to hinder or delay creditors who became such long after the deed was made.

But if the case presents other circumstances from which fraud can legally be inferred, the voluntary conveyance will be avoided in favor of a subsequent creditor." This case was cited with approval by Chancellor Green in his opinion in the case of *Beeckman v. Montgomery*, 14 N. J. Eq. 106.

In the case of *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520, Chancellor Kent, after an elaborate view of the authorities, came to the conclusion, also, that, in respect to pre-existing creditors, a voluntary conveyance was fraudulent as a legal inference, and ought to be so far as it concerned existing debts, but that as to subsequent debts there was no such necessary legal presumption, and there must be proof of fraud in fact. Indebtedness existing at the time, although not amounting to insolvency, must be such as to warrant that conclusion. The view of the learned chancellor was, that while fraud would be imputed to the voluntary grantor, so far as the grant affected pre-existing debts, yet that the fact of the existence of such debts, and their relative amount in comparison with the property of the grantor remaining, were, as to debts subsequently arising, only facts which were important in determining whether there was an actual intent, at the time of the conveyance, to hinder and delay creditors. The doctrine of this case, so far as it dealt with the attitude of a voluntary grantor toward prior creditors, was adopted by this court in the case of *Haston v. Castner*, 31 N. J. Eq. 697.

The opinion in the former case was also noticed in the opinion in *Haston v. Castner*, *supra*, as one delivered by a distinguished judge upon a review of all the decisions then extant, and as one which had largely shaped the jurisprudence of this country upon this branch of equity jurisprudence. While it is true that the court was not dealing with the feature now under consideration, yet the distinction between the *status* of the two classes of creditors was a conspicuous feature in the opinion of Chancellor Kent. It promulgated a doctrine which embraced within its scope all creditors. The approval of the opinion of Chancellor Kent went far in the direction of an indorsement of his whole declaration, which constitutes a single and complete system touching the doctrine of voluntary settlements in respect to creditors of all kinds.

By reason of these recognitions of cases in which the distinction above mentioned has been formulated, and by reason of the rational grounds upon which such a distinction rests, I regard the complainant in this case as having the burden of

showing that, at the time the conveyance was made, there existed an actual intent to hinder and delay creditors. This conclusion appears the more reasonable after an examination of the cases in the English courts dealing with this subject. From such an examination it appears that while there has been considerable fluctuation in judicial sentiment in respect to the attitude of prior creditors who attack a voluntary conveyance, there is little or none in respect to the posture of subsequent creditors. As to the latter of the two classes of creditors, the rule has been quite uniform, that an actual fraudulent intent to defraud some creditor must be proved.

In an attack upon such a conveyance by a subsequent creditor, it is true that the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent. Different equity judges have accorded to the existence of such debts different degrees of probative force, and have raised from the fact of their existence certain indisputable presumptions, but the line of adjudications is opposed to the notion that the existence of a prior debt of any amount raises a conclusive presumption that a voluntary conveyance is fraudulent as against the attack of a subsequent creditor: *May on Fraudulent Conveyances*, 64.

The rule laid down by Chancellor Kent and Judge Washington is not only simple, but equitable.

A conclusive presumption against a voluntary conveyance should be raised in respect to those debts which it may be presumed were incurred upon the faith of the ownership of the property conveyed.

It is therefore inequitable that the debtor should be permitted to give away such property at the expense of a pre-existing creditor, whether the intention be good or otherwise. But as to creditors who become such without any possible inducement arising from such ownership, no such conclusive presumption should arise. No equitable consideration requires it; and besides, if such a rule be adopted, no settlement could be made which would not be at the mercy of the grantor during his lifetime. The power to incur debts would be a power to subject the property to a liability for their payment at any time. So, as already remarked, equitable considerations, as well as the weight of authority, are in favor of the rule that an actual intent to defraud, arising from all the circumstances surrounding the transaction, must be proved

before a voluntary conveyance will be decreed void at the suit of a subsequent creditor.

An observation seems appropriate in respect to the legal terms which are employed in dealing with these two classes of cases. Void voluntary conveyances, when spoken of in respect to either class of creditors, are styled fraudulent, but as to the former class there is said to be legal fraud, and as to the latter class, actual fraud.

There is force in the remark of Mr. Bigelow that the term "legal fraud" is a misnomer. The word "fraud" implies moral turpitude. When a transaction is voided by the statute without respect to the motive which induced it, but upon considerations of policy only, it is unlawful, and not fraudulent. To style it fraudulent, whether the fraud be legal or otherwise, may fix an unmerited stigma upon the party to the transaction. A more just and appropriate appellation to apply to conveyances of the former class would be simply unlawful, while the term "fraudulent" would still properly be applicable to the latter class of conveyances.

The question of fact remains to be considered, whether there was an intention existing in the mind of the parties to the present conveyance to hinder and delay creditors, which induced the execution of the deed. In the first place, the facts proved show that that conveyance was voluntary only in respect to a slight proportion of the value of the property sold. The wife, at the time of the conveyance, was a creditor of her husband. According to the testimony, the lot sold was worth about two thousand dollars. Mr. Hagerman says the house, outhouses, barns, and fences cost two thousand five hundred dollars. The whole property was worth from four thousand five hundred to five thousand dollars.

The claims of the wife against her husband were the following: She had owned property in Brooklyn before she and her husband removed thence to Asbury Park. In 1876 she sold this property, upon which there was a mortgage for five thousand dollars, for the sum of seven thousand four hundred dollars. The balance, amounting to two thousand four hundred dollars, she loaned to her husband. He gave her a mortgage to secure this loan, with the interest thereon, amounting together to the sum of \$2,814. There was upon this property, upon which the mortgage was given, another mortgage of six hundred dollars, which mortgage she paid from the proceeds of some building and loan association stock which she owned.

If interest be allowed her on her mortgage from December 6, 1879, to July 17, 1883, it would amount to \$610 more. There is nothing in the case to show that she should not be entitled to interest, as would any other mortgagee.

It is true, she lived in the house, but nevertheless it was the home of her husband, and it was her home, because it was his home. She cannot be regarded as a mortgagee in possession. The husband owned the legal title, and was himself in possession of the property.

Nor does the fact that she took in boarders, and received compensation therefor, change this condition of affairs. She says that she expended the money so received in the care and reparation of the property. But if this be not so, it would not affect the position of the husband as the head of the family in possession; for if she took the proceeds of the boarders, it was the proceeds of her own labor, which the husband had the right to permit her to appropriate: *Peterson v. Mulford*, 36 N. J. L. 481; *Luse v. Jones*, 39 Id. 707.

Indeed, the reception of boarders seems to have been a mere incident of the housekeeping, and in no way diminished the value of the use of the property to Mr. Hagerman, but probably diminished the housekeeping expenses, which would otherwise have fallen legally upon him. So I regard the amount of the indebtedness of the husband to the wife as reaching to the sum of four thousand dollars.

I place the value of the house from four thousand five hundred to five thousand dollars, and I doubt if it would have brought more than the latter sum in the market. So the difference between the wife's claim and the value of the property which she received is not great.

But there is another fact which still further reduces the amount of this difference: the wife had her inchoate right of dower in the property, the value of which, of course, could not be applied to the payment of her husband's creditors. The fact of this encumbrance upon the property in some degree diminishes its salable value. So I think it appears true, as I have already remarked, that the voluntary element in this transaction is small, relative to the entire value of the property, and this is a material feature in solving the question whether the conveyance was fraudulent.

The point strongly insisted upon by the counsel for the complainants was, that it appeared that on the day the deed was given Mr. Hagerman entered into a partnership. He

became a member of the firm of J. C. Farr & Co. He gave for his interest in the firm two promissory notes of seven thousand five hundred dollars each, both amounting to fifteen thousand dollars. It appears that this firm became insolvent in three or four months thereafter. It is argued that this shows that Mr. Hagerman was entering upon a hazardous enterprise, and that this deed was made to place his property beyond the reach of future creditors.

Now, it is true that the fact that a person has entered into a hazardous business or engaged in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent. It evinces a desire to reap the benefit for himself if successful, and escape responsibility if unlucky. Nevertheless, each case must stand upon its own footing, and no legal rule can be adopted as to the quantity of proof or the particular complexity of facts which will annul a conveyance upon this ground. The character of the business, the degree of pecuniary hazard incurred, the amount of property remaining in the grantor, the value of the property conveyed, the acts and words occurring coincidently with the transaction, are to be viewed together in solving the question of fraudulent intent.

Now, viewing these transactions together, I do not think such an intent has been proved. I think that Mr. Hagerman inquired, as he says he did, particularly about the business of Farr & Co., and that he tried to be careful not to involve himself in a precarious business.

I think it was only when he was convinced by the persuasions of Mr. Farr that it was entirely safe, and that the amount of his notes would be paid out of the proceeds, that he entered into the business. He says it was understood that the old firm had assets to the amount of forty thousand dollars, and that the liabilities which the new firm assumed were only fifteen thousand or twenty thousand dollars. Although in fact the business was risky, as the result disclosed, as Hagerman understood it at the time he became connected with it, it did not so present itself. He undoubtedly wished to place his wife in a position of security, as she had frequently requested. But this is the object of every settlement. She had no security for the six hundred dollars. Taking into consideration the fact that he says that he had eighteen hundred dollars in bank, and a lot worth six hundred dollars, that the voluntary elements in the conveyance are so small, and that he seems

to have been led to believe that the business he afterwards engaged in was entirely safe, I do not think it proved that the conveyance to his wife was induced by a fraudulent intent to hinder and delay creditors.

The decree below should be reversed.

VOLUNTARY CONVEYANCES. — 1. *What Transfers are Voluntary.* — A voluntary conveyance has been described as one made without any consideration whatever: *Jackson v. Peck*, 4 Wend. 300; *Shontz v. Brown*, 27 Pa. St. 123; *Seward v. Jackson*, 8 Cow. 406. The fact that a transfer was made upon an inadequate consideration is doubtless one which may be, and ought to be, considered by a court or jury in determining whether or not the transfer was made with intent to defraud the creditors of the grantor, and if, in connection with other circumstances, it satisfies them of such fraudulent intent, the transfer should be disregarded: *Washband v. Washband*, 27 Conn. 424.

The expression frequently to be found in the opinions of the courts and elsewhere, that a voluntary conveyance is one entirely without consideration, is, in our judgment, inaccurate and misleading. It cannot be that a nominal consideration, one which neither the grantee nor the grantor could have regarded as other than grossly disproportionate to the value of the property, is sufficient to give the transfer the same immunity from the attacks of creditors as one which is a fair equivalent for the property transferred. The consideration must be substantial, and though it is more than nominal, it may well be so inadequate as to convince any reasonable, unprejudiced person that the transfer was voluntary, either in whole or in part. Speaking of such a transfer, the court of appeals of the state of Maryland very justly said: "But it has been strongly urged in argument that this fact was an immaterial circumstance, and that the deed, if it rests upon a moneyed consideration, must be supported, even though that consideration bears no adequate relation to the real value of the property. This proposition, as a universal rule, is not correct, so far, at least, as third persons are concerned. It is true that it gives to the deed, in contemplation of law, the character of a bargain and sale, and subjects it to all the rules of interpretation and the like which govern such instruments. Nevertheless a deed, valid in all respects as between the parties, may be assailed in chancery by creditors solely upon the ground of inadequacy of consideration; as, for example, where land is sold and conveyed at private sale, as this was, and a consideration in money is received therefor palpably less than its real value or what it would bring at a public sale in the market. In such circumstances a court of equity will regard the transaction as evidence either of fraud or of a design on the part of the grantor to make a gift to the grantee of the difference between the price paid and the actual value of the property; and if the latter, the deed, to the extent of the difference, will be regarded as voluntary, or resting upon the consideration of natural love and affection. If this were not so, fraud could be perpetrated upon creditors with impunity, by converting the deeds based in fact upon the consideration of love and affection into those based upon a moneyed consideration, by merely agreeing to receive a trivial price in money for the property sold": *Worthington v. Bullitt*, 6 Md. 198.

There are some circumstances in which transfers will not be adjudged voluntary, though the consideration can hardly be considered of any value, as where a transfer is in payment of an obligation which could not have been enforced, and which the grantor might have omitted to discharge had he

thought proper. We think it a mistaken view of the proper relation of a debtor to his creditors to leave him at liberty, as self-interest or caprice may suggest, to withdraw his property from his creditors having enforceable claims, and devote it to the discharge of claims which are supported merely by a moral obligation, and which probably would never have been discharged had not approaching insolvency warned the debtor that he could not hope to keep the property as his own. These moral obligations constitute a perpetual menace to creditors having claims enforceable by action, while they confer no rights on their holders except such as the caprice or self-interest of the debtor may from time to time concede. He can, of course, make any terms or come to any understanding he chooses with the holders of them. As these holders have no means of coercing payment, they will grant him any concession he may suggest. He may go on and do business and obtain credit, because his assets are far in excess of all liabilities which can be enforced against him, and having made purchases on credit, he may turn the proceeds of the purchases over to the payment of claims, from which he had long been practically released, through the operation of the statute of limitation, or of a discharge in bankruptcy or insolvency proceedings. The theory of the adjudications upon this subject is, that, notwithstanding the operation of the statute or of the discharge, the debt yet remains, and that the debtor has merely obtained the privilege of pleading the discharge or statute, as he may deem proper; that this is a privilege which his creditors have no right and no power to compel him to exercise; and that he may, therefore, pay the debt either in money or by the transfer of the whole or any part of his property; and unless the transaction is otherwise objectionable, they have no cause of complaint: *Wilson v. Russell*, 13 Md. 494; 71 Am. Dec. 645; *Keen v. Kleckner*, 42 Pa. St. 529; *Uplike v. Titus*, 13 N. J. Eq. 151; *Shearon v. Henderson*, 38 Tex. 245; *French v. Motley*, 63 Me. 326; *Brookville National Bank v. Trumble*, 76 Ind. 195.

So if the transfer is made to discharge an obligation which the debtor might have escaped by pleading the statute of frauds, it must be deemed supported by a valuable consideration. "The cases seem to establish the rule that a conveyance or security given for a debt or in fulfillment of a contract which could have been recovered or enforced in an action were it not for some legal maxim or statutory provision which prevents such recovery by reason of the contract not being in the form prescribed by the statute, — in other words, not being evidenced in the manner prescribed by law, — is not a voluntary conveyance or security, and therefore fraudulent and void as to creditors, if the evidence shows that there was a sufficient consideration for the debt or promise to support the same were it not for the statutory requirements": *First National Bank v. Bertsch*, 52 Wis. 438; *Goff v. Rogers*, 71 Ind. 459; *Lefferson v. Dallas*, 20 Ohio St. 68; *Cresswell v. McCaig*, 11 Neb. 222; *Livermore v. Northrup*, 44 N. Y. 107; *Stowell v. Hazlett*, 57 Id. 637.

It is, perhaps, not correct to say that a mere moral obligation is a sufficiently valuable consideration to support a transfer and to relieve it from the imputation of being voluntary. The obligation must be one which is legal and enforceable but for some statutory defense which the debtor may elect to waive, as where, to avoid liability, he must plead or otherwise urge the statute of frauds or of limitations, or a discharge under a statute relating to bankrupts or insolvents. Therefore, if a debtor has been released by a composition agreement entered into between him and his creditors, though the moral obligation to pay them is not less obvious than if such release resulted from proceeding in insolvency or bankruptcy, a conveyance of which a debt,

thus released by his creditors, is the sole consideration, is voluntary: *King v. Moore*, 18 Pick. 376; *Nightingale v. Harris*, 6 R. I. 321.

A consideration valuable in the eyes of the law does not necessarily consist of money or property, and there is at least one consideration, which, though not consisting of money nor property, and while in many instances of great value, doubtless sometimes enables the grantor to reserve a substantial benefit for himself at the expense of his creditors. We refer to the consideration of marriage. Marriage has always been regarded as a valuable consideration. Therefore a conveyance made by one person to another in consideration that the latter will marry him is supported by an adequate consideration, and unless otherwise fraudulent, cannot be avoided by the creditors of the grantor. Whatever obligations either of the parties have entered into by an antenuptial marriage settlement has the same rank and dignity as if their consideration consisted of money or other property. Hence nothing that either does, either before or after the marriage, in fulfillment or satisfaction of this obligation, is voluntary, in the judgment of the law. "Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors": *Magniac v. Thompson*, 7 Pet. 393; *Eppes v. Randolph*, 2 Call, 103; *Bunnell v. Withrow*, 29 Ind. 123; *Barrow v. Barrow*, 2 Dick. 504; *Pierce v. Harrington*, 58 Vt. 649; *Frank's Appeal*, 59 Pa. St. 190; *Lockwood v. Nelson*, 16 Ala. 294; *Dygert v. Remerschneider*, 32 N. Y. 629; *Spears v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206; *Satterthwaite v. Emley*, 4 N. J. Eq. 489; 43 Am. Dec. 618; note to *Merritt v. Scott*, 50 Id. 372; *Michael v. Morey*, 29 Md. 239; 90 Am. Dec. 106; *Jenkins v. Clement*, 1 Harp. Eq. 72; 14 Am. Dec. 698; *Prewitt v. Wilson*, 103 U. S. 22; *Gibson v. Bennett*, 79 Me. 302.

The fact that an intended husband who makes a marriage settlement is at the time financially embarrassed, and that it embraces the greater portion of his estate, certainly does not render it voluntary, nor does it necessarily impress upon such settlement the stigma of actual fraud. If, however, the wife knew of her intended husband's financial difficulties, the court or jury would doubtless be left to determine, from all the attendant circumstances, whether the settlement was fraudulent or not: *Herring v. Wickham*, 29 Gratt. 628; 26 Am. Rep. 40; *Jones's Appeal*, 62 Pa. St. 324; *Campion v. Cotton*, 17 Ves. 264; *Fraser v. Thompson*, 4 De Gex & J. 659.

It is not essential that the marriage be consummated to entitle the intended wife to the benefit of a marriage settlement, or to property conveyed to her in consideration of her promise of marriage. The consideration of the conveyance may consist of the promise of one party to marry the other, and when this is the case, the consideration is not incapacitated from sustaining the conveyance by the fact that the death of one of the parties, or some other supervening cause, prevents the fulfillment of the promise: *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758; *Connor v. Stanley*, 65 Cal. 183.

The consideration of marriage is not necessarily confined to the parties to the contract of marriage. A parent may settle property on his child in view of her marriage, and the settlement will be presumed to have been in contemplation of a marriage which follows soon afterward: *Hopkirk v. Randolph*, 2 Brock. 132. Even if the gift is made years before marriage, and during

the infancy of a daughter, and when no particular marriage could have been in contemplation, and she subsequently marries, such conveyance, from the date of such marriage, ceases to be voluntary, and is not subject to successful attacks by creditors or purchasers whose rights have their inception after the marriage: *Welles v. Cole*, 5 Gratt. 645; and it is even doubtful whether the conveyance is open to attack by those who were creditors of the grantor immediately preceding the marriage: *Huston's Adm'r v. Cantril*, 11 Leigh, 136; *Fones v. Rica*, 9 Gratt. 568.

If a marriage settlement is made after, in pursuance of articles entered into or letters written before, a marriage, it is not voluntary, and can withstand the attack of creditors: *Kinnard v. Daniel*, 13 B. Mon. 499; but a settlement made after marriage, not supported by any valid agreement previously entered into, is voluntary, and subject to the same infirmity as any other voluntary transfer or agreement: *Gugen v. Sampson*, 4 Fost. & F. 974.

A consideration which will relieve a deed from the charge of being voluntary must be legal. It cannot consist of a contract forbidden by law or public policy: *Weeks v. Hill*, 38 N. H. 199; *Jose v. Hewett*, 50 Me. 248. Hence a transfer to a mistress in consideration either of past or future intercourse is voluntary: *Wait v. Day*, 4 Denio, 439; *Potter v. Garcia*, 58 Ala. 303; 29 Am. Rep. 748; *Sherman v. Barrett*, 1 McMull. 47; *Hargroves v. Meray*, 2 Hill Ch. 222.

Though no moneyed or property consideration for a transfer exists, it is not voluntary if made in pursuance of a duty resting on the grantor. Thus if he is a mere trustee, having no beneficial interest in the property, his conveyance to his *cestui que trust* is not voluntary: *Seeders v. Allen*, 98 Ill. 468. Whatever the grantor can be compelled to do, he may do, without any other compulsion than such as results from the knowledge on his part of the existence of the duty, and of the power of the one to whom he owes it to resort to the proper tribunals to enforce its performance. Therefore, if one who holds lands or other property is a mere trustee of the legal title, or if he has entered into some agreement the performance of which can be specifically enforced, he need not wait until suit has been brought against him before he conveys to the *cestui que trust*, or to the person otherwise entitled to a conveyance; and if he conveys without compulsion, his creditors are not injured, and have no ground upon which to avoid the conveyance: *Forbush v. Williams*, 16 Pick. 42; *McConnell v. Martin*, 52 Ind. 434; *Bancroft v. Curtis*, 108 Mass. 47; *Jackson v. Ham*, 15 Johns. 261; *Gudgel v. Kitterman*, 108 Ill. 50; *Caffal v. Hale*, 49 Iowa, 53; *Norton v. Mallory*, 63 N. Y. 434; *Syracuse Chilled Plow Co. v. Wing*, 85 Id. 44; unless the grantee has by some act or omission estopped himself from insisting upon his rights as against the creditors of the grantor: *City National Bank v. Hamilton*, 34 N. J. Eq. 158.

There are cases where parties are entitled to specific performance of gifts made or agreed to be made to them, or at least to have executed the muniments of title constituting the final evidence of such gifts. When such a case has arisen, any conveyance or other evidence of the transmission of title which the donor executes is not voluntary. Thus if a gift is made of lands, and the donee enters into possession, makes valuable improvements, and does such acts as entitle him to the specific performance of the gift, the donor may then make the conveyance requisite to vest the donor with the title, and those who were not creditors of the donor when the gift was originally made, and possession taken, cannot complain: *Dozier v. Watson*, 94 Mo. 328; 4 Am. St. Rep. 388; *Van Bibber v. Mather*, 52 Tex. 406; *Kinealy v. Macklin*, 89 Mo.

433; *Dougherty v. Harsel*, 91 Id. 161. If, however, the gift rests in mere promise or in an intent to give, not so fully executed that the donee can compel its consummation, then any instrument executed or act done to complete the gift is voluntary, and can be assailed as successfully as if the intent to give had not previously existed: *Rucker v. Abell*, 8 B. Mon. 566; 48 Am. Dec. 406; *Davis v. McKinney*, 5 Ala. 719; *Hubbard v. Allen*, 59 Ala. 283; *Worthington v. Bullitt*, 6 Md. 172.

A transfer may be made by one person to another, without any consideration, to accomplish some temporary and perhaps unlawful purpose, and with the expectation, expressed or implied, that the grantee will, at some future time, when the purpose has been effected, reconvey to the grantor; and then the question may arise whether, if the grantor does so reconvey, his conveyance is voluntary, and subject to attack as such. In an early case in New York, wherein it appeared that a transfer had been made for the purpose of qualifying the donee to be a voter, it was held that his creditors had no right to object to a retransfer, where he had never taken possession of the property nor acquired any credit based upon his supposed ownership of it: *Jackson v. Ham*, 15 Johns. 261. The better rule, however, in our judgment, is, that if the transfer is good between the parties, as, for example, where the transfer is made for the purpose of defrauding creditors, so that the grantor has no power to compel a reconveyance, then if the grantee does reconvey, his act is voluntary, and may be assailed as such by his creditors: *Susong v. Williams*, 1 Heisk. 625; *Chapin v. Pease*, 10 Conn. 69; *Allison v. Hagan*, 12 Nev. 38; *Maher v. Borard*, 14 Nev. 324.

What Creditors may Attack a Voluntary Transfer as Fraudulent. — When a conveyance actually or constructively fraudulent is sought to be avoided, one of the first questions to be considered is, whether the person seeking to avoid it is, within the meaning of the law upon this subject, a creditor entitled to relief. To constitute one a creditor, it is not necessary that money be due to him from the debtor at the time of the transfer. It is sufficient that the debtor has entered into some obligation or done some act which may result in his liability to the creditor. When the liability is ascertained, it relates back to the inception of the original agreement or obligation, and entitles the creditor to proceed as though there had been a debt due and payable to him at that time: Note to *Greer v. Wright*, 52 Am. Dec. 116.

“The term ‘creditors,’ as employed in the statutes and decisions concerning fraudulent and voluntary conveyances, is not used in any narrow or technical signification, but includes all persons whose interests might be defrauded by the transfer. Wherever there exists a right or obligation for the invasion or disregard of which a judgment may be entered, a transfer made with the view of rendering such judgment ineffectual is doubtless fraudulent, and therefore void as against the interest sought to be defrauded. Thus if one has committed any tort for which he may be answerable in damages, the person entitled to recover such damages is a creditor, and as such, in proceeding to obtain satisfaction of a judgment for such damages, may treat as void any transfer made with a view of hindering or delaying him in his attempt to realize such satisfaction: *Barling v. Bishopp*, 29 Beav. 417; *Fox v. Hills*, 1 Conn. 295; *Westmoreland v. Powell*, 59 Ga. 256; *Bongard v. Bloch*, 81 Ill. 186; 25 Am. Rep. 276; *Weir v. Day*, 57 Iowa, 87; *Cook v. Cook*, 43 Md. 522; *Hoffman v. Junk*, 51 Wis. 613; *Harris v. Harris*, 23 Gratt. 737; *Patrick v. Ford*, 5 Sneed, 532, note. Hence a transfer to prevent the satisfaction of a judgment which might be recovered against the grantor for a slander uttered by him: *Walradt v. Brown*, 1 Gilm. 397; 41 Am. Dec. 190;

Lillard v. McGee, 4 Bibb, 165; *Farnsworth v. Bell*, 5 Sneed, 531; or for seduction or breach of promise of marriage: *Lowry v. Pinson*, 2 Bail. 324; 23 Am. Dec. 140; *Smith v. Culbertson*, 9 Rich. 106; *Hoffman v. Junk*, 51 Wis. 613; *Greer v. Wright*, 6 Gratt. 154; 52 Am. Dec. 111; *McVeigh v. Retenow*, 40 Ohio St. 107; or for alimony, or other moneys to which a wife is entitled from her husband: *Boog v. Boog*, 78 Iowa, 524; *Feigley v. Feigley*, 7 Md. 537; 61 Am. Dec. 375; *Sanborn v. Lang*, 41 Md. 107; *Taylor v. Wild*, 8 Beav. 159; *Draper v. Draper*, 68 Ill. 17; *Chase v. Chase*, 105 Mass. 385; *Bonslough v. Bonslough*, 68 Pa. St. 495; *Livermore v. Boutelle*, 11 Gray, 217; 71 Am. Dec. 708; *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; *Boils v. Boils*, 1 Cold. 284; *Picket v. Garrison*, 76 Iowa, 347; *ante*, p. 220; *Plunkett v. Plunkett*, 114 Ind. 484, — may be regarded as fraudulent and void.

"Sometimes it has been held that one having a claim for a tort is not entitled to protection as a creditor, unless he has commenced an action for the damages occasioned to him thereby: *Hill v. Bowman*, 35 Mich. 191, in which case the opinion is, upon this subject, a mere *dictum*. This question has not been very carefully considered; but, upon principle, there seems to be no reason for attaching any importance to the pendency of the action, except that the known pendency of an action renders it more probable that the transfer was fraudulent, and intended to avoid a claim which the parties had reason to believe would be prosecuted to judgment. But a plaintiff is no more a creditor after commencing an action than before. His cause of complaint, whatever it may be, must exist anterior to the commencement of his action, and is of precisely the same character after such commencement as before. If any change takes place in the cause of action, it cannot be prior to its merger in the judgment. Nor does the mere pendency of the action create any lien upon any property. The better opinion, therefore, is, that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencing of his action: *Corder v. Williams*, 40 Iowa, 582; *Shean v. Shay*, 42 Ind. 375; 13 Am. Rep. 366.

"If a judgment is based on a contract, the judgment creditor's right to be treated as a creditor relates back to the date of the execution of the original contract. Hence he may treat as void any fraudulent transfer executed subsequent to the contract on which the judgment was based. The transfer cannot be supported by showing that when it was made the judgment creditor's debt had not become due: *Howe v. Ward*, 4 Me. 195; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 381; or that his claim was contingent, and it could not then have been known that any cause of action against him would ever result from the contract. Therefore, if a bond be given, a fraudulent transfer made subsequently, but before breach of its condition, may be avoided as well as if executed after such breach: *Thompson v. Thompson*, 19 Me. 244; 36 Am. Dec. 751; *Stone v. Myers*, 9 Minn. 303; 86 Am. Dec. 104; *Carlisle v. Rich*, 8 N. H. 44; *Anderson v. Anderson*, 64 Ala. 403; 38 Am. Rep. 797; *Soden v. Soden*, 34 N. J. Eq. 115. The same rule prevails where the liability of the fraudulent grantor, at the date of the grant, was contingent: *Bibb v. Freeman*, 59 Ala. 612; *Post v. Stiger*, 29 N. J. Eq. 554; as where he was a surety or indorser, and it was not known that he would ever be called upon to pay the debt. *Jackson v. Seward*, 5 Cow. 67; *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594; *McLaughlin v. Bank*, 7 How. 220; *Bay v. Cook*, 31 Ill. 336; *Gibson v. Love*, 4 Fla. 217; *Crane v. Sickles*, 15 Vt. 252;

Curd v. Miller's Ex'r, 7 Gratt. 185; *Kiel v. Larkin*, 72 Ala. 493. The liability of a grantor under his covenant of warranty does not differ in principle from other contingent liabilities, and a fraudulent conveyance made at any time after such covenant ought to be regarded as void as against a judgment thereon: *Rhodes v. Green*, 36 Ind. 7; *Gannard v. Eslava*, 20 Ala. 741; *contra*, *Bridgford v. Riddell*, 55 Ill. 261.

"If debts exist when a fraudulent conveyance is made, a change in their form, or in the person to whom they are due, is immaterial. Subsequent creditors from whom means were obtained to pay off the antecedent creditors are entitled to treat the conveyance as void": Freeman on Executions, sec. 137 a; *Paulk v. Cook*, 39 Conn. 566; *Barhydt v. Perry*, 57 Iowa, 416; *Mills v. Morris*, Hoff. Ch. 419; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733; *McElnee v. Sutton*, 2 Bail. 128. So if the grantor of a voluntary conveyance is then indebted to one with whom he continues to do business and to have an account, and the payments afterwards made by the debtor are sufficient, if applied to the debt existing at the transfer, to extinguish it, but by reason of subsequent purchases by or other proper charges against the grantor the balance due from him exceeds that due at the date of the transfer, then the creditor has all the equity of one whose debt wholly antedated the transfer: *Whittington v. Jennings*, 6 Sim. 493; 3 L. J., N. S., 157.

If the creditor who is seeking to avoid a voluntary conveyance as fraudulent has commenced an action and taken out a writ of attachment, or has recovered judgment and had an execution issued thereon, he may levy his writ as though such conveyance had not been made. "As against a fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, — not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all": Freeman on Executions, sec. 136.

The creditor may, however, prefer to proceed to have the character and validity of the transfer judicially and conclusively determined before proceeding to sell the property. He may file a bill in equity and have the transfer declared void as against him: *Stock Growers' Bank v. Newton*, 13 Col. 245; *Sockman v. Sockman*, 18 Ohio, 362; *Henderson v. Dickey*, 50 Mo. 161; *Swift v. Arents*, 4 Cal. 390; *Gormley v. Potter*, 29 Ohio St. 597; *Gallman v. Perrie*, 47 Miss. 131. He is not entitled to do this under the mere allegation that he is a creditor. He must, if possible, reduce it to a judgment, and thereby establish its existence beyond controversy. The exceptions to this rule are rare, and mostly result from statutory innovations: Freeman on Executions, secs. 426, 427.

Voluntary transfers may in some instances be avoided both by prior and by subsequent creditors. If a transfer is made for the purpose of hindering, delaying, or defrauding the creditors of the grantor, it may be avoided by any of his creditors, prior or subsequent: *Gruber v. Voyles*, 1 Brev. 266; *Beecher v. Clark*, 12 Blatchf. 256; *Fox v. Mayer*, 54 N. Y. 125. If, however, it is shown that there was no actual intention on the part of the grantor to hinder, delay, or defraud his creditors, or to accomplish any other fraudulent purpose, it becomes material to inquire whether the creditor who is seeking to avoid a voluntary conveyance was such at the time it was made or became such afterwards. We wish first to consider when a voluntary conveyance may be avoided by pre existing creditors. If a creditor, undertaking the collection of his debt, finds himself wholly or partly unable to collect it without

resorting to property which his debtor has voluntarily conveyed to another, a case has arisen in which it appears more than probable that a voluntary transfer is the cause of the delay or inability to collect the debt. The original tendency of the authorities was to regard a voluntary conveyance as indisputably fraudulent and void as against a creditor, who, on its account, finds himself hindered or delayed in the collection of his debt. And even at the present time it is doubtful whether in some of the states a voluntary transfer can be upheld under any circumstances, when to uphold it is to prevent a creditor from obtaining payment of a pre-existing debt: *Chamley v. Dunsany*, 2 Schoales & L. 714; *Lockhard v. Beckley*, 10 W. Va. 87; *Spett v. Willows*, 3 De Gex, J. & S. 293; *Marmon v. Harwood*, 124 Ill. 104; *Core v. Cunningham*, 27 W. Va. 206; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 481; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Lang v. Brown*, 21 Ala. 179; 56 Am. Dec. 244; *Crawford v. Kirksey*, 55 Ala. 182; 28 Am. Rep. 704; *Huggins v. Perrine*, 30 Ala. 396; 68 Am. Dec. 131; *Reade v. Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520; *O'Daniel v. Crawford*, 4 Dev. 197; *Kissam v. Edmondson*, 1 Ired. Eq. 180; *Bogard v. Gardley*, 4 Smedes & M. 302; *Ruse v. Bromberg*, 88 Ala. 620. This is the safer and better rule, though it has no doubt been relinquished in the majority of the states in favor of transfers made by a husband or father to his wife or children, or other persons dependent upon them, and who are the natural objects of his bounty, where it is shown almost beyond a reasonable doubt that the transfer was made in good faith, without any intention to defraud or embarrass creditors, prior or subsequent, and in the reasonable belief that the donor's estate was ample to discharge all liabilities existing against it without rendering necessary a resort to the property voluntarily transferred.

While, as shown in the preceding paragraph, voluntary transfers have in some of the states been adjudged to be indisputably void as against pre-existing creditors, irrespective of the financial condition of the grantors at the time when they were made, the great weight of authority at the present time is, that such transfers are *prima facie* fraudulent, and those seeking to support them must do so by any competent evidence sufficient to satisfy the court or jury with whom the decision of the question rests that the transfer in question is not fraudulent. In other words, the mere fact of the existence of a prior indebtedness does not conclusively establish the fraudulent character of the transfer, and inevitably deprive it of all power to harm pre-existing creditors: *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545; *Clayton v. Brown*, 17 Ga. 217; *Jones v. Clifton*, 101 U. S. 225; *Hunters v. Waite*, 3 Gratt. 26; *Weed v. Davis*, 25 Ga. 684; *Salmon v. Bennett*, 1 Day, 525; 7 Am. Dec. 237; *Van Wyck v. Seward*, 6 Paige, 62; *Fitley v. Register*, 4 Minn. 391; 77 Am. Dec. 522; *Hinde's Lessee v. Longworth*, 11 Wheat. 190; *Cole v. Tyler*, 65 N. Y. 73; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 49; *Holmes v. Penney*, 3 Kay & J. 90; 3 Jur., N. S., 80; 26 L. J. Ch. 179; but it does burden the transfer with the presumption of fraud, and prevent its assertion against such creditors, unless this presumption is satisfactorily removed: *Cole v. Tyler*, 65 N. Y. 73; *Goodman v. Wineland*, 61 Md. 449; *Ellinger v. Crowl*, 17 Id. 361; *Hunters v. Waite*, 3 Gratt. 26; *Mathews v. Torinus*, 22 Minn. 132; *Oliver v. Moore*, 23 Ohio St. 473; *Spence v. Dunlap*, 6 Lea, 457; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; 39 Am. Dec. 250; *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177; *Walsh v. Byrnes*, 39 Minn. 527. The general rules applicable for this subject are very well stated in the following extract from the opinion of Baldwin, J., in *Hunters v. Waite*, 3 Gratt. 32: "The law gives no general lien to creditors upon the property of their debtors, though it enables them to obtain satisfaction there-

from by the proper judicial proceedings. It does not restrain a man's dominion over his own property so long as he acts with fairness and good faith; but it treats as null and void all fraudulent contrivances to screen it from the pursuit of his creditors. It is fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to defeat them by benefactions conferred upon others. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void; and though the conveyance be voluntary, yet if made with fairness and good faith, it is unimpeachable. The intent with which an act is done may be a conclusion of law from certain facts, against which conclusion all other evidence is unavailing; or it may be a presumption of law from other facts, which is *prima facie* only, and liable to be repelled by sufficient evidence. If a man who is in insolvent circumstances conveys away his property to strangers, or settles it upon his wife or children, the law concludes the design to be fraudulent against his creditors, and all evidence to the contrary is idle or delusive; and so if he render himself insolvent by a voluntary conveyance, however meritorious in itself merely. It is in vain to speculate upon his motive, or adduce evidence of an honest purpose. It may be that he had acted through ignorance or mistake or misconception. Apologies and excuses may be found to absolve him from moral turpitude; but to these the law cannot listen. He is bound to know his own circumstances and the just demands against him; and the injustice and wrong to his creditors are palpable and unquestionable. On the other hand, if a man is in flourishing or unembarrassed circumstances, and exercises a reasonable and prudent discretion in gifts and advancements to his children, adapted to their wants, and justified by his means, leaving an ample fund for the payment of his debts, there can be no propriety in the conclusion of a fraudulent purpose from the mere fact of indebtedness at the time. Still, as it is difficult to ascertain the exact state of a man's pecuniary circumstances at the time of his making a voluntary conveyance, as the claims of creditors are strong, and the devices of fraud are numerous and often plausible, there ought to be a leaning against the protection of property from the pursuit of creditors, and a preliminary presumption in their favor, throwing the burden of establishing the fairness and good faith of the transaction upon the adverse party. This he may do by satisfactory proofs of the donor's ample resources, the moderation of his gift, and his freedom from embarrassment; and in the attempt to do this, he may be met by marks or badges of a fraudulent purpose."

When a voluntary transfer is void as against creditors, whether prior or subsequent, its invalidity does not depend upon the insufficiency of consideration, but upon the presumed intent of the grantor. And here it must not be forgotten that it is the inference or intent which must be drawn from the circumstances that controls, rather than the actual intention of the grantor. The language of some of the authorities on this subject seems at first irreconcilable, for we sometimes find them asserting that the intent of the grantor is immaterial, and at other times declaring that it is controlling. This apparent contradiction arises from the employment of the word "intent" in the one case to denote the absence of all evil motives on the part of the grantor, and in the other case to denote the motive which the court or jury must impute to him from his financial condition at the time of the transfer in question. If the transfer must necessarily or probably hinder, delay, or defraud the grantor's creditors, it is void as against them, however innocent his inten-

tion or worthy his motive in making it: *Potter v. McDowell*, 31 Mo. 62; *Churchill v. Wells*, 7 Cold. 370; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Patten v. Casey*, 57 Mo. 118; *Cole v. Tyler*, 65 N. Y. 573; *Freeman v. Pope*, L. R. 5 Ch. App. 538; L. R. 9 Eq. 206. He has no right to hinder, delay, or defraud them, and his voluntary transfer will not be sustained if that result might reasonably have been apprehended when it was made.

With respect to the grantee of a voluntary conveyance, as he has paid no consideration therefor, he has no equities paramount nor even equal to those of the pre-existing creditors of the grantor. His intent is therefore immaterial, and the conveyance to him must stand or fall, according to the presumed intent of his grantor. The grantee cannot support it by proving his entire innocence and his want of all knowledge of the intent or circumstances of the grantor: *Thomson v. Dougherty*, 12 Serg. & R. 448; *Swartz v. Hazlett*, 8 Cal. 118; *Wise v. Moore*, 31 Ga. 148; *Clark v. Chamberlain*, 95 Mass. 257; *Hicks v. Stone*, 13 Minn. 434; *Peck v. Carmichael*, 9 Yerg. 325; *Gamble v. Johnson*, 9 Mo. 597; *Laughton v. Harden*, 68 Me. 208; *Woody v. Dean*, 24 S. C. 499.

As a voluntary transfer must either be enforced or disregarded, according to the intent which must be imputed to the grantor at the time it was executed, it is of the utmost importance to ascertain from what circumstances the fraudulent intent should or should not be presumed. If the grantor is at the time financially embarrassed, if there are judgments rendered or actions pending against him or suits threatened, his voluntary conveyance is unquestionably fraudulent and void as against creditors: *Bohannon v. Combs*, 79 Mo. 305. To render a voluntary transfer fraudulent, it is not essential that the grantor be insolvent at the time of making it. "If a debtor is in embarrassed circumstances, and makes a voluntary conveyance, and is afterwards unable to meet his debts owing at the time of the assignment, in the ordinary course prescribed by law for their collection, or is reduced to that condition that an execution against him would be unavailing, such conveyance is void as to those debts, and the property conveyed is subject to their payment": *Potter v. McDowell*, 31 Id. 62. "It is sufficient to show that the grantor was embarrassed or in doubtful circumstances, and was not possessed of ample means outside of the particular property for the satisfaction of his then existing debts. When this condition of affairs is proven to exist, the conveyance in question—although none but the purest motives may have prompted its execution—becomes fraudulent in law, and is open to attack, and can be successfully assailed by all who were creditors at the time of the execution of the conveyance, and whose debts remain unliquidated and incapable of collection in the ordinary course of proceedings": *Patten v. Casey*, 57 Id. 118.

As the object of evidence concerning the debtor's inability at the date of the transfer is to enable the court or jury to judge what his intent was in making it, and as no conclusive presumption of fraud arises from the fact that he was somewhat indebted at the time, it is evident that the precise amount of indebtedness necessary to avoid such transfer cannot be stated, and that different courts or juries may reach diverse conclusions from the same state of facts. If, after a transfer, the grantor still continued to be the owner of property sufficient to pay his debts, and was not about to embark in some business in which he expected to contract additional liabilities, and this transfer is assailed by a pre-existing creditor, whose debt remains unpaid, it must be left to the jury or the court to determine as a question of fact, from all the attendant circumstances, whether the intent of the grantor

was fraudulent or not: *Sanders v. Wagonseller*, 19 Pa. St. 248; *Lerow v. Wilman*, 9 Allen, 382; *Chambers v. Spence*, 5 Watts, 404; *Mateer v. Hissim*, 3 Penr. & W. 160; *Posten v. Posten*, 4 Whart. 27; *Pomery v. Bailey*, 43 N. H. 118. The general principle which ought to govern courts and juries in determining this question has been thus stated by the court of appeals of Kentucky: Although the grantor "may not at the time have been insolvent, or so much involved at the date of the deed as to render the residue of his estate then necessarily insufficient to pay his debts, yet if he was involved 'to a material extent,' by which we are to understand an extent which might, in view of ordinary contingencies, endanger the rights of his creditors, then the deed was constructively fraudulent as to subsequent as well as pre-existing debts; for in such a case a fraudulent intent is implied; and the deed was void for express fraud, if from the extent of the grantor's indebtedness, compared with his means of paying, the unreasonableness of the conveyance as an advancement to the appellant, considering the claims of other children, and other attending circumstances, the inference is justified that the grantor made the conveyance for the purpose of avoiding the payment of his liabilities": *Lowry v. Fisher*, 2 Bush, 70; 92 Am. Dec. 475.

No case has come within our observation in which a voluntary transfer has been sustained against a pre-existing creditor when the grantee was not a member of the grantor's family, and as such the natural object of his bounty; nor, on the other hand, have we met with any case declaring that such a transfer could not be upheld because made to a stranger. Doubtless the fact that the donee is bound to the donor by the ties of consanguinity or even affinity is worthy of great consideration, because it is natural and commendable for one whose financial standing enables him to do so to provide for and secure against want in the future the members of his family, and it is more probable that a voluntary transfer to them may have been made without any fraudulent intention than a like transfer to a stranger. If, however, a voluntary transfer should be made to one not related to the grantor, and not especially entitled to his benefaction, and from the grantor's financial ability at the time, and from all the surrounding circumstances, the court and jury should be convinced of the absence of all fraudulent intent, we see no reason for denying the validity of the transfer, though the grantor may have been indebted at the time, provided that such debts bore an inconsiderable ratio to his remaining assets.

The right of a husband or father to make conveyances to his wife or children, notwithstanding the existence of indebtedness against him at the time, is now well established in a majority of the states. Still these gifts cannot be sustained if they embrace all the grantor's property, or even if he is financially embarrassed, or if he ought, as a prudent, practical man, to foresee that they will result in some of his creditors being deprived of the means of obtaining payments of their debts. One has no right to be generous, even to the members of his family, if his generosity will probably be at the expense or detriment of his creditors: *Marmon v. Harwood*, 124 Ill. 104; 7 Am. St. Rep. 345; *Howe v. Wassman*, 10 Mo. 169; 49 Am. Dec. 126; *Lewis v. Love*, 2 B. Mon. 345; 38 Am. Dec. 161.

Though it is doubtful whether the property which the grantor retains may not be sufficient to discharge all his liabilities, a voluntary conveyance to his wife and children must be pronounced fraudulent, if the amount of his indebtedness is large, and he is fearful that his property may not be sufficient to pay it, and especially if his conceded insolvency follows within a short time after the execution of the voluntary transfer: *Stewart v. Rogers*, 25 Iowa,

395; 95 Am. Dec. 794; *Driggs v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78. If, on the other hand, the property to which the grantor retains the title after making a voluntary transfer is at the time unquestionably sufficient to discharge all his liabilities, and the transfer is no more than a reasonable gift in view of his remaining assets, his ability to earn money, and the demands which are likely to be made upon him, then the transfer should be sustained, unless it appears from other circumstances to have been made for a fraudulent purpose: *Grilley v. Watson*, 53 Ill. 193; *Cole v. Tyler*, 65 N. Y. 78; *Arnott v. Wanett*, 6 Ired. 41; *Winchester v. Charter*, 97 Mass. 140; *Taylor v. Eustman*, 92 N. C. 601; *Miller v. Pierce*, 6 Watts & S. 101; *Walsh v. Ketchum*, 84 Mo. 427; *French v. Holmes*, 67 Id. 186; *Miles v. Richards*, Walker, 477; 12 Am. Dec. 584; *Morgan v. Hecker*, 74 Cal. 540.

Though a donor is considerably indebted at the date of the transfer, if he continues solvent for a long period of time afterwards, during which his creditors might have obtained payment of his debt by the exercise of ordinary diligence, they, after lying supinely by until their debtor's position is changed from one of comparative affluence to one of insolvency, cannot wrest from the voluntary grantees of the latter property which he had transferred to them, without at the time of the transfer depriving himself of the means to fully satisfy all his creditors: *Eigleberger v. Kibler*, 1 Hill Eq. 113; 26 Am. Dec. 192; *Lloyd v. Fulton*, 91 U. S. 479.

It remains for us to consider when a voluntary transfer may be avoided by a creditor of the grantor, who was not such at the time it was made. Here, as in the case of pre-existing creditors, the inquiry is concerning the intent of the grantor, as it must be inferred from all the circumstances, both prior and subsequent, which may properly be considered as throwing light upon such intent and revealing its character. For if it be established that the purpose of a voluntary transfer was to hinder, delay, or defraud the creditors of the grantor, then it must, as a general rule, be adjudged void as against subsequent as well as against prior creditors. Subsequent creditors may therefore avoid a voluntary transfer made by their debtor by satisfactorily establishing that it was made with a design to defraud the grantor's pre-existing creditors: *Bassett v. McKenna*, 52 Conn. 437; *Wyman v. Brown*, 50 Me. 139; *Louvy v. Fisher*, 2 Bush, 70; 92 Am. Dec. 754; *Barling v. Bishop*, 29 Beav. 417; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; 39 Am. Dec. 250; *Vertner v. Humphries*, 14 Smedes & M. 130; *Carpenter v. Roe*, 10 N. Y. 227; *Parish v. Morphee*, 13 How. 92; *Walsh v. Byrnes*, 39 Minn. 527; *Day v. Cooley*, 118 Mass. 524; *Dewey v. Moyer*, 72 N. Y. 70; *Marston v. Marston*, 54 Me. 476. While the rule as thus stated is expressed without limitation in many of the adjudged cases, we think it is necessarily subject to several limitations or qualifications. A voluntary or even a fraudulent transfer is not absolutely void; it is valid and effectual between the parties. The utmost which can reasonably be claimed in favor of subsequent creditors is, that it shall not be permitted to operate as a fraud upon them. A voluntary conveyance may have been intended as a fraud upon then existing creditors, without, as we think, making it necessarily fraudulent as to subsequent creditors. The voluntary transfer may have been made so long prior to the contracting of a subsequent debt that it is impossible to conceive that it could have been made with a view of contracting it. And where this is the case, we do not understand how it can properly be regarded as fraudulent as against this subsequent creditor, nor upon what principle he may be permitted to disregard it, if he had notice of it, or did not permit the debt to be contracted in the reasonable belief that his debtor was still the owner of the property which had been long

previously transferred. In other words, it seems to us that a voluntary transfer, fraudulent and void as against existing creditors, is not forever thereafter void as against subsequent creditors, however remote the creation of their debts may have been from the execution of the conveyance.

The grantor in a voluntary deed may part with all possession and dominion over the property, or, when it is real estate, the grantee may cause the conveyance to be recorded, and thereby impart notice of its existence to all subsequent purchasers and creditors of the grantor. In either event, all subsequent creditors of the grantor have notice of his existing financial condition. They have no reason to expect that the property which has thus been transferred can be made available to them for the satisfaction of their debts. Knowing that the debtor no longer has this property, they may contract with him or not, as they may think best, in view of his apparent financial condition. It is difficult, therefore, to understand how they can be defrauded by the prior transfer of which they are thus notified. It has been said that if they have notice of the transfer, they also have notice that it was fraudulent as against pre-existing creditors, and that it is therefore void, and that they may therefore go on contracting with the grantor upon the assumption that the apparent conveyance is in fact no conveyance at all, because it was fraudulent and void in its inception. But the better rule, we think, is, that creditors who contract debts under such circumstances that the knowledge of previous voluntary transfers must be imputed to them cannot be regarded as hindered, delayed, or defrauded by such transfers, and therefore cannot avoid them for the purpose of obtaining collection of their debts: *Schumberg v. Beberistein*, 51 Tex. 457; *Lewis v. Castleman*, 27 Id. 407; *Monroe v. Smith*, 79 Pa. St. 459; *Snyder v. Christ*, 39 Id. 499; *Fowler v. Stoneum*, 11 Tex. 478; 62 Am. Dec. 490; *Lewis v. Simon*, 72 Tex. 470; *Baker v. Gilman*, 52 Barb. 39; *De Garcia v. Galvan*, 55 Tex. 53; *Bullett v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412. If, on the other hand, a conveyance of real estate is not recorded so as to impart constructive notice thereof to subsequent purchasers and creditors, or if, in the case of a voluntary gift of personal property, the donor remains in possession, exercising the same dominion over it which other owners exercise over like property, then subsequent creditors may undoubtedly assail the transfer as fraudulent upon as favorable terms as if they had been creditors whose debts existed before the transfer which they seek to assail: *Seals v. Robinson*, 75 Ala. 363; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733.

As we have heretofore shown, a voluntary transfer by one who is indebted at the time is presumed to be fraudulent as against pre-existing creditors. Whether a transfer by one in like circumstances is presumed fraudulent or not as against subsequent creditors, is a question less easily answered from the authorities. The principal case, as well as some others, favors the rule that a subsequent creditor must assume the burden of proving that a voluntary transfer which he seeks to avoid was fraudulent as against him; or in other words, that it was made when the grantor had a purpose to subsequently contract the liability in question, and to defraud his creditors thereby: *Crawford v. Beard*, 12 Or. 447. See also *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177.

It has sometimes been held that if the facts are shown to be such as to render a transfer fraudulent as against prior creditors, it will be presumed also to be fraudulent as against subsequent creditors; that is to say, it will be presumed to have been made with the intent of contracting subsequent debts, and of delaying, hindering, and defrauding subsequent creditors: *Rogers v.*

Verlander, 30 W. Va. 619; *Edwards v. Entwistle*, 2 Mackey, 43; *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569.

We apprehend that no general rule can be formulated equally applicable to all cases, and that such judicial declarations as have been made upon the subject must be interpreted with reference to the particular facts of the case in which they were made. If the subsequent debts were contracted long after the voluntary transfer was made, the presumption that it might have been made with a view of contracting them and of defrauding the subsequent creditors certainly becomes exceedingly weak, and may reasonably be treated as entirely destroyed, unless other circumstances appear to give it renewed vitality. The evidence may, on the other hand, disclose that the subsequent debts have merely taken the place of prior ones, or that the debtor has continued or embarked in a business in which his becoming indebted was inevitable, or there may be other circumstances of the like persuasive character creating or strengthening the presumption that as the transfer was in fraud of prior it was also in fraud of subsequent creditors. In the one class of cases, the courts are likely to insist that the transfer must be assumed as valid as against subsequent creditors, and that they must rebut this assumption. In the other class, the courts are almost inevitably led to presume that the transfer was fraudulent as against prior creditors, and to call upon the donee, or those claiming under him, to overcome such presumption.

In some of the states, the presumption that a deed shown to be fraudulent as against existing creditors is also fraudulent and void as against subsequent creditors is given very great, if not absolutely conclusive, force, if the grantor was at the time largely indebted or seriously embarrassed, or if the property so transferred constituted the whole or even a greater part of his fortune: *Vertner v. Humphries*, 14 Smedes & M. 143; *Lush v. Wilkinson*, 5 Ves. 387; *Holloway v. Millard*, 1 Madd. 417.

In *Rogers v. Verlander*, 30 W. Va. 619, it appeared that the grantor executed a voluntary conveyance of more than two thirds in value of his real estate, and that he had no personal property, and that within less than a year thereafter executions were issued against him, and returned unsatisfied. The court was convinced that the property which he retained was not ample to satisfy all his existing creditors, and that the inference was justified that the voluntary gift was intended not only to hinder, delay, and defraud his existing creditors, but that it was also actually intended to defraud his future creditors. The English cases also support the rule that if the grantor was insolvent at the time he made a voluntary conveyance, or if the transfer must be regarded as unreasonable in amount and value, considered with reference to his remaining fortune, then the presumption is justified that the transfer was intended to defraud subsequent as well as prior creditors: *Spiro v. Willows*, 3 De Gex, J. & S. 293; *Taylor v. Coenen*, 34 L. T., N. S., 18. So in Connecticut, when it appears that the grantor was largely indebted and insolvent, and that he gave away the only means of his satisfying his creditors, and that the grantee knew of his financial condition, it will be presumed, either that the grantor was incapable of managing his affairs, or incompetent to make a conveyance, or that he made it "under some secret hope or expectation of benefit to himself from the use of the property, or some equivalent for it after the conveyance"; and that the transaction is corruptly fraudulent, and that "if the grantor, at the time the deed was made, was indebted to the extent of insolvency, or perhaps of great embarrassment, so as to create a reasonable presumption of a fraudulent design,

the deed may be impeached even by a subsequent creditor, unless the presumption is repelled by showing that such prior debts were secured by provision in their favor in the deed itself": *Redfield v. Buck*, 35 Conn. 328; 95 Am. Dec. 241.

These are extreme views, and in our judgment not sustainable upon principle. Before subsequent creditors can avoid a transfer, it must appear to be at least probable that it may have been made with a design to hinder, delay, or defraud them. Though the grantor has no other property, and never expects to have any, his conveyance cannot be fraudulent if he owes no debts, does not meditate the contracting of any, and is not in any business nor about to enter upon any business in the transaction of which he is likely to become indebted: *Thompson v. Allen*, 103 Pa. St. 44; 49 Am. Rep. 116.

If the creditor is but little indebted at the time of making a voluntary transfer, and there are no attending nor immediately subsequent circumstances to create a suspicion of meditated fraud on his part, such transfer cannot be successfully attacked by subsequent creditors: *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301; *Pelham v. Aldrich*, 8 Gray, 515; 69 Am. Dec. 266. If the grantor is entirely free from debts, the case is still more clear, if possible. There not only cannot be any presumption in favor of such subsequent creditors that the transfer was fraudulent; the presumption must necessarily be the other way, unless it appears that the grantor was about to enter upon some business or meditated some scheme in which he was about to become indebted, and was seeking in some manner to throw the hazard of such business or scheme upon his subsequent creditors instead of assuming it himself, as he should in good faith do: *Smith v. Rodgers*, 92 U. S. 183; *Rock Island Stove Co. v. Walrod*, 75 Iowa, 479; *Martin v. Olliver*, 9 Humph. 561; 49 Am. Dec. 717; *Gilligan v. Lord*, 51 Conn. 562; *Wheeler & W. M. Co. v. Monahan*, 53 Wis. 198.

There is no doubt that a creditor who becomes such after an involuntary transfer had been made by him may attack and overthrow it by establishing that it was fraudulent as to him: *Lewis v. Simon*, 72 Tex. 40. And there are instances, as we have heretofore shown, where the debtor's doubtful financial condition may cast the burden of proof upon the donee or his successors in interest: *Moritz v. Hoffman*, 35 Ill. 559; *Stillman v. Ashdown*, 2 Atk. 481. The most familiar instances of a voluntary conveyance being declared fraudulent as against subsequent creditors are those arising when the transfer is made with a view of embarking in some hazardous business, of becoming indebted therein, and in case the business shall prove unprofitable, of escaping from loss through the aid of such previous transfer: *Mackay v. Douglas*, 41 L. J. Ch. 539. "A settlement on a wife on the eve of a new business, and with a view of providing against its contingencies, is as unavailing against new creditors as against old ones": *Littleton v. Littleton*, 1 Dears. & B. 327; *Blount v. Nease*, 37 Pa. St. 433; *Graham v. O'Keefe*, 16 Irish Ch. 1; *Murphy v. Abraham*, 15 Ir. Eq., N. S., 571; *Moritz v. Hoffman*, 35 Ill. 558. If a conveyance is "made in anticipation of becoming indebted, and for the purpose of defrauding creditors, and without consideration, it matters not whether the grantor was insolvent or not, and the conveyance is void as against subsequent creditors. Hence, where a debtor in failing circumstances made a conveyance of his property to his mother without consideration, and the next day after the execution of this deed received a loan of money, for which loan he had previously negotiated, it was held that it might fairly be inferred, from the circumstances attending the execution of the deed and the making of the debt, that the conveyance was made in anticipation of becoming

indebted, and was therefore fraudulent as against the debt subsequently contracted": *Morrill v. Kilner*, 113 Ill. 318. "But a voluntary deed may likewise be void as to creditors whose claims are contracted subsequent to its execution. If the grantor of such a deed executes it in the expectation of shortly contracting debts, and with the design of so placing the property so conveyed that if misfortune afterwards befalls him, and he becomes unable to pay his debts, it shall be beyond the reach of his creditors, the deed will be held void on the ground of fraud. To illustrate: if a person just on the eve of embarking in a business which requires both capital and credit to conduct it successfully, should, by a voluntary conveyance, strip himself of a large portion of his property, and make it over to his wife, or distribute it among his children, and then procure the conveyance to be withheld from record, so that he might still trade upon the property as its owner, and in the interval incur debts beyond his ability to pay, the transaction would furnish such cogent evidence of fraud against both grantor and grantee that no court would allow the deed to stand for an instant against the persons who had been defrauded by it. The law on this subject is established. A citation of authorities is only useful to show how the law has been applied in particular instances": *City National Bank v. Hamilton*, 34 N. J. Eq. 160; *Muller v. Wilson*, 44 Pa. St. 413; 84 Am. Dec. 416; *Beeckman v. Montgomery*, 14 N. J. Eq. 106; 80 Am. Dec. 229.

The mere fact that a grantor has become indebted after making a voluntary transfer, and that he is unable to pay such debts, is not conclusive in favor of subsequent creditors. To so hold would place prior and subsequent creditors on the same footing. The grantor may not have intended, when he made the transfer in question, to embark in any business or to become indebted to any extent whatever. If so, his conveyance could not have been fraudulent as against subsequent creditors: *Horn v. Ross*, 10 Ga. 210; 65 Am. Dec. 64. The court or jury must be left to determine, from the fact of the subsequent indebtedness, its proximity to or remoteness from the transfer, and all the other circumstances disclosed at the trial, whether the creation of the debt was contemplated at the time of the transfer or not. If it was contemplated, its holder occupies a position not less advantageous than if he were a prior creditor.

GEORGE v. BRADDOCK.

[45 NEW JERSEY EQUITY, 757.]

CHARITABLE USE, WHAT IS. — A DEVISE OF PROPERTY, TO "CONSTITUTE A SACRED TRUST for the express purpose of spreading the light of social and political liberty and justice in these United States of America," creates a charitable use.

CHARITABLE USE. — THE ONLY RESTRICTION WHICH HAS BEEN IMPOSED ON DEVISES FOR THE BETTER DISTRIBUTION OF SPECIFIED WRITINGS OR BOOKS is, that the writings to be circulated must not have, when considered with respect to their purpose, a general tendency of hostility to religion, law, or morals.

CHARITABLE USE. — THE COURTS WILL PERMIT THE ENFORCEMENT OF A TESTAMENTARY USE which is designed to circulate works calling in question fundamental rules and establishments of the law, and agitating the question whether such law has or has not any better foundation than wrong and injustice.

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Libel.

whether the defendant was not notified in writing of the whole title, and of the purpose to protect the mortgage interest. But we have enough to show that the existence of the mortgage was not, by itself, of any effect in impairing the policy, and the destruction of it by the beginning of foreclosure would be a consequence not reasonable, and not to be inferred without convincing provisions, which we do not discover, as changing the former decision of this court.

We think the judgment should be affirmed.

INSURANCE. — If the policy requires the statement of certain facts, and their expression in the policy, and the insured states the facts to an agent, but the agent does not insert them in the policy issued, the omission cannot be allowed to prejudice the insured: *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386.

INSURANCE. — Where a woman, ignorant, and unable to read English, procured insurance upon property owned by her children, but in which she had a dower interest, and it appearing she did not know the distinction between "dower" and "fee," and was ignorant of the provisions of the policy stipulating for a forfeiture if the assured did not own in fee the insured property, the policy was valid, where the agent had knowledge of the facts, and there was no fraud on the part of the assured: *Hartford Ins. Co. v. Haas*, 87 Ky. 532; compare *Baker v. Ohio Farmers' Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and note; *Home Mutual F. Ins. Co. v. Garfield*, 60 Ill. 124; 14 Am. Rep. 27.

MCALLISTER v. DETROIT FREE PRESS COMPANY.

[76 MICHIGAN, 338.]

LIBEL. — PUBLICATION OF NEWSPAPER ITEM CONFESSEDLY UNTRUE IN SEVERAL PARTICULARS, all of which tended, in the connection used, to carry the impression that the parties named therein were guilty of felony, is clearly libelous *per se*, and the question for the jury is only one of damages.

LIBEL. — NO NEWSPAPER HAS ANY RIGHT to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and business without answering for the libel in damages, and the greater the circulation of the paper the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items.

LIBEL. — NEWSPAPER REPORTER HAS NO RIGHT to collect stories on the street, or gather information from policemen or magistrates out of court, about a citizen, to his detriment, and to publish them as facts in his newspaper. If true, such publication may be privileged; but if false, the newspaper is responsible to any one who is wronged thereby.

LIBEL. — FALSE PUBLICATION OF ARREST AND IMPRISONMENT. — A party cannot be subjected to the wrong and outrage of a false publication of his arrest and imprisonment, looking toward his guilt, without remedy; and no excuse of the demand of the public for news, or of the peculiarity

and magnitude of newspaper work, can avail to alter the law so as to leave the injured party without redress and recompense for a wrong, which, under the law, can never be adequately compensated to one who values his reputation more than money.

LIBEL — PRIVILEGED COMMUNICATIONS. — The truth is privileged when published from good motives and for justifiable ends, and that which is not true, but honestly believed to be true, and published in good faith by one in the performance of public or official duty, in certain cases, is also privileged.

LIBEL — PRIVILEGED COMMUNICATIONS. — Communications made to a body or officer having power to redress a grievance complained of, or having cognizance of the subject-matter of the communications, to some intent or purpose, are privileged, and so in cases where the communication is made confidentially, or upon request, where the party requiring the information has an interest in knowing the character of the person inquired after. So a person may be justified when honestly endeavoring to vindicate his own interests, as in a case of slander of title, or guarding against any transaction which might operate to his own injury.

LIBEL. — LIBERTY OF THE PRESS, as the law now stands, is only a more extended and improved use of the liberty of speech prevailing before printing became general; and, independent of statute, the law recognizes no distinction in principle between a publication by a newspaper and a publication by any other person. A newspaper is not privileged, as such, in the dissemination of the news, but is liable for what it publishes in the same manner as any other individual.

Corliss, Andrus, and Leete, and Edwin F. Conely, for the appellant.

F. A. Baker, for the defendant.

MORSE, J. On Saturday, February 11, 1888, the plaintiff and one Lester B. French, two reputable citizens of Detroit, crossed over to Windsor. French went to Windsor to dispose of about twenty-seven dollars of Canadian postage-stamps which he had purchased of Dr. Kennedy, of Detroit. McAllister went with French, because the latter asked him to, and did not know what was the object of French's visit.

After they arrived at Windsor, they met a Mr. Ronald, who resided there, and walked up to the Manning House, which was soon to be opened, for the purpose of looking through it, having been invited to do so by Mr. Ronald. When they got there, the house was locked, and Mr. Ronald had no key to it. From there they went to the post-office. French went to the stamp-window, and asked the gentleman there, who proved to be the assistant postmaster, if he would take some stamps "that had been sent to us on the other side"; told him that he got the stamps from a physician on this (American) side. The man said (so French testifies, and it is not disputed):

"No, we cannot take them here"; and directed him to a book or stationery store a few doors below. McAllister stayed in the post-office until French was through, but did not know what the latter was doing.

From the post-office they went to the book-store. French explained at this store how he came to have the stamps, and offered them for sale. The man at the store said he had so many on hand he could not use them, and directed French to another book-store. They then went to the second book-store, where French sold about ten dollars' worth of stamps, at a discount of from three to five per cent. Before going to this store, they stopped at another place, where French offered stamps for sale, but sold none. McAllister knew what French was doing after they left the post-office. French might have sold all his stamps at the book-store at ten per cent discount, but declined to do so.

As they came out of this store, they were arrested, and taken to jail by a policeman, accompanied by the assistant post-master. McAllister wanted to know what the trouble was,—what they were arrested for,—but received no answer. French said: "If there is anything wrong, if you will take us to the telephone we will identify ourselves. Here is the man that owns this hotel here. I can telephone to him; he is on the other side of the river, and will come over. I am well acquainted with business men over there, and we will satisfy you that everything is all right." The officer answered: "That don't make any difference. Go with us, and we will take you to a telephone all right."

They were not taken to a telephone, but to the jail, where they were searched, and everything taken from them. They told the officers that they lived in Detroit, and who they were. The effects upon them,—letters, the monogram upon McAllister's watch, and a bank-book in the possession of McAllister,—corroborated their story, but it was of no avail. The chief of police, Bains, came to them at the station dressed in citizen's clothes, and asked French where he got the postage stamps. French asked him, "Who are you?" to which Bains replied, "None of your business." French then said: "Then it's none of your business where I got them." Thereupon Bains fell into a passion, and locked them up in different cells.

After they were locked up, Bains asked them who they were, and if they knew any one in Detroit. McAllister told

him where he lived; that he boarded at the Antisdel House, but had been away from there. He wished to send for Mr. Andrus, his attorney, but this was denied him. Bains asked: "Do you know any detective in Detroit?" They could not think of any, and then Bains said, "If you don't know any detective in Detroit, you don't live there," and went away. They were put in jail about half-past twelve, and remained there until about seven, P. M. About three, P. M., detectives McDonell and Noble came over from Detroit, and were asked if they knew them, and McDonell said he knew McAllister well, and related that when McAllister's house was robbed he looked up the case for him. He also said that he had seen Mr. French, but could not place him, but knew his face well. McAllister said to Bains: "You have found nothing at all suspicious on me. Can't you let us sit in the office, instead of putting us in the cell again?"

But Bains said: "No; you go right back in there."

He refused to let them occupy the same cell. French told Bains that he got the stamps of Dr. Kennedy.

Bains came in at one time with a piece of paper in his hand, and said: "French, you are a liar. I have telegraphed to Dr. Kennedy, and he says he don't know you."

Bains let French go to the telephone at one time, but for some reason he could not get Detroit; and Bains said: "Come away from there. I guess you don't want to get them very bad, anyway."

It seems that Mr. Wigle, the postmaster, made a complaint before Alexander Bartlett, the police magistrate at Windsor, against French and McAllister, for the unlawful sale of postage-stamps, under a Canadian statute reading as follows:

"No person other than a postmaster shall exercise the business of selling postage-stamps or stamped envelopes to the public, unless duly licensed to do so by the postmaster-general, and under such conditions as he prescribes; and every person who violates this provision by selling postage-stamps or stamped envelopes to the public, without a license from the postmaster-general, shall, on summary conviction, incur a penalty not exceeding forty dollars for each offense": 38 Vict., c. 7, sec. 74, being R. S. Can., c. 35, sec. 106.

Neither French nor McAllister had any knowledge of this statute, or that they were doing anything wrong in selling or offering these stamps for sale.

The complaint was read to French and McAllister, who were taken before the magistrate for that purpose; but the magistrate swears that Mr. Wigle was convinced, by the time the complaint was read, that they were innocent of any intentional violation of the law, and withdrew it. No complaint was made against them for any other offense. There was some talk between Mr. Wigle and the magistrate about the robbery of a post-office at Bothwell, Ontario. The magistrate could not swear that the chief of police informed him that he suspected these men of that robbery, but thinks it quite probable that he did. There was, the magistrate says, no hearing or adjournment on the complaint made by Wigle. Wigle withdrew it, and that was the end of it, as far as the magistrate was concerned. It was withdrawn between three and four o'clock, P. M.

But Mr. Bains, as they testify, kept these men incarcerated until after six o'clock, P. M., and told them then that he was not quite satisfied, but they could go if they would come back at nine, A. M., on Monday. On Monday they went over, and were told they were not wanted. Bains swears that he did not require them to return on Monday, but released them unconditionally. While in Canada, French and McAllister received no intimation from any one that they were suspected of the Bothwell robbery, and knew nothing about it.

The Detroit Free Press (daily), on Sunday, February 12, 1888, contained a number of items of news under the heading of "Windsor." In these items, and the third one in the list, appeared the following: "A week ago, it will be remembered that a safe was cracked in Bothwell, and that two thousand dollars in money and about thirty dollars' worth of stamps were stolen. Yesterday two hard-looking citizens canvassed the entire business part of Windsor, in the effort to sell stamps at half-price. They at last tried to sell the stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found thirty dollars' worth of stamps. They gave their names as Edward H. McAllister and Lester B. French. Chief Bains will hold them to await developments."

On Tuesday, the 14th of February, 1888, under the heading of "Windsor," the Daily Free Press published, with other items of news, the following: "Edward H. McAllister and Lester B. French, the men who were arrested on Saturday for trying to dispose of stamps at half-price, have been released,

as there was no evidence to show that they are the men who are wanted at Bothwell."

It is not shown that the Free Press ever made any other or further allusion to the matter. The plaintiff brought suit against the Free Press company for libel, declaring upon the first publication.

The defendant pleaded the general issue, and gave notice that on the fourth day of February, 1888, the post-office building at Bothwell, Ontario, was feloniously broken into and entered by a person or persons unknown, who did then and there steal Canadian postage-stamps of the value of thirty dollars, and also money, jewelry, goods, and other personal property of the value of two hundred dollars; and that on the eleventh day of February, 1888, the plaintiff went to Windsor, with a companion, and offered for sale a quantity of Canadian postage-stamps, of the value of about thirty dollars, and that among other persons to whom he offered them was the assistant postmaster at Windsor; that said assistant postmaster reported the facts of said burglary and larceny at Bothwell, and the attempt of said plaintiff and his companion to sell about the same quantity of postage-stamps, to a police-officer at Windsor; that, upon such information, said police-officer had reasonable cause to suspect the said plaintiff and his companion to have been guilty of the felony aforesaid; and that thereupon the said police-officer, by virtue of his power as such officer, arrested the said plaintiff and his companion, and took them before Alexander Bartlett, a police magistrate in Windsor, to be dealt with according to law. "And the said defendant will further insist and prove that if it published the alleged libelous article set forth in the plaintiff's declaration, the same was a true and correct account of the said felony, and of the arrest of the said plaintiff and his companion by a police-officer, on his suspicion that they were guilty of said felony; and said article was and is, in that sense, a true and correct statement of the facts, and was published as a privileged publication, and for good purposes and justifiable ends."

Upon a trial had in the circuit court for the county of Wayne, before a jury, Hon. C. J. Reilly, the presiding judge, directed a verdict for the defendant, and judgment passed accordingly.

It is to be presumed that the trial judge held the publica-

tion to have been privileged, no reason being stated in the record for his action.

In addition to the facts of the arrest, as hereinbefore stated, the plaintiff showed that he then lived in Bay City, Michigan, where he had resided since October 16, 1888. Previous to that time he had lived in Detroit fourteen months; two years before that in Chicago; eight months before going to Chicago in Flint, Michigan; and for twenty-three years before living in Flint he had resided in Detroit steadily, and for twenty years at one place,—244 Park Street. At the time of his arrest he was dealing in and owner of real estate in Detroit; and French, his companion, was also in the same business, and had an office on Griswold Street.

Plaintiff first saw the article in the Free Press on the afternoon of February 12, 1888. Heard some parties speaking about it at the house where he boarded. After the publication, people halloed to him upon the street in different ways, and he also received letters in relation to it. At the time he was searched he had two fifty-cent American pieces, and two five and one three dollar gold pieces, a diamond ring, and about fifty dollars in money, including the gold pieces.

The defense showed the commission of the robbery at Bothwell by some unknown person on the night of February 4, 1888. William Regan, the postmaster at that place, testified that he discovered the robbery the next day, and at once notified the post-office inspector at London, Ontario. Bothwell is about sixty miles from Windsor. Regan testified that about \$110 of Canadian postage-stamps were taken, and about \$80 in money,—gold, silver, and bills,—\$194 in all, stamps and money. Some jewelry was also taken,—a watch-chain and some charms,—and some gold pieces,—one five-dollar, one two-and-a-half-dollar, and two one-dollar gold pieces. The five-dollar piece was an American coin.

The defendant proved by Bartlett, the magistrate, that this robbery at Bothwell, under the laws of Ontario, was a felony, and the selling of stamps without license a misdemeanor. It also appears from his testimony that the complaint was withdrawn before McAllister and French were required to plead to it.

William Bains, the chief of police, was also sworn on behalf of the defendant. His main evidence was given in the attempt to justify his conduct towards the prisoners while in his charge, in which he was not successful. He testified that he gave no

directions to have them arrested, and first saw them at the lock-up, where he went after hearing of their arrest. Before their arrest he had received from Mr. Parker, the post-office inspector at London, the following letter:—

“POST-OFFICE INSPECTOR’S OFFICE.

“LONDON, 7 Feby., 1888.

“*Dear Sir*,—I beg to inform you that on the night of Saturday, fourth inst., the Bothwell P. O. was burglarized, and some \$200 in cash and postage-stamps stolen from the safe. There was also a quantity of jewelry taken, the property of the postmaster’s wife, consisting of 1 gold chain, long, with fancy link; 2 locketts, silver,—one with gold chain attached; 2 gold pencil-cases; 1 \$5 gold coin; 1 \$2.50 do.; 2 \$1 do.; 1 sovereign, with a hole in it, and the name ‘Ella Rose’ stamped across the face; 1 25c gold coin. I will feel obliged if you will have such inquiry made by your staff for the stolen goods as you may deem necessary, as they may be offered for sale in your locality. Yours truly,

“R. W. PARKER, P. O. Inspector.

“MR. BAINS, Chief of Police, Windsor.”

He was present when French and plaintiff were searched, and saw the articles found upon them, and after they were locked up reported the case to Mr. Bartlett.

He testifies that the finding of the stamps and the gold coins upon their persons, and the letter he had received from Parker, led him to believe or suspect that these men might have had something to do with the Bothwell robbery; that he sent an officer over to Detroit to find out about them, and to see Dr. Kennedy; that the officer returned about six o’clock, P. M., and reported that the doctor said he had sold the stamps to French, and also that he had been to the magistrate, Bartlett, who instructed him to release them.

On cross-examination Bains testified:—

“Q. Did you have any talk with the newspaper reporters about this matter? A. When these gentlemen left, one of them—I can’t say which—turned and said to me: ‘Don’t give this to the papers. We don’t want this in the papers’; and I said: ‘Gentlemen, they will not get it from me.’ That is what passed. Shortly after they passed through the front door, a reporter came to me and asked me about this matter, and I said: ‘The gentlemen are released. It appears there is nothing against them, and I was requested not to let the

papers have it.' Who that reporter was there for I can't tell you.

"Q. Do you know his name? A. No, sir, I don't; and I don't know what paper he was for.

"Q. You can't say whether he was a reporter for the Detroit Free Press? A. I don't know. That is the only reporter I spoke to about it."

The policeman who arrested them testified to arresting them on information that they were selling stamps at less than their face value. He knew about the Bothwell robbery. The assistant postmaster told him of this, and pointed the men out to him. He also knew of their trying to sell the stamps at two other places. He claims he arrested them on suspicion of the Bothwell robbery. He swears he did not talk with or give any information about the affair to any reporter.

Ira W. Quinby, exchange editor of the Free Press, testified that at the time of the publication of the alleged libel he was a reporter for that paper, and had been "doing" Windsor in that capacity for about two years. He wrote both the items published in the Free Press in relation to the arrest of French and plaintiff. He was in Windsor on the day of such arrest, and was in Bartlett's court-room about three o'clock, P. M., as near as he could remember. While there he heard a conversation between Mr. Bains and the magistrate. He had no conversation with Bains, but talked some with Bartlett. He was not acquainted with plaintiff or French, and saw them for the first time when he testified. He wrote the item about six o'clock, P. M., and handed it to the city editor of the Free Press. He was not in Bartlett's court over eight or ten minutes, and in Windsor but half an hour.

"Q. Where did you get the information which led you to write this article? A. When I came in, Mr. Bains was there talking with the magistrate about these two men. Mr. Bains said there had been a burglary committed, and he thought that these two men were the ones. That is what he was telling Bartlett at the time. Mr. Bartlett was not so sure, but Mr. Bains was telling him the stuff he found on them, and he gave Bains permission to keep them until further developments. I think I arrived there shortly after they had been examined and returned to the cell. That is my impression now.

"Q. Yo didn't see these men in the court-room at any time? A. No, sir.

"Did you hear anybody else talking about it besides Bains

and the magistrate? A. No, sir; I did not. I talked with Bartlett afterwards, and he read the warrant that Mr. Wigle had sworn to; and Mr. Bartlett gave me the information that I got.

"Q. He gave you the information about the Bothwell robbery? A. Yes, sir.

"Q. Did you know about it before? A. No, sir; I hadn't heard about it.

"Q. Will you state whether or not the account was based upon the facts that you learned there? A. Yes, sir.

"Q. Will you state what, if anything, was said in that conversation about their being hard-looking characters? A. Yes, sir. Mr. Bains, I think, said it. He said they were rather hard-looking citizens. The idea that I got from it was, that they were a couple of tramps, such as you see any day on the railroad. That is the impression conveyed to me."

He could not say that either Bains or Bartlett said that two thousand dollars in money had been taken from the Bothwell post-office, but expects they did, because he wrote it that way. Mr. Bartlett said that about thirty dollars of stamps had been stolen at Bothwell. He also told witness that the men (plaintiff and French) were searched at the station, and thirty dollars' worth of stamps found upon them.

"Q. Who told you that they were hard-looking citizens? A. Mr. Bains said it to the magistrate. Nobody told me. There should be quotation marks there.

"Q. Who told you that they canvassed the business part of Windsor? A. The magistrate, also.

"Q. Who told you that they were making an effort to sell the stamps at half-price? A. Mr. Bartlett.

"Q. Where did you get their names? A. I found them on the warrant."

He further testifies that he did not ask any particulars about these men; nobody seemed to know where they came from.

"I asked Mr. Bartlett if he knew who they were, and he said no, he did not.

"Q. Did you ask Mr. Bains? A. No, sir. You can't ask Mr. Bains anything when he is excited.

"Q. Was Bains excited? A. Yes, he was. Whenever Mr. Bains had criminals on hand, I would always go to Mr. Bartlett for information, because he didn't get so frustrated."

This reporter made no further effort to find out who these

men were, or the particulars of the transaction, because, as he says, "there was no use." He testified that Bartlett was not so strong in his opinion that the men were connected with the burglary as Bains; but Bartlett told the reporter that Bains would hold them for developments. On Monday, about three o'clock, P.M., he learned that the men had been released. Before he wrote the last item, he went up to the court-house at Windsor. Bains and Bartlett were inside. Outside of the building he met a patrolman,—didn't know who he was,—and asked him about "the McAllister-French business." He said they were discharged. "I said, 'What was the matter?' and he said, 'No evidence.' I said, 'Don't you know who they were?' and he said, 'No.'"

He claims he went back to the town hall or court-house twice afterwards that day to see Mr. Bains, but he and Bartlett had gone to Sandwich.

"Q. When did you write that item? A. Monday night. It came out Tuesday.

"Q. Did you ever make any effort, up to that time, to find out whether they were reputable citizens or not? A. No, sir. It had slipped my mind."

Mr. Fralick, the city editor, was not sworn, but Mr. Quinby testified that he didn't know that Fralick took any steps to find out about these men. He heard nothing about the matter afterwards.

A. G. Boynton, one of the stockholders of the defendant company, was sworn for the defendant, and testified that he resided on Bagg Street, which runs into Park Street.

"Q. Some allusions were made by counsel in this case, in his opening, to the fact that you lived in the same neighborhood with Mr. McAllister. A. Mr. McAllister lived a neighbor to me for some years."

He testified that he was acquainted with plaintiff in a general way for some years, but never knew Mr. French until he saw him in the court-room. Boynton never heard of the item complained of until it was published.

"Q. Did you read the item before it was published? A. No, sir; I don't remember reading it at all."

It was not an item that came in his department, and he knew nothing of it until told that suit was brought, and then he hunted it up.

This is the substance of the material testimony taken in the case. Mr. Bartlett having returned to Windsor, plaintiff's

counsel asked the court to adjourn the case until the following morning, so that he could be produced for the purpose of contradicting the witness Quinby as to the source of his information. The court declined to allow an adjournment, and exception was taken.

It does not appear from the record at what time of day this motion was made, and therefore we are not entirely satisfied that this refusal was an abuse of discretion; but it seems to us that the adjournment, in the interest of justice, should have been granted. If the witness Quinby was not telling the truth as to his source of information, it was a very material fact to be considered in the case. If the portions of the article acknowledged to be untrue were manufactured by the reporter, they were certainly not privileged. Such fact would also have a bearing upon the question of damages. If, as the reporter says, he did not get to the court-room of the magistrate until after the plaintiff and French had been taken out, the warrant read to them, and they returned to their cells, it is not likely that Bartlett gave the reporter the information he claims he did, if Bartlett's testimony on the trial is true. Mr. Bartlett testified as follows:—

“Q. About what time upon this Saturday did Mr. Wigle make the complaint, and swear to it? A. I think between two and three o'clock.

“Q. Were the accused parties arraigned on that complaint? A. The complaint was read to them, I think.

“Q. What was done when it was read? Were they required to plead to it? A. Mr. Wigle appeared, I think, at the same time that they were there, and the complaint was read to these parties; but Mr. Wigle, by the time we read the complaint, had become convinced that they were innocent, so far as an intentional violation of the law was concerned, and he withdrew the complaint, and I think he withdrew it in the presence of these two parties.”

He also testified that no complaint was made against them on account of the Bothwell robbery, and that such robbery was only a matter of conversation between him and the postmaster, and he could not swear that Bains, the chief of police, informed him that he suspected these men of that robbery, but thought it quite probable that he did. Nor could he remember that there was any conversation between himself and Bains in regard to the circumstance of these parties having postage-stamps that they were offering for sale. It would

appear from the record that Mr. Bartlett was sworn for the defense, and had gone back to Windsor before Mr. Quinby was examined. The plaintiff was entitled to his testimony, unless the circumstances were such that it could have been procured that day without adjournment over.

This case clearly ought to have gone to the jury. The item was confessedly untrue in several particulars; and these false items all tended, in the connection used, to carry the impression that plaintiff and French were guilty of a felony: 1. The coincidence, which was not a true one, that about thirty dollars' worth of stamps had been stolen from Bothwell, and the same amount found upon these parties; 2. That they were "hard-looking citizens," carrying the impression, as Quinby admits, that they were a "couple of tramps"; 3. That they canvassed the entire business part of Windsor, in the effort to sell stamps at half-price, which contains two untruths; 4. That they at last tried to sell the stamps to the postmaster.

It requires but a glance to discover a vast difference between the actual facts of this transaction, and the story as published. A true account would have shown the arrest of two reputable American citizens for the offense of selling stamps without a license, discharged by the magistrate of such offense as soon as the complaint was read, because the postmaster was satisfied that they meant no intentional violation of the law, but kept by the chief of police of Windsor for three hours afterwards, and treated by him with gross indignity; that he had suspicions that they were connected with the Bothwell robbery, because of the stamps and gold coin found upon their persons, but he refused to let them communicate with their friends or counsel in Detroit, and did not release them until he was obliged to by the order of the magistrate, although he had learned that they were all right,—in short, an inexcusable outrage by the chief of police upon honest men, guilty of no crime, and innocent of any intentional wrong.

The publication shows a couple of tramps, trying at every business place in Windsor to sell postage-stamps at half-price, having the same amount in their possession that was stolen at Bothwell the week before. At last they try the postmaster, who has them arrested. "Chief Bains will hold them to await developments."

Before or about the time it was handed to the city editor, who, it seems, took no steps to ascertain its truth, these men had been discharged; and, when it was being read by people

on Sunday in the Free Press, French and the plaintiff were at home in Detroit, as free from any restraint of the law, and from any suspicion of wrong-doing, except for this article, as the reporter who wrote it.

If it were not possible, as contended, that a true statement of the whole of the facts could have been published at that time, certainly a little inquiry on Monday afterwards by this same reporter might have set the matter aright. But it was a matter of so small consequence to him that "it had slipped his mind," and he contents himself with the statement of a patrolman on the streets of Windsor, and the paper on Tuesday has an item that French and the plaintiff have been discharged because there was no evidence that they were the men wanted at Bothwell. In other words, it is published, not that they were discharged because their innocence was established, which was the fact, but because the charge or suspicion that they were concerned in the Bothwell robbery was "not proven."

If the reporter had contented himself with stating that these men had been arrested; and a complaint made against them for selling stamps without a license, and that the fact of their offering to sell the stamps, and having them in their possession when searched, led the chief of police to think that they might be connected with the Bothwell robbery, and that Chief Bains was holding them to await developments, it might have been privileged, although not true at the time it was published, and not the whole truth at any time, which the reporter had the means and opportunity to discover, but did not. But, as the case stood, it was not privileged, and the only question for the jury was one of damages.

It will be noticed that the item as published was not in "quotation marks," as the reporter thinks some of it ought to have been. It was printed as a matter of fact coming from Windsor, when in fact it was written by an employee of the paper at Detroit, entirely from hearsay. He could have personally investigated the matter, but did not do so. He did not ask to see the men, or go where they were. He did not talk with the postmaster. He heard, as he says, a talk between Bains and Bartlett, and asked the latter a few questions. The only thing that he saw with his own eyes—the complaint—he does not mention in his publication. If he had stated the nature of it, it might not have carried so great an impression of the parties' guilt. The publication was looking

towards a felony. The complaint he saw was only for a misdemeanor.

Nor was any care shown by the newspaper. It was, as far as the record shows, published as handed in by the reporter, without thought of verification. It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it has heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and wide-spread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise.

The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby.

It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, and for which indignity oftentimes he has no redress, without being further subjected to the wrong and outrage of a false publication of the circumstance of such arrest and imprisonment, looking towards his guilt, without remedy. And no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law

stands, never be adequately compensated to one who loves his reputation better than money.

What is privileged in publications? The truth is privileged when published from good motives, and for justifiable ends. And that which is not true, but honestly believed to be true, and published in good faith, by one in the performance of a public or official duty, in certain cases, is also privileged.

This is so in the case of communications made to a body or officer having power to redress a grievance complained of, or having cognizance of the subject-matter of the communication, to some intent or purpose, and in cases where the communication is made confidentially, or upon request, where the party requiring the information has an interest in knowing the character of the person inquired after. So may a person be justified where he is honestly endeavoring to vindicate his own interests, as in the case of the slanderer of title, or guarding against any transaction which might operate to his own injury: See *Usher v. Severance*, 20 Me. 9, 16; 37 Am. Dec. 33. As is well said by Chief Justice Whitman in that case: "The case at bar is one of a publication addressed to no person or body of men having power to redress a grievance, and it is rather superfluous to add, not a confidential communication to any one, and does not appear to have been designed to guard against any injury imminently threatening the individual interests of the publisher; nor does it present a case of words in themselves not actionable."

The liberty of the press, as the law now stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other person. A newspaper proprietor is not privileged, as such, in the dissemination of the news, but is liable for what he publishes in the same manner as any other individual: *Townshend on Slander and Libel*, sec. 252.

The judgment of the court below is reversed, and a new trial will be granted, with costs of this court to plaintiff.

NEWSPAPER LIBEL. — The object of this note is, not to treat of the general law of libel, but rather to state the rules especially applicable to cases wherein complaint is made of libels alleged to have been published in newspapers or other periodicals. We are not aware that the rules or principles

applicable to the publication of libels are in any respect different when their publication is in a newspaper from what they are when such publication is in some other periodical. Therefore, in this note, we shall use the term "periodical" as indicating newspapers as well as other publications made at stated periods, in magazines and other periodicals of more enduring and pretentious character than ordinary newspapers. If in this note any attention is given to principles not exclusively applicable to the publishers of periodicals, it will be found, on examination of the adjudged cases in which these principles have been announced and applied, that by far the greater number of them have been actions or prosecutions against the publishers of periodicals, and that while the principles may occasionally be applied to other publishers, yet that such is so rarely the case that their consideration is amply justified in a note which attempts to treat of the law of newspaper libel.

For the publication of a libel in any periodical, five different classes of persons may be answerable, viz., the author, the editor, the printer, the proprietor, and any other person who engages in the publication or distribution of the libelous periodical with knowledge of the libel therein contained. In other words, all who knowingly participate in or contribute to the libel must respond in damages to the subject thereof, if he is injured thereby.

The proprietor of a periodical in which a libel has been published cannot escape liability otherwise than by proving that it was a matter which, notwithstanding its libelous character, he had the right to publish. In vain may he urge that he knew nothing of its intended publication, that he was absent from the city or other place where his paper was printed, and had left it in charge of others, who in the publication of the libel complained of had not acted in pursuance of his instructions to them: *Hunter v. Sharp*, 4 Fost. & F. 983; 15 L. T., N. S., 421; *Rex v. Walter*, 3 Esp. 21; *Rex v. Dodd*, 2 Ses. Cas. 33; *Andres v. Wells*, 7 Johns. 260; 5 Am. Dec. 267. "As respects a publication by writing a libel, not only the publisher, but all who in any wise aid or are concerned in the production of the writing, are liable as publishers. The publication of the writing is the act of all concerned in the production of the writing. Thus if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher. The law denominates them all makers and all publishers: Townshend on Slander and Libel, sec. 115; 2 Starkie on Slander, 225; Bishop's Crim. Law, sec. 931. The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it (*Huff v. Bennett*, 4 Sand. 120); for he is liable, even though the publication was made in his absence, and without his knowledge, by an agent to whom he has given express instructions to publish nothing exceptionable, personal, or abusive, which might be brought in by the author of the libel": *Buckley v. Knapp*, 48 Mo. 152.

Whenever the proprietor of a periodical leaves it in charge of other persons, he provides them with the means of injuring others by malicious or careless assaults upon their reputation. If he reserves no supervision over them, he practically authorizes them to write and publish whatever they think proper. They stand in his place and represent him; and if they publish a libel, he is as responsible as if it had been done by him personally or under his direct supervision, and whether the wrong resulted from their negligence or from a wanton and reckless purpose to injure the object of it. In such a case, the fact that the proprietor was not present, and did not have any previous knowledge of the libelous publication, does not constitute a sufficient defense, even to a criminal prosecution against him for libel, in the absence of

any statute modifying the rule of the common law upon this subject: *Bruce v. Reed*, 104 Pa. St. 408; 49 Am. Rep. 586; *Rex v. Gutch*, 1 Moody & M. 433; 22 Eng. Com. L. 353; *Commonwealth v. Morgan*, 107 Mass. 199; *Lothrop v. Adams*, 133 Id. 471; 43 Am. Rep. 528. Even if those placed in charge of a periodical by its proprietor publish a libel in defiance of his express instructions, he remains answerable therefor in a civil action; but at the present time the fact that the libel was published contrary to his orders would probably, in the absence of any negligence or carelessness on his part, be sufficient to prevent his conviction if prosecuted criminally: *Perret v. Times Newspaper*, 25 La. Ann. 170; *Commonwealth v. Morgan*, 107 Mass. 199; *Rex v. Gutch*, 1 Moody & M. 433; 22 Eng. Com. L. 353; *Dunn v. Hale*, 1 Ind. 344.

The author of a libel which has been published in a periodical, while generally answerable therefor equally with the proprietor, is not liable merely because he is its author. In truth, it is only those who either aid in or assent to the publication of a libel who are answerable therefor. However much one may contribute to the libel in other respects, he is not answerable therefor if he can show his innocence of its publication: *Weir v. Hoss*, 6 Ala. 881; *Mayne v. Fletcher*, 9 Barn. & C. 382. One who composes a libel does not thereby commit any actionable wrong. It is only when his act, assent, or perhaps his carelessness, causes its publication that he commits an actionable wrong and becomes responsible for its consequences. It need not be shown by direct evidence that the author of a libel procured its publication, if it appears that he did that from which his desire for or his assent to the publication may be presumed. If, for instance, he sends manuscript to the publisher of a periodical, and the latter prints either the whole thereof or a part only, the author must be regarded as guilty of the publication, and held responsible accordingly: *Turpley v. Blaney*, 2 Bing. N. C. 437; 2 Scott, 642; 7 Car. & P. 395; *Bond v. Douglas*, 7 Id. 626; *Pierce v. Ellis*, 6 I. C. L. R. 55; *Rex v. Lovett*, 9 Crim. Law Rep. 462; *Burdett v. Abbot*, 5 Dow, 201; 14 East, 1; and one may be regarded as the author of a libel, and answerable for its publication, although he does not himself commit it to writing, as when, being present at a public meeting where libelous charges are made, he calls attention to the representatives of the press there present, and states that the case is a very scandalous one, of which he hopes they will take notice, and that they will give publicity to the matter: *Parkes v. Prescott*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 Week. Rep. 773; 20 L. T. 537.

In Illinois, at the trial of a prosecution for libel, it appeared that the defendant made a statement of the facts constituting the alleged libel to a reporter of a newspaper, who, after writing part of an article embodying these facts, communicated them to the editor of the paper, who wrote and published the article which was claimed to be libelous. When the article was set up in type, it was read by the defendant from proof-sheets, who said it was a little rough, but it was true, and let it go. Having been convicted, the defendant insisted that these facts did not justify the finding that he published the article, and, therefore, that he was wrongfully convicted; but the supreme court, in sustaining the conviction, said: "It is a familiar maxim that what a person does by another he does by himself. And we think it applies in its full force in this case. He voluntarily gives the main statements in the article to one of the persons connected with the publication of the paper, who, after writing part of an article embodying the facts thus given him, communicated them to the editor of the paper, who thereupon wrote and published the article read in evidence. After it was in type, the article was read to plaintiff in error from the proof-sheet. He suggested a

correction as to the course the family referred to resided from Streator; said it was a little rough, but it was true, and let it go. That he, in substance, so said to Gale and Babcock, we think so abundantly proved as to require the jury to so find. He knew it was in type, for the purpose of being published in the paper. He must have known it was read to him to get his indorsement of the truth of the statements it contained. He made no protest or objection to its publication, but, on the contrary, said 'let it go,' and it was published as he thus directed. We may reasonably infer that had he previously, or even at that time, directed the editor not to publish the article, as it might not be true, and if not, that it would inflict a grievous wrong on innocent people, it would never have appeared. On the contrary, he volunteered the statements on which the article is based; hears it read after it is written and in type; hearing it read, he says 'let it go,' and it was published as it was thus directed. Although the editor may be equally liable, that does not exonerate the plaintiff in error. He took an active part in its production and publication, and is essentially one of its authors and publishers, and, as such, must be responsible for the injury he has inflicted on society by his reckless, if not wanton and malicious, conduct in this matter. It would have required but little effort to have learned whether the rumor, as he calls it, was true; but he does not pretend to have made any effort. He himself admitted that it was rough, but that did not restrain his action. We have no doubt of the sufficiency of the evidence to sustain the verdict, and, perceiving no error in the record, the judgment of the court below is affirmed": *Clay v. People*, 86 Ill. 147.

The liability of the editor of a periodical is, in England, coextensive with that of its proprietor: *Watts v. Fraser*, 7 Car. & P. 369; 7 Ad. & E. 223; 1 Moody & R. 449; 1 Jur. 671; *Kelzor v. Newcomb*, 1 Fost. & F. 559. In this country, the editor may escape liability by showing that the libel complained of was published without his orders and against his will: *Commonwealth v. Kneeland*, Thach. C. C. 346.

The printer of a periodical is also answerable for any libel therein, and he cannot avoid liability upon any grounds which are not equally available to its proprietor: *Rex v. Dover*, 8 How. St. Tr. 546; *Watts v. Fraser*, 7 Car. & P. 369; 6 Ad. & E. 225; 1 Jur. 671; 1 Moody & R. 449.

Those who distribute periodicals, either gratuitously or through the sale thereof, thereby become publishers of any libel to be found therein, and equally liable with the proprietor, except that they may exonerate themselves by proving that they did not know, nor have any reason to suspect, that such periodicals contained any libelous matter: *Staub v. Bentheuser*, 36 La. Ann. 467; *Rex v. Matt*, 8 Mod. 123; *Emmens v. Pottle*, L. R. 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 Week. Rep. 116; 53 L. T. 808; *Day v. Bream*, 2 Moody & R. 54. In the case of the sale of a great or unusual number of the periodical containing the libel, it is obvious that a defense of this character ought not to be sustained; for the unusual sale ought to put the vendor on inquiry for the cause of the exceptional demand, and no one should be permitted to reap unusual profits through the sale of a libel, and then shield himself by proof of his own negligence in closing his eyes to what he was then doing: *Chub v. Flannagan*, 6 Car. & P. 431.

Though several persons may be guilty of the publication of a libel, and therefore subject to an action therefor, neither, after satisfying a judgment obtained against him, has any right to contribution from the other. In fact, there does not appear to be any possible case in which one who is guilty of a libel may compel another to share with or indemnify him for the conse-

quences thereof: *Colburn v. Patmore*, 1 Crompt. M. & R. 75; 4 Tyrw. 677. An agreement, made in advance of the publication of a libel, to indemnify and save harmless the publisher thereof for any damages which may be recovered of him by the party libeled, is against public policy, and therefore void: *Atkins v. Johnson*, 43 Vt. 78; *Arnold v. Clifford*, 2 Sum. 238.

The publication of a libel in a periodical may be proved by putting in evidence a copy of such periodical, and showing that it came from defendant's office, and was one of an edition of the same date: *State v. Geandell*, 5 Harr. (Del.) 475; *Woodburn v. Miller*, Cheves, 194; or by establishing that other copies were sold by the defendant's agent, who received money for them: *Respublica v. Davis*, 3 Yeates, 321. A periodical, printed and published in one state, may also be generally circulated in other states, and when this is the case, the same person may be answerable for its publication in both states. Thus one who has written a libel, and caused it to be published in a periodical in Rhode Island, may be convicted of publishing it in an adjoining county of Massachusetts, in which the periodical usually circulated, if it appears that the number containing the libel in question was received and circulated in such county: *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Clinton v. Crosswell*, 2 Caines, 244; 2 Am. Dec. 235. There is no doubt that the circulation of a periodical in any county or state is sufficient to sustain an action or prosecution for its publication in such county or state: *Root v. King*, 4 Cow. 403; *Lucan v. Carendish*, 10 Ir. L. T. 537; *Pickney v. Collins*, 1 Term Rep. 647; *Commonwealth v. Malcom*, 101 Mass. 6.

MALICE. — To entitle one of whom a libel has been published in a periodical to recover his actual damages suffered therefrom, he need not offer any evidence to show whether or not its author or publisher was actuated by malicious motives. If the matter published is both libelous and untrue, malice on the part of its publisher is presumed: *Bradstreet v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Ryan v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726; *Beehee v. Missouri Pacific R'y*, 71 Tex. 424; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Simmons v. Holister*, 13 Minn. 249; *Root v. King*, 7 Cow. 613; *Dillard v. Collins*, 25 Gratt. 343; *Smart v. Blanchard*, 42 N. H. 137; *Eviston v. Cramer*, 47 Wis. 659; *Jones v. Townsend's Adm'r*, 21 Fla. 431; 58 Am. Rep. 676. With respect to malice in law this presumption is conclusive. And here it is proper to observe that it is unfortunate that the word "malice" has at least two legal meanings, and that it is sometimes difficult to determine in which it is intended to be used by judges and text-writers in discussing the law of libel. In its ordinary signification, malice means actual ill-will; a desire to injure the object of it, or at least a reckless disregard of consequences, and indifference whether injury is inflicted or not. Whether malice in this sense existed, or not, often becomes a material subject of inquiry in actions and prosecutions for libel, because its existence may justify the imposition of exemplary damages, or render the defendant answerable for publications which are privileged when made upon proper occasions and from justifiable motives. But the presence of malice in this sense is never essential to the maintenance of an action for libel where the publication is not privileged. "In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally without just cause or excuse": *King v. Patterson*, 49 N. J. L. 417; *Blumhardt v. Rohr*, 70 Md. 328. "Malice is the gist of an action for slander. But the term 'malice' has a twofold signification. There is malice in law as well as malice in fact. In the former and legal sense, it signifies a wrongful act intentionally done without any justification or excuse. In the

latter and popular sense, it means ill-will towards a person; in other words, an actual intention to injure or defame him. This distinction runs through the elementary books and the reports of adjudged cases": *Gilmer v. Eubank*, 13 Ill. 274. "If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice — malice in fact and malice in law — in actions for slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communication to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff. But in an ordinary action, for libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice": *Bromage v. Prosser*, 4 Barn. & C. 247. The absence of malice in fact, therefore, will not relieve the defendant from liability for such injuries as he may have inflicted on the plaintiff by the publication of a libel upon him: *Haire v. Wilson*, 9 Barn. & C. 643; 4 Man. & R. 605; *Fisher v. Clement*, 10 Barn. & C. 472; 5 Man. & R. 730; *Wenman v. Ash*, 13 Com. B. 845; 22 L. J. Com. P. 190; 17 Jur. 579; *Huntley v. Ward*, 6 Com. B., N. S., 514; 6 Jur., N. S., 18; 1 Fost. & F. 552; *Clark v. Molyneux*, L. R. 3 Q. B. 237; 47 L. J. 230; and even in a criminal prosecution for libel, where the statute permits the defendant to give in evidence in his defense the truth of the matter contained in the publication charged as libelous, if he further satisfactorily shows that the publication was with a good motive, and for justifiable ends, proof that the matter published was libelous still constitutes a *prima facie* case, and the presumption of malice must be rebutted by the defendant; *Commonwealth v. Snelling*, 15 Pick. 337; *Commonwealth v. Bonner*, 9 Met. 410.

As before suggested, the presumption of malice in law is indisputable when the publication is false, libelous, and not privileged: *Dakota v. Taylor*, 1 Dak. 471. The publisher cannot rebut this presumption by proving that he believed the matters constituting the alleged libel to be true, and published it from good motives: *Smart v. Blanchard*, 42 N. H. 147; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33; *Cass v. New Orleans Times*, 27 La. Ann. 214; *Commonwealth v. Snelling*, 15 Pick. 337.

There may be circumstances in which a publisher may escape liability by showing that he did not know that the matter published was libelous. It was so held in a case where the defense "was that an alleged libel was a mere fancy sketch or fictitious tale, which had no relation to the plaintiff, and was not intended to apply to him; that the publisher did not know the plaintiff, nor had he heard of any of the facts stated in the alleged libel as applicable to him, and if it was intended by the writer to be so applied, the defendant had no knowledge of such intention": *Smith v. Ashley*, 11 Met. 367; 45 Am. Dec. 216; *Dexter v. Spear*, 4 Mason, 115. The facts in this case were exceptional, and the principles stated by the court in deciding it are not beyond question. Certainly if the matters published are libelous on their face,

or if there is anything to warn the publisher that he may injure the reputation of some one, or bring him into contempt, the defendant will not be permitted to prove, as a complete defense, that he did not know that the publication was libelous: *Curtis v. Mussy*, 6 Gray, 261.

In implying that an act must be done intentionally to be malicious in law, we think the authorities introduce a false element into their definitions of malice as applied to the law of libel, unless they further imply that every one must be conclusively presumed to intend the necessary or probable results of his acts. One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type, or in placing plaintiff's name under a column, headed "first meetings in bankruptcy," instead of that headed "dissolutions of partnership": *Shepherd v. Whitaker*, 1 L. R. 10 Com. P. 502; 32 L. T. 402; or in erroneously stating that the plaintiff's name had been stricken from the roll of attorneys, when it was intended to state that he had been suspended only: *Blake v. Stevens*, 4 Fost. & F. 232; 11 L. T. 543. Mere errors in printing an item written by the plaintiff in a somewhat illegible hand will not enable him to maintain an action for libel, though the item, as printed, necessarily exposes him to derision, to which derision the item as written by him contributes quite as much as the errors of the printers in deciphering his manuscript: *Sulling v. Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166.

DAMAGES. — So much of the law of damages as is peculiar to the law of newspaper libel is almost inseparably connected with the consideration of the question of malice in making the publication complained of. Of course, as in all other cases of libel, the plaintiff, when entitled to recover at all, should be awarded all the damages actually suffered by him. The more extensive the publication of the libel, the greater the injury probably occasioned by it. Therefore, as bearing on the question of the actual damages done to the plaintiff, he may prove the extent of the circulation of the periodical or pamphlet in which it was published: *Gathercole v. Miall*, 15 Mees. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337; *Fry v. Bennett*, 28 N. Y. 324; *Bigelow v. Sprague*, 140 Mass. 425; and the principal case. "If it appears upon the trial that there was no intention in fact to injure the plaintiff, and that all proper precautions were observed in the publication of the article complained of, such facts will not prevent a recovery of such damages, but will reduce the amount thereof to such sums as must inevitably result from the wrong": *Evening News Association v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450; *Scripps v. Reilly*, 38 Mich. 23. The plaintiff, if the matters published of him are libelous *per se*, need not offer any evidence of special damages, unless he desires thereby to increase the amount of his recovery; for if he has been libeled, the law will presume that he has been injured, and leave the amount of such injury to the determination of the jury: *Boogher v. Knapp*, 76 Mo. 457; *Price v. Whitely*, 50 Id. 437; *Rep. Pub. Co. v. Miner*, 12 Col. 77.

There are various matters which it is said may be proved in mitigation of damages. We do not understand this expression to mean that any of these matters ought to or can deprive plaintiff of his right to recover such damages as he has actually suffered, but rather that they may wholly or partly remove the presumption of malice, which will otherwise be indulged, and will therefore relieve the defendant from the imposition of punitive damages: *Rearick v. Wilcox*, 81 Ill. 77; *Shipp v. Story*, 68 Ga. 47; *Wazelka v. Hettrick*, 93 N. C.

10. Hence it has been held that a defendant may prove, in mitigation of damages, that he received letters purporting to have been written by reputable citizens charging the plaintiff with certain wrongful acts; that these letters were in fact forgeries, and that he, believing them to be genuine, was imposed upon and induced to publish the libel complained of, in the belief that it was true: *Storey v. Early*, 86 Ill. 461. If the defendant wishes to give evidence of the truth of the libelous matter, he must plead it in justification; and failing to so plead it, he is not entitled to place in evidence before the jury, in mitigation of damages, matters which ought to have been pleaded in justification. Hence if the defendant's belief in the truth of a libelous publication can be proved in mitigation of damages, it can only be in those cases in which he distinctly disavows all right to urge that the words published were true in fact, and merely seeks to remove the presumption of malice by disclosing "the circumstances which induced him erroneously to make the charge complained of": *Minesinger v. Kerr*, 9 Pa. St. 312; *Shilling v. Carson*, 27 Md. 175; 92 Am. Dec. 632; *Howard v. Thompson*, 21 Wend. 319; 34 Am. Dec. 238; *Petrie v. Rose*, 5 Watts & S. 364. In criminal prosecutions for libel, there are cases where, though the truth of the defamatory publication is not a complete defense, it may be given in evidence in mitigation of the offense: *Commonwealth v. Morris*, 1 Va. Cas. 175; 5 Am. Dec. 515; *Commonwealth v. Blinding*, 3 Pick. 304; 15 Am. Dec. 214; *Commonwealth v. Clap*, 4 Mass. 163; 3 Am. Dec. 212. The gross negligence of the defendant may be shown for the purpose of enhancing damages: *Smith v. Harrison*, 1 Fost. & F. 565; *Scripps v. Reilly*, 35 Mich. 272. On the other hand, evidence is admissible to rebut any imputation of negligence which might otherwise exist, and the proprietor of a periodical is therefore entitled to show the circumstances attending its publication, the necessity of prompt action on his part, the haste incident to issuing the paper, the time at which the libelous article was handed in, and the sufficiency of the force employed on the paper for gathering news and preparing and supervising articles for publication: *Scripps v. Reilly*, 38 Mich. 10. It is not proper, however, to instruct the jury that they may consider in mitigation of damages the excitement attending a pending election at which the plaintiff was a candidate, and that the alleged libel was published for the purpose of assisting in his defeat: *Rearick v. Wilcox*, 81 Ill. 77.

While the retraction of a libel does not relieve its publisher from liability for its publication, it may be proved in mitigation of damages: *Cass v. New Orleans Times*, 27 La. Ann. 214. One insult does not justify another, nor has the subject of a libel unbounded liberty to indulge in libels upon his adversary. Nevertheless, a libelous retort to a recently published libel is viewed with great charity. If it is in the nature of a reply to the previous libel, and in refutation of its charges, accompanied with disparaging remarks on the libeler not entirely irrelevant to the subject under consideration, the previous libel will be in many instances received in evidence in justification, and in all cases is admissible in mitigation of damages: *Chaffin v. Lynch*, 83 Va. 106; *Myers v. Kaichen*, 75 Mich. 272; *Stewart v. Minneapolis Tribune Co.*, 41 Minn. 71. The publisher may also prove in mitigation of damages that in publishing the article complained of he acted from an honest motive to protect the public against impostors, and upon information tending to show that the person defamed by the publication was engaged in a corrupt scheme to obtain and appropriate money for his own profit: *Mosier v. Stall*, 119 Ind. 244; *Hunter v. Sharpe*, 4 Fost. & F. 983; 15 L. T., N. S., 421.

The general rule controlling the reception of evidence in mitigation of damages is, that any circumstances may be proved "which tend to disprove

malice, but do not prove the truth of the charge": *Storey v. Early*, 86 Ill. 461; *Newell on Defamation*, 882. Evidence may therefore be admitted to show what were the motives of the defendant in making the publication. *Heilman v. Shanklin*, 60 Ind. 441. There is one class of evidence admissible in mitigation which appears to establish rather than to disprove actual malice. We refer to evidence of the existence of circumstances connected with the libelous charge, and showing any provocation therefor received from the plaintiff: *Knott v. Burwell*, 96 N. C. 279; *May v. Brown*, 3 Barn. & C. 113; 10 Eng. Com. L. 24.

Exemplary damages, in the absence of statutes denying them, may always be awarded if it appears that the defamatory publication proceeded from express malice or ill-will: *Snyder v. Fulton*, 34 Md. 128; and various circumstances may be received in evidence as tending to establish the existence of malice in fact. Among these are, that other libelous publications have been made by the same defendant against the same plaintiff: *State v. Riggs*, 39 Conn. 493; *Larrabee v. Minneapolis Tribune Co.*, 36 Minn. 141; *Behee v. Railway*, 71 Tex. 424; though made at so remote a period that any action to recover damages therefor is barred by the statute of limitations: *Evening Journal Association v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; or a refusal to retract a libel, or to publish, except as an advertisement to be paid for by the plaintiff, any card or statement expressing belief in his innocence: *Klewin v. Bauman*, 53 Wis. 244; *Barnes v. Campbell*, 60 N. H. 27.

If a periodical is owned or published by two or more partners, malice in fact of any one of them in making a libelous publication entitles the plaintiff to recover against all, as if all had participated in such malice: *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 528. We find it difficult to reconcile the decisions concerning the liability for libels attributable to the malice of editors, reporters, and other employees, in which the proprietors of the periodical in which the publication was made did not participate. It is undoubtedly true that a proprietor who places another person in charge of a periodical becomes answerable for whatever he may publish, "whether the wrong resulted from mere negligence, or from a wanton and malicious purpose to accomplish the business in an unlawful manner"; and, perhaps, in many states, a proprietor in whose periodical a libel is published through the malice or ill-will of an editor, reporter, or other employee is liable to the same extent as if the malice had been entertained, and the publication authorized by the proprietor himself: *Bruce v. Reed*, 104 Pa. St. 408; 49 Am. Rep. 586. Probably, however, the weight of authority at the present time is in favor of exonerating a proprietor from exemplary damages if the publication is due to the malice of his employees, and is made without his previous knowledge or consent, and under circumstances which relieve him from the charge of negligence in permitting such publication: *Steriston v. Cramer*, 57 Wis. 570; *Detroit Post Co. v. McArthur*, 16 Mich. 447; *Scripps v. Reilly*, 38 Id. 10; *Robertson v. Wyld*, 2 Moody & R. 101.

In a few of the states exemplary damages are not allowed in actions for slander or libel: *Rep. Pub. Co. v. Miner*, 12 Col. 77; *Rosewater v. Hoffman*, 24 Neb. 222; but in a greater number they may be awarded in all cases where the jury is satisfied, from the evidence, that the defamatory publication was actuated by malice or ill-will towards the defendant: *Templeton v. Graves*, 59 Wis. 95; *Klewin v. Bauman*, 54 Id. 244; *Montgomery v. Knox*, 23 Fla. 595; and this malice or ill-will may be inferred from the fact that the defendant has published defamatory matter of the plaintiff which falsely charges

him with an indictable offense, or which is otherwise libelous *per se*: *Bergmann v. Jones*, 94 N. Y. 51.

The plaintiff's reputation may, previously to the publication of the libel of which he complains, have been bad, in which case the publication can do him little or no harm. The defendant is entitled to prove this fact in mitigation of damages. The evidence upon this subject, to be admissible, must not be in regard to plaintiffs having in fact committed specific acts or crimes, but must be restricted to the plaintiff's general reputation: *Warner v. Lock-erly*, 31 Minn. 421; *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762; *Byrket v. Monohon*, 7 Blackf. 83; 41 Am. Dec. 212; *Clark v. Brown*, 116 Mass. 504; *Mahoney v. Belford*, 132 Id. 393; *Young v. Bennett*, 4 Scam. 43; or his reputation of having committed the particular act with which he is charged in the publication complained of: *Wetherbee v. Marsh*, 20 N. H. 561; 51 Am. Dec. 244. "The authorities are numerous to prove that the defendant is not confined to evidence of character founded upon matters of the same nature as were specified in the charges, as, for instance, to evidence of the plaintiff's character as a thief, whereas in this case the charge was theft; but he may give in evidence the general bad character of the plaintiff, not by way of justification, but in mitigation of damages, and for this inquiry the plaintiff must stand prepared": *Lamos v. Snell*, 6 N. H. 415; 25 Am. Dec. 468. That it had been generally reported and believed that plaintiff was guilty of the offense charged against him may in some of the states be proved as tending to establish that his reputation had, before the publication complained of, been so depreciated that the libel could not have injured him to the same extent as if he had been of good and unquestionable repute in the neighborhood wherein he lived, or where the publication was made: *Nelson v. Evens*, 1 Dev. 9; *Calloway v. Middleton*, 2 A. K. Marsh. 372; 12 Am. Dec. 499; *Wetherbee v. Marsh*, 20 N. H. 561; 15 Am. Dec. 244; *Sanders v. Johnson*, 6 Blackf. 50; 36 Am. Dec. 564.

There is no doubt that no one has any right to repeat a pre-existing but false defamatory rumor or statement, and the fact that a slander or libel is but a repetition of one previously existing never justifies it, and will not be received in evidence as a complete defense: *Watkins v. Hall*, 9 Best & S. 279; L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 Week. Rep. 857; 18 L. T., N. S., 561; *Hotchkins v. Oliphant*, 2 Hill, 410; although the last publisher discloses the name of some previous author or publisher at the time he makes the publication complained of: *McPherson v. Daniel*, 10 Barn. & C. 263; 5 Man. & R. 251; *Tidman v. Anslie*, 10 Ex. 63.

If a defamatory charge is published without any reference being made to its author or previous publisher, the last publisher, when an action is brought against him therefor, cannot show, even in mitigation of damages, that he merely repeated what had already been published by another: *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Inman v. Foster*, 8 Wend. 602; *Peterson v. Morgan*, 116 Mass. 350; *Bradley v. Gibson*, 9 Ala. 406; *Talbot v. Clark*, 2 Moody & R. 312; *Shehan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271; *Davis v. Sladden*, 17 Or. 259; *Marker v. Dunn*, 68 Iowa, 720. The defendant may, however, prove, in mitigation of damages, that the charge had been previously published, if, at the time of its republication, he either gave the name of the author or the person from whom he had heard it, or disclosed in some other appropriate manner that he did not make the charge himself, but merely repeated what he had heard or had seen in some other publication: *McDonald v. Woodruff*, 2 Dill. 244; *Bennett v. Bennett*, 6 Car. & P. 586; *Evans v. Smith*, 3 Mon. 363; *Dunscombe v. Danville*, 8 Car. & P. 222; 2 Jur.

32; *Storey v. Early*, 86 Ill. 461; *Galioway v. Courtney*, 10 Rich. 414; *Young v. Simons*, Wright, 124; *Williams v. Greenwade*, 3 Dana, 438. In Minnesota, and perhaps in a few other states, the defendant, for the purpose of establishing his belief of charges published by him, and of relieving himself from the imputation of malice in fact, may prove, in mitigation of damages, that he had seen the same charges in another periodical before he published them himself: *Hewitt v. Pioneer Press Co.*, 23 Minn. 178.

Newspapers exist in response to a demand of the public for news, or for information upon divers subjects, both public and private. When one who publishes a libel acts in the *bona fide* discharge of a public or private duty, legal or moral, he is exonerated from liability, unless it appears that he acted with a malicious intent: *White v. Nichols*, 3 How. 286. There are provisions in the constitution of many of the states guaranteeing the liberty of the press, and there is an unquestionable demand for news upon all sorts of topics, and especially for statements concerning the character, reputation, and supposed evil doings of those who are personally known in the community, or whose prominence is such as to excite interest in them even beyond localities in which they are personally known. Because of these provisions guaranteeing the liberty of the press, and of the wide-spread demand for all kinds of news, it has been claimed on behalf of publishers of periodicals that they have the right to publish whatever they may, in good faith, regard as news, and as supplying a well-known demand, provided that, in what they publish, they do not act malevolently, nor otherwise than merely in response to the desire of the public for information respecting the matters published. From the fact that there is a demand for news, they argue a duty on their part to supply such demand, and, as a necessary consequence, that they can not be held answerable for performing this duty as long as they do not act maliciously, even though it should happen that the statements published were not true, and were calculated to imperil or destroy the reputation and happiness of the persons against whom they were made.

If the duty of the proprietor of a periodical is to be measured by the demand for what he publishes, then the more libelous his publications the more imperative his duty to publish them, for, doubtless, the demand for defamatory news is more eager and inexhaustible than for any other. The existence of this duty cannot be conceded, except to a very limited extent. In considering whether it may be conceded at all, and if so, under what circumstances, or in what cases, publications may profitably be divided as follows: 1. Those relating to private persons, acting in their private capacity; 2. Those relating to persons either filling or seeking public offices or stations, or to the criticism of works to which they have expressly or impliedly invited public attention; 3. Those relating to acts done or proceedings taking place in some public office or department, — legislative, executive, or judicial.

The liberty of the press, which is guaranteed under the constitution of many states, does not confer upon it any greater right to publish, through periodicals, than is given by those other clauses of the same constitutions guaranteeing liberty of speech, — to publish through the vocal organs. In either case, the publisher is subject to the laws of the land; his publication must not be criminal, nor one in defiance of the penal laws; and, at least, when false and defamatory, he must answer in damages to any one defamed or injured thereby: *Davidson v. Duncan*, 7 El. & B. 229; 26 L. J. Q. B. 104; *Palmer v. Concord*, 48 N. H. 211; 97 Am. Dec. 605; *Burnes v. Campbell*, 59 N. H. 185; 47 Am. Rep. 183.

A leading case upon this subject is that of *Shekell v. Jackson*, 10 Cush. 25.

The defendants had published a libel of the plaintiff, charging him with treachery and bad faith in regard to money received by him to obtain manumission of a fugitive slave, and with then inviting the slave to go into a slave district with a view of again placing him in a state of slavery. The defendants sought to prove that there was a general anxiety in the community lest the slave in question had been deceived in transactions with the plaintiff, and reduced to slavery; and they claimed that, as publishers of a periodical, they had a duty to perform, and that they stated what they honestly thought to be true. The trial court, among other instructions, gave the jury the following: "But in point of law, the occasion of this publication was not such a one as affords a justification to the defendants for publishing what was not true. The defendants' case does not come within the privileged or excepted cases from the general rule. But if the publication is libelous upon the plaintiff, upon the definition of libel as before given to you, then the defendants are by law responsible to the plaintiff in damages for the injury they have done him. Then it has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods, to the injury of others." These instructions, when assailed in the appellate court, were pronounced correct in point of law, and well adapted and applied to the circumstances of the case.

"The terms 'freedom of the press' and 'liberty of the press' have misled some to suppose that the proprietors of a newspaper had a right to publish that with impunity for the publication of which others would have been held responsible. But the proper signification of these phrases is, if so understood, misapprehended. The 'liberty of the press' consists in a right in the conductor of a newspaper to print whatever he chooses, without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible for the publication": *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757.

"Freedom of the press and freedom of speech are equally sacred and equally protected by the constitution. Section 3 of the Bill of Rights provides that 'the liberty of the press shall forever remain inviolate, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such rights.' In this country, almost all officers are elective. The press does not possess any immunity not shared by every individual. In every election the same freedom of discussion of the merits and demerits of candidates is allowed equally to press and people, and every citizen can claim to be interested in the choice of his rulers. Now, can it be said that every household visitation made by itinerant politicians, poisoning the minds of electors with libelous and slanderous charges against candidates, every public harangue filled with similar matter, every club-room discussion in which such charges are bandied about with licentious freedom and exaggeration, are privileged communications, and imposing upon the injured party the necessity of proving that they were uttered and published with express malice? We have never supposed that the freedom of speech, even in this country, could legally be carried to such an extent. Yet, if such is the law as to an article published in a public journal, there can be no good reason shown why it does not extend to all channels of communication between man and man during the pendency of an election. We think a public

journal or an individual who indulges in defamatory assertions about candidates for office is equally liable for his acts with those who commit the same offense against private individuals": *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84.

So far as our researches have extended, we have been unable to discover any case wherein a periodical has falsely charged a person acting in his private capacity with the commission of a crime in which the proprietor of the periodical has been permitted to justify his act on the ground that the publication was privileged, because made in good faith as an item of news. "The right to publish through the newspaper press such matters of interest as may thus be properly laid before the public does not go to the extent of allowing publications concerning a person of false and defamatory matter, there being no other reason of justification for doing so than merely publishing the news": *Mallory v. Pioneer Pub. Co.*, 34 Minn. 521; *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33. "The law favors the freedom of the press so long as it does not interfere with private reputation, or other rights entitled to protection. And inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to public scrutiny. And since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns, to the lowest degree which reasonable foresight can assure": *Detroit Daily Post Co. v. McArthur*, 16 Mich. 452.

In the case of *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183, the defendants, who had charged plaintiff with the commission of a crime, pleaded that they were the publishers of a newspaper, and, as such, that it was their duty to give to their readers such items of news as they might judge to be of interest and value to the community, and that, as such publishers, they published the article complained of in good faith, without malice, and believing, and having good reason to believe, the same to be true. In determining that this plea was insufficient, and ought to be stricken out, the appellate court said: "The defendants probably intended to set out the excuse of a lawful occasion, good faith, proper purpose, and belief, and probable cause to believe, that the publication was true. They laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt as a privileged class from the consequences of damage done by their false news. Their communications are not privileged merely because made in a public journal. They have the same right to give information that others have, and no more. The occasion of the defendants' publishing a false charge of crime against the plaintiff was not lawful, if the end to be attained was not to give useful information to the community of a fact of which the community had a right to be, and ought to be, informed, in order that they might act upon such information: *State v. Burnham*, 9 N. H. 34, 41, 42; 31 Am. Dec. 217; *Palmer v. Concord*, 48 N. H. 211, 217; 97 Am. Dec. 605; *Carpenter v. Bailey*, 53 N. H. 590; 56 Id. 283. The defendants do not state facts that would constitute a lawful occasion. They make a loose averment of their general duty to give their readers such news as they (the defendants) might properly judge to be of interest and value to the community. This should be struck out of the

record as insufficient and misleading. It is, in effect, an intimation that they published the libel in the usual course of their business, and is calculated to give the jury the erroneous impression that the defendants' judgment of the propriety of the publication is evidence of the lawfulness of the occasion. The defendants' general business of publishing interesting and valuable news was not, of itself, a lawful occasion for publishing this particular false and criminal charge against the plaintiff. It will be for the jury to say what weight the defendants' business has as evidence on the question of malice. But however high the defendants' vocation, and however interesting and valuable the truth which they undertake to give their readers, their ordinary and habitual calling is no excuse for assailing the plaintiff's character with this false charge of crime. They must show specific facts, constituting a lawful occasion in this particular instance, as if this false charge had been the only thing they ever published."

While the decisions to which we have referred have generally related to libels charging plaintiff with grievous crimes punishable as felonies, the same principles must prevail where the libel in question is less serious in character: *Snyder v. Fulton*, 34 Md. 128. Thus a periodical reflecting upon the integrity of a professional man, and charging him with treachery to the interests committed to his protection, cannot be justified because published as an item of news; nor, if he be a lawyer, can the publication be justified on the ground that it related to his conduct of a proceeding in court; for, in those cases in which publication may be made of proceedings in court, the publication must be confined to what actually took place, and not accompanied by libelous animadversions on the participants: *Atkinson v. Detroit Free Press Co.*, 45 Mich. 341; *Ludwig v. Cramer*, 53 Wis. 193.

Various statutes have been enacted in different portions of the United States for the purpose of modifying the law of libel with a view of enlarging the circumstances under which newspapers may either wholly escape liability, or may diminish the damages otherwise recoverable. Thus in Connecticut, in the year 1855, it was enacted "that in every action for an alleged libel the defendant may give proof of intention; and unless the plaintiff shows proof of malice in fact, he shall recover nothing but the actual damages proved and especially alleged in the declaration." In construing this statute it was held that a belief that the charge is true is not a defense sufficient to excuse the party making the publication, where the circumstances were such as to show an indifference to its truth or falsity: *Moore v. Stevenson*, 27 Conn. 14. It was also held that this statute permitting the defendant to give evidence of his intention was but an extension of a rule previously existing as to the admissibility of evidence; that such evidence had always been admissible in reduction of damages, but that the statute made it, in the absence of rebutting proof on the part of the plaintiff, a bar to the recovery of general damages; that the provision that the plaintiff shall prove malice in fact was not intended to prescribe any new rule as to the kind and degree of malice to be proved, or as to the evidence by which the existence in fact of improper motives was to be shown, but only to require that it be shown by other evidence than mere legal presumption from the fact of publication that the defendant's motives were not proper and justifiable; that the motives of defendant were improper may still be inferred from the character of the publication itself and from the attendant circumstances, and that it was not necessary for the plaintiff to prove any actual hostile motives; and finally, that any construction of the act which would make it abridge beyond these limits the rights of plaintiff in such a suit would bring it into conflict with that portion of the constitu-

tion of the state declaring that "every person for an injury done him in his person, property, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay": *Hotchkiss v. Porter*, 30 Conn. 414. By the Michigan statute of 1885 it was enacted "that in any suit brought for the publication of a libel in any newspaper, the plaintiff shall only recover actual damages, if it shall appear that the publication was made in good faith and did not involve a criminal charge, and its falsity was due to mistake or misapprehension of the facts; and that in the next regular issue of said newspaper after such mistake or misapprehension was brought to the knowledge of the publisher or publishers, whether before or after suit was brought, a correction was published in as conspicuous a manner and place in said newspaper as was the article sued on as libelous"; and the statute further declared that the words "'actual damages' should be construed to include all damages the plaintiff may show he has suffered in respect to his property, trade, profession, or occupation, and no other damages." In the case of *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep., the opinion was expressed that this statute was not "within the power of constitutional legislation." This portion of the opinion was, however, not necessary to the decision of the case. A similar statute having been adopted in Minnesota, its constitutionality was sustained by the supreme court of that state in *Allen v. Pioneer Press Co.*, 40 Minn. 117; 30 Alb. L. J. 294; 12 Am. St. Rep. 707. In this case it was further determined that mere belief in the truth of the publication is not sufficient to constitute good faith on the part of the publisher; that he must be free from negligence as well as from improper motives in making the publication; and that it is his duty, notwithstanding the statute, to take all reasonable precautions to verify the truth of the statement and prevent any untrue and injurious publication against others.

The head-line of an article or paragraph, being so conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, may in itself inflict very serious injury upon a person, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. There is no doubt that in publications concerning private persons, as well as in all other publications which are claimed to be libelous, the head-lines directing attention to the publication may be considered as a part of it, and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so: *Lewis v. Clement*, 2 Barn. & Adol. 702; *Clement v. Lewis*, 7 Moore, 200; 3 Brod. & B. 279; *Harvey v. French*, 2 Tyrw. 585; 1 Car. & M. 11; 2 Moore & S. 519; *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874.

We have heretofore shown that the publication of a libel cannot be justified on the ground that it is a mere repetition of what had already been said or otherwise published by some other person or periodical. The fact that a former publication took place at a public meeting and was a part of the proceedings of such meeting, or of a speech there delivered, or a report there made or filed, does not render the rule inapplicable, unless the meeting is that of some official body whose proceedings may be rightfully published within the limits to be hereafter stated. The fact that defamatory words are spoken or written to or by an assemblage of persons does not entitle a proprietor of a periodical to republish them: *Davison v. Duncan*, 7 El. & B. 229; 3 Jur., N. S., 615; 26 L. J. Q. B. 104; *Popham v. Pickburn*, 7 Hurl. & N. 891; 8 Jur., N. S., 179; 31 L. J. 133; 10 U. K. 324; 5 L. T., N. S., 846; *Hearne v. Stowell*,

12 Ad. & E. 719; 4 Perry & D. 696; 6 Jur. 456; and if the republication is incited by any of the participants in such meetings, they are answerable therefor: *Parks v. Prescott*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 Week. Rep. 773; 20 L. T., N. S., 537.

While, ordinarily, a periodical cannot justify a libelous publication on the ground that it had a duty to the public, or some portion of it, to make the publication in question as an item of news, a periodical may exist for the special purpose of keeping a particular body or class of men informed on a special subject, and where this is so, it may perhaps justify a republication of libelous matter as falling within the duty which it has voluntarily assumed to its patrons. The least questionable instances of this class of periodicals is to be found in professional and religious journals, which undertake to keep the members of a profession, church, or association informed with respect to the conduct or standing of their fellow-members, and of other matters of especial interest to the common members of such church, profession, or association. If charges have been preferred against a church member, and have resulted in his trial and excommunication by the proper authorities, his sentence may afterwards be read in the church of which he was a member, in the presence of his fellow-members and others who may happen to be there present, without subjecting his pastor, who reads it, to an action for libel: *Farnsworth v. Storrs*, 5 Cush. 412. On the same principle, if a charge is made against a minister to an association of ministers of the same church, and is followed by the adoption by them of a resolution declaring their belief in the truth of such charges, and notifying the subject of it to appear and show cause why he should not be dismissed, the publication of this resolution in those periodicals recognized as denominational organs is privileged: *Shurtleff v. Stevens*, 51 Vt. 501; 31 Am. Rep. 698. A medical journal may also publish the proceedings of a medical society, when such society is a public corporation authorized by law, though the proceedings include charges made against a member of the association resulting in his expulsion: *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479.

The decisions upon the topic which we are now considering are infrequent, and are hardly sufficient to definitely settle the law controlling it. Possibly they may all be explained and supported upon the ground that the proceedings republished took place before *quasi* judicial tribunals to the jurisdiction of which the parties claiming to have been libeled were subject, and that the publications were justifiable as fair reports of what took place before such tribunals.

If it were possible for one to voluntarily assume the duty of giving information by written or printed publications to a special class of patrons, and to defend whatever he might thus do, in good faith and without malice, as privileged, then the protection of the rule should be extended to the proprietors of commercial agencies, who undertake to obtain information of the standing of persons engaged in trade, and to give their patrons the benefit of such information by circulars or other printed or written means of communication. But while it is lawful to collect such information, and to impart to any patron who may especially apply therefor whatever has been learned concerning the business repute or affairs of any one in whose affairs such patron has any interest (*Ormsby v. Douglass*, 37 N. Y. 477; *Stute v. Lonsdale*, 48 Wis. 348; *Trussell v. Scarlett*, 18 Fed. Rep. 214; *Sock v. Bradstreet*, 22 Id. 771), yet general publications purporting to disclose the business standing or acts of men, and which are circulated among all the patrons of the publisher, and may therefore reach persons who may not have any special interest in the business

or affairs of the person of whom the statements are made, are not privileged, and if false and defamatory, are actionable. This rule has been applied with but little judicial dissent in actions for libel, brought against the Bradstreet and other well-known commercial agencies: *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Dec. 322; *Taylor v. Church*, 8 N. Y. 452; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Ever v. Dun*, 12 Fed. Rep. 526; *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622; *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77.

The freedom with which libelous statements are made against, and dishonest and corrupt motives attributed to, public officers in periodicals of high standing and wide circulation tends to produce a popular impression that such officials are not protected by the law against libel. If this impression is to any extent correct, the fault is in the administration of the law, and not in the law itself. The law, instead of abandoning its agents and administrators, seeks to give them special protection; and pronounces as libelous publications of persons in their official capacities which might be regarded as innocent if they were private citizens only. Words spoken of a person to disparage him in an office of public trust, and which directly tend to prejudice him therein, are actionable, without any proof of special damages: *Bellamy v. Burch*, 16 Mees. & W. 590; *Tillotson v. Cheetham*, 3 Johns. 56; 3 Am. Dec. 459.

It is true that "it is the duty of all who witness any misconduct on the part of a magistrate, or any public officer, to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bona fide* and forwarded to the proper authorities, are privileged. It is not necessary that the informant or memorialist should be in any way personally aggrieved or injured; for all persons have an interest in the pure administration of justice, and the efficiency of our public affairs in all departments of state": *Olgers on Libel and Slander*, 225; *Harrison v. Bush*, 5 El. & B. 344; 25 L. J. Q. B. 25, 99; *Lake v. King*, 1 Sev. 240; 1 Saund. 131; 1 Mod. 58; *McIntyre v. McBean*, 13 U. C. Q. B. 534. Such charges, to be privileged, must always be made in good faith and to some person, officer, or tribunal authorized to consider them; and must not be spread broadcast over the land. The press has no more privilege to libel public officials than it has to libel private citizens. It owes no duty to the public which justifies it in making false and defamatory charges against public officials. "One may in good faith publish a truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor, however good his motive." The acts of officers may be criticised; they may even be exposed to ridicule and sarcasm without subjecting the publisher to liability for libel. It is otherwise with respect to the private characters and motives of officers. Aspersions upon them are at the peril of the publisher. He may escape this peril by showing that they were true. The public has an interest in knowing the truth about its officials, but has not any such interest in knowing falsehoods regarding them. The publisher of a libel upon a public official can justify his publication only by proving that it was true: *Hamilton v. Eno*, 81 N. Y. 116; *Parmeter v. Coupland*, 6 Mees. & W. 105; 4 Jur. 701; *Wilson v. Reed*, 2 Fost. & F. 149; *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436; *Bourreseau v. Detroit etc. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320; *Nebb v. Hope*, 111 Pa. St. 145; *Campbell v. Spottiswoode*, 3 Best & S. 769; 9 Jur., N. S., 1069; 32 L. J. Q. B. 185; 11 Week. Rep. 569; *Rowand v. De Camp*, 96 Pa. St. 493.

The following publications regarding public officials have therefore been

adjudged not to be privileged, and to be actionable, unless shown to be true: A statement that an award made by a public officer recommending a certain street pavement had been dictated by those interested in such pavement, and made in consideration of a reward given such officer: *Hamilton v. Eno*, 81 N. Y. 116; a charge that a member of the legislature had been bribed, or had voted for or against any particular measure from corrupt and dishonest motives: *Cramer v. Riggs*, 17 Wend. 209; *Wilson v. Nunan*, 23 Wis. 105; *Negley v. Farrow*, 60 Md. 158; that the plaintiff, who was a member of Congress, was a fawning sycophant, and misrepresentative in Congress, and a groveling office-seeker, and had abandoned his post in Congress in pursuit of office: *Thomas v. Croswell*, 7 Johns. 264; 5 Am. Dec. 269; that plaintiff had openly avowed the opinion that government had no more right to provide by law for the support of the worship of a Supreme Being than for the worship of the Devil: *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189; that plaintiff lacked capacity as a judge, had abandoned the principles of truth, and bartered away the office of clerk of his court in such manner as to cancel some of his private debts: *Robbins v. Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152; that it was expected that the plaintiff, as court commissioner, would discharge all persons who might be committed by the legislature for refusing to testify, merely to subserve the views of other parties, whose tools and toadies the plaintiff was, and that whatever he might do in the future, the past would warrant the depriving him of his office: *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 281; that the plaintiff was "a damned-fool justice": *Spiering v. Andrae*, 45 Wis. 330; that the plaintiff, subscribing himself chairman of the Democratic county committee, appeared in a card for a ring, by which he was paid a fee, and the publication of which was paid for out of the corruption fund of the ring; that he had descended from the high calling of a clergyman to the recognized champion and professional defender of prostitutes, and the lowest grade of criminals who throng the audience halls of police courts, and seems to follow his profession solely for the purpose of making money, and his opinions are molded by the extent of his client's means to pay: *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367; that a city physician has caused the death of a child by reckless treatment: *Foster v. Scripps*, 39 Mich. 376; 33 Am. Rep. 403; that the plaintiff, as representative in Congress, had, for the purpose of obtaining votes, intentionally pressed for the payment of public money on claims the validity of which was questionable: *State v. Schmitt*, 49 N. J. L. 579; that plaintiff, while holding the office of sealer of weights and measures, had made a practice of tampering with the weights and scales in order to swell the fees of his office: *Eviston v. Cramer*, 57 Wis. 570; that the plaintiffs, who were officers of the state penitentiary, had been grossly derelict in their duty, and in the management of the prison: *Banner Pub. Co. v. State*, 16 Lea, 176; 57 Am. Rep. 214; that the plaintiff was a "retail liquor dealer, and, we are informed, is under indictment for not canceling the stamps on liquor-casks, the contents of which he has sold": *Jones v. Townsend's Adm'r*, 21 Fla. 431; 58 Am. Rep. 676; that a county superintendent of schools, for a consideration in money, had induced the county board of education to order a change in school-books: *Hartford v. State*, 96 Ind. 461; that a school-teacher had punished a pupil so excessively as to cause its death: *Doan v. Kelley*, 121 Id. 413.

While the motives and private characters of public officials cannot be assailed in periodicals without subjecting their proprietors to actions for libel, in which they must assume the burden of establishing the truth of their defamatory assertions, criticism of all official acts may be safely indulged, and the language employed may be caustic and irritable in the extreme. A peri-

odical may comment on the conduct of a magistrate in dismissing a case without hearing the whole evidence, or in committing a prisoner for trial on insufficient evidence, if the motives of the magistrate in so doing are not questioned: *Hibbins v. Lee*, 4 Fost. & F. 245; 11 L. T. 541. Comment may also be made on the management of the poor, and the administration of the poor-law: *Purcell v. Sowler*, L. R. 2 C. P. D. 218; L. R. 46 C. P. D. 308; 25 Week. Rep. 362; on the official conduct of way-wardens: *Harle v. Catherall*, 14 L. T. 801; and on that of all other officials in the discharge of the duties devolving upon them as such.

Doubtless it is impossible to prescribe the precise limits to which the criticism of official action or inaction may extend without becoming unlawful, and therefore actionable. But few attempts have been made to describe these limits. One of these may be found in the opinion of the court in *Palmer v. City of Concord*, 48 N. H. 211; 97 Am. Dec. 605. Palmer brought an action against the city to recover damages for property destroyed by a mob. The statute under which the action was authorized declared that no recovery could be had thereunder in favor of any person, if the destruction of his property was caused by his illegal or improper conduct. The defendant, for the purpose of proving that the loss of plaintiff's property grew out of his illegal and improper conduct, offered evidence that its destruction was the act of soldiers justly enraged at articles in the plaintiff's periodical reflecting on the conduct of the war, and imputing to the officers and men constituting the army of the nation cowardice, murder, and robbery. The court held that, as the charges were made against a body of men, without specifying individuals, that probably no single soldier could maintain any action therefor; but that an indictment might nevertheless have been found and successfully prosecuted therefor, because it tended to a breach of the peace, and to the disturbance of society at large. Upon the question whether the publications made by plaintiff were defensible as criticisms on the conduct of public affairs, made in good faith and for justifiable motives, the court said: "Conductors of the public press have no rights but such as are common to all: *Sheckell v. Jackson*, 10 Cush. 25-27. But in this country every citizen has a right to call the attention of his fellow-citizens to the maladministration of public affairs, or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses or to defeat the re-election or reappointment of an incompetent officer. If information, given in good faith, to a private individual of the misconduct of his servants is 'privileged,' equally so must be the communication to the voters of a nation concerning the misconduct of those whom they are taxed to support, and whose continuance in any service virtually depends on the national voice. To be effectual, the latter communication must be made in such form as to reach the public. If the end which Palmer had in view — the controlling, moving purpose of the publication — was to inform the public of the manner in which the war was conducted, for the purpose of inducing citizens to use their influence with government to repress abuses, or to vote for members of Congress and other elective officers who would check such abuses, reform the army, stop the war, or conduct it in a more humane manner, his end or motive was justifiable. If the end to be attained is 'to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful': *Parker, C. J., in State v. Burnham*, 9 N. H. 34, 41, 42; 31 Am. Dec. 217. If such were Palmer's motives, he is not guilty of libel, if the facts he alleged were true, or if he had probable cause to believe, and did believe, that they were true. But if he had no justifiable

motive, inasmuch as the natural and inevitable tendency of the publication is to injure and degrade, he is guilty of libel, even though the facts alleged in the article were true."

In *Miner v. Detroit Post and Tribune Co.*, 49 Mich. 358, the alleged libel consisted of reflections upon the plaintiff's conduct as a justice of the peace, the substance of which was, that when a complaint had been filed in his court against a Chinaman, the judge, without the assent of the complainant, had inserted the name of another and different Chinaman; that though the evidence completely exonerated this second man, he was held for trial under heavy bonds; that his being so held was an inexcusable outrage; that if the justice would enforce the law against the violation of the liquor and gambling laws, when they were brought before him, people would be more lenient in their judgment, but instead of so doing he turns upon a helpless Chinaman, who has no political influence. The trial court ruled that so much of the defamatory article as related to the enforcement of the liquor and gambling laws was privileged, but that the imputations concerning the holding for trial of the Chinaman were not. The appellate court dissented from this latter ruling, and in an opinion by Mr. Justice Cooley, said: "When a judge orders a man into confinement without a charge against him, he deprives him of liberty without due process of law, and in doing so violates the earliest and most important guaranty of constitutional freedom. When in a case where bail is of right, he demands security in a sum which, considering the position in life and probable means and ability to give it, of the person accused, is altogether beyond his power, the demand is unreasonable, and for that reason is repugnant to a further provision of the constitution, the importance of which is only second to the other. There must be some great and most serious defect in the administration of the law when such things can take place, and the matter is one which concerns every member of the political community; for if constitutional principles fail to protect the most humble of the people, they protect no one. The defendant contends that to call public attention to what so vitally concerns the public is matter of privilege; and that, by presumption of law, its motives in doing so must be deemed proper, and not actuated by malice. The trial judge denied this claim altogether. In doing so he put the case precisely on the same footing with publications which involve merely private gossip and scandal. The truth was allowed to be a defense, if made out, and so it would have been if the injurious charge which was published had been one in which the public was not concerned. If there is no difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave personal concern, then this judgment may be right, and should be affirmed. But it is very certain, I think, that no declaration of this or any other court can convince the common reason that the distinction is not plain and palpable. Few wrongs can be greater than the public detraction which has only abuse, or the profit from abuse, for its object. Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty. I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern involving public wrongs, and the publication of personal scandal, come under the same condemnation of the law; for this inevitably brings the law itself into contempt, and creates public sentiment against its enforcement. If a law is to be efficiently enforced, the approval of the people must attend its penalties, and there must be some presumption, at least, that an act which it punishes involves some element of wrong-doing.

If, *prima facie*, the punishment is as likely to be inflicted for a right act as for a wrong act, the violation of law will not only be without disgrace, but the reckless libeler, when ranked by the law in the same company with respectable and public-spirited journalists, will shield himself to some extent behind their commendable public spirit, and will find some protection for his license in the public opinion which condemns the law which it cannot respect."

That a candidate for an elective office puts in issue his fitness for the office in question, is undoubted; and there can be but few, if any, public offices or trusts in respect to which a good moral character is not an essential element of fitness. In every species of service, whether public or private, fidelity is a requisite the absence of which no other qualities can adequately supply; and a probable want of fidelity may reasonably be anticipated from one who has previously been guilty of any breach of trust, or has engaged in any single act or any persistent course of conduct indicative of a willingness to disregard the principles of right. Therefore, in the discussion of the fitness of a candidate for an office which he seeks, or which others seek to impose upon him, his moral character and much of his private life are relevant. As the question of the fitness of the candidate affects the whole people, it may be discussed before the whole people; and every person who engages in the discussion, whether in private conversation, in public speeches, or in periodicals, may, while keeping within proper limits, and acting in good faith, be regarded and protected as one in the discharge of a duty.

But, conceding that the fitness, and, incidentally, the character of a candidate are in issue, and that every citizen is under a duty to assist in determining the issue, does not, necessarily, carry with it the further concession that he may, if he can, determine the issue by the aid of foul means as well as of fair. Certainly he may not be knowingly a false witness. The doubtful question is, whether, though he does not assert what he knows to be false, he may, without being responsible to the injured party, affirm that which is known to be defamatory, and is not known to be, and is not, true. The people have an interest in the character of the candidate; but both he and they have an interest that they shall not be induced to reject him through false aspersions against his character and previous conduct. The exigencies of an impending election often require prompt action. An accusation must sometimes be accepted or rejected, in the absence of a full opportunity to either obtain or duly weigh all the evidence bearing upon it; and it may, though false, be republished in a periodical by those who act in good faith, and in the belief that it is true, and ought to be known to all persons entitled to vote for or against the candidate upon whom it reflects. On the other hand, to grant immunity to political libelers, in all cases where their bad faith and malice in fact cannot be established by the libeled candidate, leads to the grossest abuse of the privileges of the press, including the flooding of the country with shrewdly conceived libels, purposely withheld until it is too late for their refutation or denial before the voting is to take place. These conflicting considerations have necessarily led the judiciary to conflicting decisions, one class of which inclines to protect candidates against false and defamatory statements concerning their private acts and characters, and the other class of which, in effect, though not in express terms, abandons them to all the furious tempest of defamation which either personal spite or personal or political self-interest may engender, leaving them no other protection than such as may be found in denial, in resort to counter-defamation, and sometimes to personal violence.

We shall first refer to decisions which, in our judgment, belong to the

class last mentioned. In *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, it appeared that the plaintiff was a judge of one of the courts of the city of Philadelphia, and was a candidate for re-election; that at a meeting of an association of citizens a letter was read, which, in substance, charged that a certain steal had been made possible through Judge Briggs's instructions to the jury. The defendant was the person who brought this letter to the meeting of the association, and caused it to be read in the presence and hearing of the reporters of the city press and others. As a matter of fact, Judge Briggs did not preside at the trial intended to be referred to in the letter, and the charge which was delivered by the judge who did preside at such trial "was fair, impartial, and in every way proper." The appellate court conceded that the charge contained in the letter was false, defamatory, and libelous; but maintained that as it was a charge made by a citizen against a candidate for office, it was a matter in which all the electors had an interest; that, as such, the defendant, unless he knew it to be false, had a right to communicate it to the meeting at which the reporters were present; that it was, in effect, a privileged communication; and, finally, that the plaintiff was entitled to no redress, "because of a rule of policy of far more importance than the inconvenience of a single citizen. That rule requires that free discussion, especially upon political topics and candidates, shall not be so hampered as to make it dangerous." In *Marks v. Baker*, 28 Minn. 162, the facts were, that, while the plaintiff was a candidate for re-election to the office of city treasurer, the defendants, who were residents and taxpayers of the city, published in a periodical of such city an article calling attention to a discrepancy between certain official reports, from which the inference might reasonably be drawn that the plaintiff had not charged himself with all moneys received by him as such treasurer, but had, on the other hand, embezzled some of them. An action having been brought for libel in making the publication mentioned, the defendants, in their answer, alleged that the publication was made in good faith; that they believed, at the time of making it, there was reasonable cause therefor, and that they were discharging a sacred and moral obligation as editors and publishers. At the trial, they admitted that, notwithstanding the discrepancy which existed, and to which they had called attention, the plaintiff had in fact accounted for all moneys received by him in his official capacity, and that any charge or insinuation to the contrary was false. The defendant Baker, being called as a witness for the defense, was permitted, as against the objection and exception of the plaintiff, to testify that, at the time of making the publication complained of, he believed it to be true; that he published it for the general interest, and for no other purpose; and that he did not intend to charge the plaintiff with embezzling any sum whatever. A judgment was entered in favor of the defendants; and upon an appeal therefrom, the admissibility of the evidence offered in their behalf was sustained. The court held that the subject-matter of the publication was one of public interest in the community of which the defendants were members, that it was therefore a privileged communication, if made in good faith, and that it was made in good faith, if the defendants published the article believing it to be true, and with a good motive or for a good object, and without any intention to do wrong, and with an affirmative intention to do that which, in view of the fact that the subject-matter of the article published was one of public interest, was right, and in a certain sense a duty; and furthermore, that, whether this intention established the full defense of a privileged communication or not, it was admissible, as showing mitigating circum-

stances, under the statute of Minnesota providing that, in an action for libel or slander, "the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and whether he proves a justification or not, he may give in evidence the mitigating circumstances." We understand the courts of Texas to be in substantial harmony with those of Minnesota respecting the questions now under consideration: *Express Printing Co. v. Cope-land*, 64 Tex. 354. In Iowa and Kansas, the liability of the publisher of a periodical for libel published of a candidate for office has not, as far as we are aware, been directly in question; but, in those states, it is clear that an elector who speaks or writes to other electors defamatory words respecting a candidate for office is not answerable therefor, if such elector, at the time, believed what he thus communicated to his fellow-electors to be true, and acted in good faith and with justifiable motives in making the communication: *Boys v. Hart*, 60 Iowa, 251; *State v. Blach*, 31 Kan. 465; *Mott v. Dawson*, 46 Iowa, 533.

The device of calling as a witness a defendant who has published of another that which is admitted to have been both false and defamatory, and who is being pursued in the courts for this grievous wrong, and having him testify that his motives were pure, his conduct actuated by an irresistible impulse to promote the public weal, and that, upon the whole, he regards himself as having acted the part of an exceptionally praiseworthy citizen "discharging a sacred and moral obligation as editor and publisher," has the recommendation of simplicity and effectiveness. The simplicity might, however, be still further simplified by dispensing with court, jury, and other witnesses, and submitting the question to the defendant without argument. The only safe evidence of a man's motives must relate to his acts, and to the circumstances under which he acted; and if he calls another man a felon, he must be conclusively presumed to intend to injure that man; and if the charge is false, he ought not to be permitted to shield himself from making just compensation, by interposing between himself and his victim the insubstantial form of his self-assumed public spirit, "discharging a sacred and moral obligation as editor or publisher." The better opinion, and the one sustained by the preponderance of the authorities, both English and American, is, that false and defamatory publications concerning the acts or character of a candidate are not privileged, and are actionable: *Onslow v. Home*, 3 Wils. 177; 2 W. Black. 750; *Harwood v. Astley*, 1 Bos. & P., N. R., 47; *Parkhurst v. Hamilton*, 3 Times L. R. 500. "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate": *Duncombe v. Daniell*, 8 Car. & P. 222; 2 Jur. 32; 1 W. W. & H. 101. "The authorities fully sustain the position that a publication in a newspaper, made either of a public officer or a candidate seeking an office from the votes of the people, which imputes to him a crime or moral delinquency, is not a privileged communication, either absolute or conditional; but such publication is *per se* actionable, the law imputing malice to the author or publisher": *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757. "If one accuse another of crime, he is presumed to make a false accusation; and malice is inferred from the falsehood. That the plaintiff was a candidate for office is no excuse for slandering him. We have no right to tell a lie of another because he is a candidate for office, or is in office; though we may speak the truth of him, we have no right to bear false witness against our neighbor. It would subvert our government

to allow the promulgation of falsehood, which would drive from office men who regard character, and leave it only to those without any": *Seeley v. Blair*, Wright, 358. "The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress, and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. 'Slander,' says Judge Overton, 'is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people when in the exercise of one right you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed, but no falsehoods be propagated.' To hold that false charges of a defamatory character made against a candidate are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensible and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled, and unworthy; to men who have no character to lose, and no reputation to blemish": *Bronson v. Bruce*, 59 Mich. 467; 60 Am. Rep. 307. When, therefore, the publisher of a periodical falsely charges a candidate with having been guilty of crimes or immoral practices, he cannot escape liability on the ground that the publication was made with good motives and for justifiable ends, without malice, and in the honest belief that the occasion required it: *Bronson v. Bruce*, *supra*; *Jones v. Townsend*, 21 Fla. 431; 53 Am. Rep. 676; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Curtis v. Mussey*, 6 Gray, 261; *Rearick v. Wilcox*, 81 Ill. 77. But if the charge was substantially true, though not correct in some particulars, or in the proper technical designation of the crime charged, and was made in good faith, and for justifiable motives, and by one who honestly believed it to be true, all these facts may be received in evidence, not as a technical justification, but as establishing that the plaintiff had suffered no substantial injury: *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251.

An attack upon a candidate, if otherwise privileged, must not be given a wider publicity than is necessary to accomplish the purposes which the publisher professes to seek. If the office is to be filled by appointment, or by an election in which only the members of a certain board or tribunal can participate, there can be no justification of a false and defamatory publication in the public press, and which must reach, and be intended to reach, a large number of persons who have no share in filling the office to which the person libeled is an aspirant: *Hunt v. Bennett*, 19 N. Y. 173.

In accordance with the principles announced in the decisions heretofore referred to as maintaining the better opinion concerning the defamation of candidates, the following charges have been held not to be privileged, and, when false, to be actionable: That the candidate had committed perjury: *Seeley v. Blair*, Wright, 358; or forgery: *Seeley v. Blair*, Id. 686; "was a scoundrel, a coward, a liar, an assassin, and a murderer": *Harwood v. Astley*, 4 Bos. & P. 47; had been guilty of cheating in two specified transactions: *Duncombe v. Daniell*, 8 Car. & P. 222; 2 Jur. 32; 1 W. W. & H. 101; was a professional gambler, a representative from the prize-ring or gambling-den,

a bully, and black-leg, one "whom you wouldn't trust in your hen-coop": *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757; was a forger, had stolen the deposits of poor men and women, and cheated laboring men out of their hard earnings: *Bronson v. Bruce*, 59 Mich. 467; 60 Am. Rep. 307; had been indicted for not canceling stamps on empty liquor-casks: *Jones v. Townsend*, 21 Fla. 431; 58 Am. Rep. 676; had "committed a misdemeanor, for which he was arrested and tried for his life, was arraigned at the bar in the state of North Carolina, and I will show it in black and white": *Brewer v. Weakley*, 2 Over. 99; 5 Am. Dec. 656; was in a drunken condition, and as such the object of loathing and disgust while acting as presiding officer of a state senate: *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; had been guilty of "legal Jesuitism," and in making a decision had acted from partisan and ignoble motives: *Curtis v. Mussey*, 6 Gray, 261; had been guilty of entering into a corrupt understanding with certain persons to control the political and legislative power of the state with a view to his own advantage, and to the serious injury of the public; and, if elected, would use his influence to embarrass and defeat a great public improvement: *Powers v. Dubois*, 17 Wend. 63.

If a publication consisting of an aspersion of a candidate can fairly be deemed a mere criticism, or an opinion which the author or publisher has drawn of his fitness for the office sought, and not as an assertion of a fact involving moral delinquency, it is privileged. Thus in *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757, it was said that "as when the alleged libels were published, the plaintiff was a candidate for popular suffrage, any allegations which referred to his fitness for the office he sought, mentally or physically, were privileged communications, and could not be the basis of a libel suit; nor any other allegations which did not refer to his moral character, though they were ever so harsh and uncomplimentary." It was therefore held that such charges as merely implied that the candidate was "an uneducated, lazy, and ignorant man, and as such unfit to represent the people," were not actionable, though "expressed in coarse and harsh language." Words imputing to a candidate mental weakness resulting to his mind from disease, and impairing it to the extent of disqualifying him for the proper discharge of the duties of the office, are not actionable: *Mayrant v. Richardson*, 1 Nott & McC. 347; 9 Am. Dec. 707.

The rule which permits adverse newspaper criticism of public officials is justified upon the ground that they have assumed duties toward the public; that the public has an interest in the proper performance of those duties; and that publications made in good faith, and for the purpose of advising the public of the conduct of its servants, may fairly be regarded as made in the discharge of a duty which every citizen owes to his fellow-citizens. The same reasoning must justify criticism of all other persons who, though not public officers, voluntarily assume duties of a public nature, in the fit performance of which large numbers of persons have an interest. The most familiar instances are clergymen and teachers of public and private schools. Their private characters and motives may not be safely maligned by the press. To falsely impute to them the commission of crimes or of acts which, though not punishable as criminal, are obviously grossly at variance with their callings, and such as, if true, ought to deprive them of their positions, is actionable: *Chaddock v. Briggs*, 13 Mass. 248; *McMillan v. Buch*, 1 Binn. 178; *Demarest v. Haring*, 6 Cow. 76; *Hayden v. Cowden*, 27 Ohio St. 292; *Higmore v. Harrington*, 3 Com. B., N. S., 142; *Pemberton v. Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011; *Gathercole v. Miall*, 15 Mees. & W. 319; 10 Jur. 337; 15 L. J. Ex. 179. But the conduct of public worship by

a clergyman, and the uses to which he puts his church and vestry, are lawful subjects of public comment: *Kelly v. Tinling*, L. R. 1 Q. B. 699; 14 Week. Rep. 51; 13 L. T., N. S., 255; 35 L. J. Q. B. 940; 12 Jur., N. S., 940. In *Press Company v. Stewart*, 119 Pa. St. 584, it was determined that one who had opened a school, to which he attracted attention by advertisements of an extraordinary nature, and wherein he assumed to teach his patrons the arts of shorthand writing, type-writing, and phono-scribing, became "thereby a *quasi* public character"; that "whether he was a proper person to instruct the young, and whether his school was a proper place for them to receive instruction, were matters of importance to the public"; that the newspaper "was in the strict line of its duty when it sought such information, and gave it to the public; and if that information tended to show that the plaintiff was a charlatan, and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it."

Directors and other managers of *quasi* public corporations, such as railways, may also, when dealing with great enterprises by which the citizens of large portions of a state or nation may be affected, may properly be regarded as public persons, and subjected to hostile criticism as such: *Crane v. Waters*, 10 Fed. Rep. 619; 26 Alb. L. J. 212.

In California it has been held that the office of director of a mining corporation should not be regarded as a public office, exposing its holder to the same liberty of adverse criticism to which public officials are subjected. In determining this question, the supreme court of that state said: "Another point made by the defendants is, that the publication was privileged, and that the defendants could not be held liable except on the proof of express malice, of which, it is claimed, there was no evidence whatever. It is said to be privileged, because it was published by public journalists as a matter of general and peculiar interest, and related to the conduct of plaintiff in his capacity of trustee of a mining corporation. But this was a private, and not a public, corporation. The plaintiff was in no sense a public officer, and was responsible only to the stockholders and creditors of the corporation for the fidelity of his conduct as a trustee. His office was no more a public office than that of a trustee of a private corporation to build a bridge or construct a wagon-road. Officers of this character have never been deemed public officers in such sense as to render them amenable to criticism, as in case of persons filling public offices of trust and confidence, in the proper administration of which the whole community has an interest. In the latter class of officers public policy demands that the official conduct should be open to unrestricted criticism, in which no malice is implied by law; and express malice must be proved, to render the author liable. No case has been cited, nor am I aware of any, which holds that the trustee of a private corporation is a public officer in the sense claimed by the defendants. Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case, that I am aware of, has ever gone so far. But while such publication cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstance under which the publication was made, the sources of his information, and the motives which induced the publication.* The public interest, and a due regard to the freedom of the press, demands that its conductor should not be mulcted in punitive damages for publication on subjects for pub-

lic interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publication in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff in respect to malice, there would be but little security for private character": *Wilson v. Fitch*, 41 Cal. 363.

Authors, artists, and all other persons voluntarily exposing the result of their labors to the public, seeking to gain favorable recognition of their work if found to be meritorious, become public characters, so far, at least, as their works are concerned. Any periodical may publish an estimate of such works, whether favorable or unfavorable; and if unfavorable, it may use strong terms of condemnation, and expose the work to merciless ridicule. No action can be sustained for such adverse criticism, unless it is shown or on its face it appears to be actuated by malice in fact: *Tabart v. Tepper*, 1 Camp. 351; *Carr v. Hood*, 1 Id. 355, note; *Thompson v. Shackell*, Moody & M. 187; *Soane v. Knight*, 1 Id. 74. A condemnatory criticism of a literary work or of a painting, though imputing profanity or indecency, will be excused, unless so unfair and reckless in its character as to justify the presumption of malice: *Strauss v. Francis*, 4 Fost. & F. 1107; 15 L. T., N. S., 674. An author may be written of so far as he is connected with the work which he has given to the public, but criticism of his work must not be used as a pretext for an attack upon his private character or reputation; and if a critic, while professing to give an estimate of a literary work, proceeds to attack the author and to impute to him either the commission of offenses or of being actuated by dishonorable motives, either in the work under consideration or in other works or respects, then the publisher may be guilty of libel. In other words, it is only the work, and the author as he exhibits himself in the work, which are subject to criticism, to the extent that such criticism, even though erroneous, will not subject the publisher to an action for libel. To the work the author has invited criticism. It is otherwise with his acts and life, of which the work so offered for public consideration is no part. For any defamation of an author or artist not necessarily connected with his public works, the publisher of such defamation is answerable, though it may have been published as a part of a professed criticism of such work: *Cooper v. Stone*, 24 Wend. 434; *Fraser v. Berkerley*, 7 Car. & P. 621; *Macleod v. Wakeley*, 3 Id. 311; *Stewart v. Lovell*, 2 Stark. 93. A public entertainment of any character is always a proper subject for criticism in a periodical: *Ryan v. Wood*, 4 Fost. & F. 734; and so is any thing or article which by its owner is made the subject of public exhibition: *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

The case last cited was an action to recover damages for an alleged false and malicious statement concerning the plaintiff's property, a stone statue, commonly known as the "Cardiff Giant." The plaintiff claimed that the statue was of great value as a scientific curiosity, and, for the purpose of exhibition, had long been a source of profit to him. It appeared at the trial that the defendant had published a statement that the Cardiff Giant had been sold for eight dollars; that "the man who brought the colossal monolith to light confessed it was a fraud"; that the plaintiff was on the eve of effecting a sale of one half of his interest in the statue for several thousand dollars, and that the purchaser refused to carry out the agreement because of the defamatory statement made by the defendant. The judgment of the trial court was in favor of the defendants; but it was reversed by the appellate court because of error in giving instructions at the instance of the de-

fendant, and also in refusing to give an instruction requested by the plaintiff. In considering the law applicable to the subject, the appellate court said: "This action is not for a libel upon the plaintiff, but for publishing a false and malicious statement concerning his property, and could not be supported without allegation and proof of special damages: *Malachy v. Soper*, 3 Bing. N. C. 371; 3 Scott, 723; *Swan v. Tappan*, 5 Cush. 104. The special damage alleged was the loss of the sale of the plaintiff's statue to Palmer. Evidence of the value of the statue as a scientific curiosity or for purposes of exhibition was therefore rightly rejected as immaterial. The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice: *Dibdin v. Swan*, 1 Esp. 28; *Carr v. Hood*, 1 Camp. 355; *Henwood v. Harrison*, L. R. 7 Com. P. 606. But in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in reckless disregard of his rights, and of the consequences that may result to him: *Commonwealth v. Bonner*, 9 Met. 410; *Moore v. Stevenson*, 27 Conn. 14; Erle, C. J., in *Hibbs v. Wilkinson*, 1 Fost. & F. 608, 610; and in *Paris v. Lery*, 2 Id. 71, 74, and 9 Com. B., N. S., 342, 350; Cockburn, C. J., in *Morrison v. Belcher*, 3 Fost. & F. 614, 620; in *Hedley v. Barlow*, 4 Id. 224, 231; and in *Strauss v. Francis*, 4 Id. 1107, 1114. The only definition of malice given by the learned judge who presided at the trial was therefore erroneous, because it required the plaintiff to prove 'a disposition willfully and purposely to injure the value of this statue,' as well as 'wanton disregard of the interest of the owner.' The jury, upon the evidence before them, and under the instruction given them, may have been of opinion that the defendant's statements that the plaintiff's statue was an 'ingenious humbug,' 'a sell,' and 'a fraud,' were false, reckless, and unjustifiable, and had the effect of injuring plaintiff's property, and caused him special damage; and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury."

We have heretofore shown that, as a general rule, the publication of a libelous charge could not be justified on the ground that it was merely a repetition of what had before been stated or published, and that the defendant had merely republished it as a matter of news, and for the purpose of informing the public of existing events of which he, being the publisher of a periodical, had assumed the duty of keeping the public informed. An exception to this rule exists in the proceedings taking place in the legislative and judicial departments of the government, and in the proceedings of some other public tribunals or departments, of which, upon grounds of public policy, it is regarded as proper to keep the public fully informed, though thereby libelous charges may be republished.

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the

welfare of the community depends. Where would be our confidence in the government of the country, or in the legislature, by which our laws are framed, and to whose charge the great interests of the country are committed, — where would be our attachment to the constitution under which we live, — if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation?" *Wasson v. Walter*, 8 Best & S. 671; L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 19 L. T., N. S., 409; 17 Week. Rep. 169. Fair reports of the proceedings of legislative bodies, in which the public has an interest, including the speeches of their members and reports made by committees, may be published in periodicals without entitling any one falsely defamed thereby to maintain an action for libel against their proprietors: *Wasson v. Walter*, *supra*; *Rex v. Wright*, 8 Term Rep. 293; *Kane v. Mulvanis*, 2 I. R. C. L. 402; *Henwood v. Harrison*, 41 L. J. C. P. 206; L. R. 7 Com. P. 606; 20 Week. Rep. 1000; 26 L. T., N. S., 938; *Curry v. Walter*, 1 Bos. & P. 525; 1 Esp. 457. Periodicals are also privileged to publish the testimony taken before an investigating committee of a legislative body: *Terry v. Fellows*, 21 La. Ann. 375. There is probably attached to the general rule authorizing the publication of such testimony the limitation that the proceeding in which it was taken must not be secret and *ex parte*: *Belo v. Wren*, 63 Tex. 686. The privilege which secures immunity for the publication of fair reports of the proceedings of Parliament, of Congress, and of the state legislatures, extends to minor legislative bodies, such as town councils, with the same limitation, that the proceedings must have been open and public: *Wallis v. Beget*, 34 La. Ann. 131; *Allbutt v. General Council*, L. R. 23 Q. B. D. 400.

The public undoubtedly has an interest in the proceedings of all courts of justice, whether civil or criminal, superior or inferior. In all cases where the proceedings of such courts are open to the public, so that any individual who may choose has the right to be present to see what is done and to hear what is said, he may, though not present, be given the same information through the columns of a periodical that he might have secured by his presence in court: *McBee v. Fulton*, 47 Md. 403. "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings": *Rex v. Wright*, 8 Term Rep. 298.

Cockburn, C. J., instructed the jury as follows, upon this topic, at the trial of the case of *Risk Allah Bey v. Whitehurst*, 18 L. T., N. S., 615: "Whatever may have been thought in past times, nowadays we are agreed on this, that fair and impartial reports of the proceedings in courts of justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage that the publishing of them to the world predominates so much over the inconvenience to individuals as to render these reports highly conducive to the public good; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest, and impartial. It need not be a report of every word that passes upon a trial. No newspaper, however large, could report the proceedings in the full extent to which, upon a long trial, these proceedings necessarily extend. You may either have it to the utmost possible extent the limits of the paper will allow it to be given, or in the more condensed form of a summary or epitome, but you must have the report honest and fair. A paper may give a report of the proceedings of courts of justice properly condensed and fair, but it is not entitled, under pretense of giving a report, to add comments of its own, or to display facts not brought forward

in the proceedings, but coming out of the reporter's own head. This is admitted on all hands to be the state of law."

If the proceedings are such that the court deems them unfit for publication, and therefore sits with closed doors, or enters an order prohibiting the publication, either of the whole proceedings or of some part thereof, doubtless no periodical could have any privilege of publishing that which the court had expressly or impliedly declared ought not to be generally known; and any publisher violating the injunction of secrecy would surely be answerable in damages for any libel included in his publication. If the subject-matter of the trial was itself a blasphemous or obscene libel, no right to indefinitely repeat or publish it could be gained from the fact that it had been made the subject of judicial investigation and condemnation: *Rex v. Carlile*, 3 Barn. & Ald. 167; *Steele v. Brannan*, L. R. 7 Com. P. 261; 41 L. J. M. C. 85; 20 Week. Rep. 607; 26 L. T. 509. But a fair report of the proceedings of a public trial, including the testimony of the witnesses, the arguments of counsel, the remarks of the judge during the progress of the cause, and his final instructions to the jury, are all matters which any one, whether the proprietor of a periodical or not, is privileged to publish. The proceedings need not be published in full. They may be greatly condensed; but still, however condensed, they must be a fair statement of what took place, and must not, by their omission of exculpatory and their emphasis of inculpatory evidence or remarks, deal unjustly with an accused person, and thereby produce an impression of guilt which a candid statement of the whole proceedings would be unlikely to create. Any report in a periodical of judicial proceedings, whether in full or a mere synopsis, is privileged, unless it appears to have been made for malicious or unworthy motives, or is so manifestly unfair as to evince, either an intent to injure the person complaining, or a reckless indifference as to whether he should be injured or not: *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479; *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *Smith v. Scott*, 8 Car. & K. 580; *Hoare v. Silverlock*, 9 Com. B. 20; 19 L. J. Com. P. 215; *Turner v. Sullivan*, 6 L. T., N. S., 130; *Runje v. Franklin*, 72 Tex. 585; 13 Am. St. Rep. 833; *Risk Allah Bey v. Whitehurst*, 18 L. T. 615.

Unquestionably a sound public policy demands that periodicals shall, to a certain extent at least, be privileged to publish the proceedings of courts of justice; but this policy extends no further than keeping the public advised of the acts of their judicial servants, in order that abuses may be corrected, worthy service rewarded by continuing confidence and renewed trust, and unworthy service visited by opprobrium, and cut short by the withdrawal of public confidence and the selection of a more worthy minister of justice. Whether the judiciary has properly discharged its functions in any given instance can only be known from a report of everything upon which its action was based. Hence public policy will not permit any suitor or other person to complain of the publication of any part of the proceedings at a public trial, on the ground that it may injuriously affect his reputation. But a garbled or one-sided statement of what took place, or the publication of the contents of a petition or affidavit upon which the court has never been and may never be called to act, is prohibited, rather than demanded, by public policy, and contributes to no other end so surely as that of assailing the reputation of one who has, as yet, no opportunity to repel the assault. Garbled or one-sided statements are nowhere favored; and a publication of the defamatory evidence of a witness, or the still more defamatory invective of counsel, is not privileged, where it does not amount to a fair statement of the whole evidence

bearing upon the reputation of the person against whom it reflects: *Saunders v. Mills*, 3 Moore & P. 520; 6 Bing. 213; *Kane v. Mulraine*, 2 I. R. C. L. 402.

The publication of an *ex parte* pleading or affidavit before a trial is manifestly as unfair as is the publication of a one-sided statement of what occurs at the trial itself. In either case there is likely to be an unjust aspersion on the reputation of some one who has no opportunity to reply, and in neither is any sound public policy subserved by permitting a statement to be made with impunity, if false and defamatory. There was formerly a very strong judicial inclination against regarding as privileged any publication of an *ex parte* proceeding, or of any matter of evidence or of pleading taken or filed prior to the commencement of the trial: *Hoare v. Silverlock*, 9 Com. B. 23; 19 L. J. Com. P. 215; *Duncan v. Thwaites*, 3 Barn. & C. 556; *Purcell v. Sowler*, 2 Com. P. Div. 215; 46 L. J. Com. P. 308; 25 Week. Rep. 362; 36 L. T. 416. It is now settled in England that the mere fact that a judicial proceeding was *ex parte* will not deprive a publication of what took place in open court of protection as being privileged. Thus where a statement was published that three gentlemen, civil engineers, had applied to a magistrate for criminal process against another civil engineer, and that their spokesman stated that they had been engaged in certain surveys, and that their money, or some portion of it, had been paid to the other engineer, who had withheld it, and in their judgment had been guilty of the criminal offense of withholding the money, but that the magistrate had regarded it as a matter of contract between the parties, and, though on the face of the application they had been badly treated, said he must refer them to the county court, it was held that if the publication complained of was a fair and impartial report of what took place before the magistrate that it was privileged: *Usill v. Hales*, L. R. 3 C. P. D. 319; 47 L. J. Com. P. Div. 323; 38 L. T., N. S., 65; 26 W. Rep. 371. In England, publication of proceedings before magistrates of the preliminary examination of a prisoner: *Regina v. Gray*, 10 Cox C. C. 184; *Lewis v. Levy*, El. B. & E. 537; 4 Jur., N. S., 970; 27 L. J. Q. B. 282; or before judges at chambers: *Smith v. Scott*, 2 Car. & K. 580; or before registrars in bankruptcy upon the examination of a debtor: *Rayalls v. Leader*, L. R. 1 Ex. 296; 12 Jur., N. S., 503; 4 N. & C. 555; 35 L. J. Ex. 185; or before examiners to inquire into the sufficiency of sureties, — are all privileged, whether *ex parte* or not: *Cooper v. Lawson*, 8 Ad. & E. 746; 1 W. W. & H. 601; 2 Jur. 919; 1 Perry & D. 15.

In all these instances the proceedings, though *ex parte*, take place before a judicial or quasi judicial tribunal; and the decisions treating their publication as privileged do not necessarily authorize the publication of other *ex parte* matters upon which no action has been taken. Early English decisions have condemned the publication of depositions taken for use, but not yet used, at a trial: *Carr v. Jones*, 3 Smith, 491; *Stiles v. Nokes*, 7 East, 493; *Rix v. Fisher*, 2 Camp. 563. In this country, the fact that a party has been arrested, and what is the charge against him, may be published, provided no assumption of his guilt is implied in the language used: *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33; *Tresca v. Muddox*, 11 La. Ann. 206; 66 Am. Dec. 198. The tendency of the American cases is to limit the privilege of publishing judicial proceedings to matters which take place in public, either at the trial or at some other hearing of the case in open court, or if not in open court, then at some place and before some officer or tribunal where the public have a right to be present. Thus in Michigan, it has been said "that there is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of other matters in litigation. The parties, and none but the parties,

control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is, that the pleadings are addressed to courts, where the facts can be fairly tried, and to no other readers. If the pleadings and other documents can be published to the world by any one who has access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting these printed as news. The public has no right to any information on private suits until they come up for public hearing or action in open court; and when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or, on trial, the case may easily fail of proof or probability. The law has never authorized any such mischief": *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. Hence a pleading filed in a cause containing libelous assertions, but which has never been presented to the court for its action, or for the determination of the truth or falsity of its allegations, may not, nor may any portion of its contents, be published in a periodical, and the publication protected as a publication of privileged matters: *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377; *Park v. Detroit Free Press Co.*, *supra*; nor may *ex parte* charges and affidavits filed in a criminal proceeding, or in proceedings taken to procure the disbarment of an attorney, be published as privileged. "If a publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police-officer, however groundless, and whether emanating from mistake, or malice of a third person, then must private character be indeed imperfectly protected. Such publications not only inflict injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind, and creating a prejudice against a party whom the law still presumes to be innocent": *Cincinnati v. Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *Cowley v. Pulsifer*, 137 Mass. 392; 50 Am. Rep. 318. The report of a justice of the peace of statements made by certain persons to him on applying for a warrant, which statements have not been incorporated into an affidavit or other paper on file, nor made the subject of any judicial action, cannot be published as a privileged matter: *McDermott v. Evening Journal Association*, 43 N. J. L. 488.

If a proceeding is such that a periodical has a right to make it public, such periodical may, nevertheless, be held answerable for damages, if it appears to have acted from malicious motives: *Stevens v. Sampson*, L. R. 5 Ex. Div. 53; 49 L. J. Ex. Div. 129; 41 L. T., N. S., 782.

As before suggested, a publication of judicial proceedings is not privileged, unless it is fair and impartial. It must not be accompanied by any malicious or defamatory comment: *Cincinnati Co. v. Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *State v. Nokes*, 7 East, 493; *Carr v. Jones*, 3 Smith, 49; or libelous insinuations: *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Thomas v. Crosswell*, 7 Johns. 264; 5 Am. Dec. 269; *McNally v. Oldham*, 16 I. R. C. L. 298; 8 L. T., N. S., 604; *Scripp v. Reilly*, 38 Mich. 10; *Delegal v. Highley*, 5 Scott, 154; 5 Bing. N. C. 950; 8 Car. & P. 444; or statements drawn from other sources; *Bathrick v. Detroit Post Pub. Co.*, 50 Mich. 629.

A periodical is not prohibited from commenting upon the proceedings in a court of justice, or the parties or witnesses connected therewith, nor is it limited to the bare recital of what took place; but whatever comments it makes must be just and fair, "and it is for the jury to say whether they are

so or not": *McBee v. Fulton*, 47 Md. 403. The comments must be from the facts in evidence, and if there is any departure from them, or if a one-sided personal view of them is given, this will be evidence of unfairness: *Woodgate v. Rulout*, 4 Fost. & F. 202. It has been held that the evidence may be declared unfounded, unconscious, or careless, but it must not be stigmatized as willful and malicious, or recklessly false: *Hedley v. Barlow*, 4 Id. 224; nor as being unsupported, having no effect, and as being commented upon with cutting severity: *Roberts v. Brown*, 10 Bing. 519; 4 Moore & S. 407. A publication denouncing the verdict of a jury as infamous, and declaring that it was impossible to express sufficient contempt for the jurors who had thus offended public opinion, and done injustice to their oaths, is libelous, and not protected as privileged: *Byres v. Martin*, 2 Col. 605.

The recent English decisions incline to be lenient with the press when pursued for alleged libelous comments or statements either upon or concerning judicial proceedings, and the persons affected by them, or upon other matters in which the public has an interest, and concerning which it is admitted that newspapers and public writers have a duty to keep it informed. If the matters under consideration are such as to excite great public interest, and necessarily to arouse a deep conviction in the mind of a writer or publisher that he has a duty to perform in laying bare the facts, and in holding some evil-doer up to public condemnation, the courts will generally excuse his mistake of fact made in good faith, or his intemperance of expression generated by natural aversion to what he believes to be a wrong that ought to be exposed and thereby suppressed. Speaking of alleged libelous comments upon a plaintiff who pretended to unusual skill and knowledge respecting the treatment of disease, Cockburn, C. J., in charging the jury, said: "Here is a man bringing forward what professes to be a scientific book, inviting the public to come and be treated for the saddest disease that is known among us. If he does that, he challenges public criticism, and then if a public writer of competent knowledge deals with his theory, and, looking upon all the circumstances, using that forbearance and moderation, and exercising that temperate judgment which every man is bound to exercise who not only criticises the conduct of another, but proceeds to impute to him evil motives and designs, — if the public writer executes his task with that spirit, goes beyond the limits to which a more sound knowledge of the facts would have warranted him in going, he is nevertheless privileged; the occasion is a privileged one, and if the privilege is exercised honestly and faithfully, and with reasonable regard to what truth and justice require, he is exempt from the consequences if he shall have gone beyond what the limits of truth more carefully ascertained would have justified. It is, therefore, not necessary that justification should, to all intents and purposes, be made out if you think the defendant or the party who wrote this article for which the defendant is made liable was, in the reasonable and honest exercise of his duty as a public writer, warranted by the circumstances in drawing the inferences which he has drawn as to the motives and conduct of the plaintiff, although it may turn out that he has not been to the fullest extent accurate": *Hunter v. Sharpe*, 4 Fost. & F. 983; 15 L. T., N. S., 421.

In the case of *Risk Allah Bey v. Whitehurst*, 18 L. T. 515, the defendant was the publisher of the Daily Telegraph, and the matters complained of as libelous were a leading article and parts of letters from a correspondent of that periodical at Brussels relative to the trial of the plaintiff for the murder of his ward. The letters, so far as complained of, commenced by suggesting that the defendant in the criminal prosecution "has certainly to meet a

formidable array of charges"; they next detail the circumstances accompanying the murder, and call attention to various supposed facts tending to inculpate the accused, and to other facts, some of which tended to support and others to refute the assumption that his ward's death could have been due to suicide; the speech of the counsel for the prosecution and that of the counsel for the accused were referred to at considerable length, some parts of the latter being given *verbatim*, though that part of it detailing the facts was omitted. The letters written after the accused had been acquitted restated the case against him with very great force and dramatic power, and from them no other conclusion could fairly be drawn than that it was not the exculpatory evidence, but the prosperity, skill, and power of the prisoner and his counsel which averted a conviction. In commenting on these letters to the jury, Cockburn, C. J., called attention to the fact that they were written in a foreign country, where the tendency was to present judicial proceedings in a sensational and dramatic form, and exhibited his preference for the more prosy and less theatrical modes employed by writers in England; he admitted that the writer must have felt that the evidence bore strongly against the accused, and that he had no right to give the impression which had been formed in his own mind. "He is not called upon to give an opinion. He is not called upon to tell the impression produced upon a court of justice, but he takes upon himself to say that there is no prohibition against any one at this time to say that the man was a villain. You can judge how far that is consistent with a fair report of the proceedings. I am bound to tell you it is not. It is beyond the province of a reporter or publisher to go beyond reporting, and say of a person on his trial, 'that man is a villain.'" The chief justice concluded that portion of his charge having reference to the letters as follows: "Gentlemen, while on the one hand we uphold the liberty of the press, and especially in the matter of reporting the proceedings of our courts of justice, which it is to the interest of the whole public should be made known as widely as possible, we must take care those who exercise that all-important function shall act under a due sense of the duties they have to perform, and the responsibility under which they exercise those functions; and if you are of opinion that, looking at the whole of these communications, they do not contain a fair, honest, and faithful representation of what passed under the proceedings of that trial, but that, yielding to the impressions of the moment, or with the idea of making his articles as taking, as attractive, and effective as possible, the writer has gone beyond the legitimate bounds of privilege, and that on these considerations he has stated that which is unfair and prejudicial to the man about whom he was writing, — if you think there are passages where the reporter is merely repeating his own statements, — you are bound to say so by your verdict. You will have to say what the damages are. The issue presented to you is, whether this was a fair report of the proceedings of a court of justice, or whether it is a garbled, prejudiced, and passionate description of what took place."

Proceeding with his charge in the same case, the chief justice next referred to the editorial article which had been published by the defendant in his journal, and to the claim made by the one side that it, in effect, merely suggested that the plaintiff had been a fortunate man to have had his innocence affirmed by the jury, and on the other hand, as, in substance, stating that he was "a fortunate man to have escaped, not because the circumstances against him had been cleared up at the last moment, but because he had been a lucky man, or had the advantage of an ingenious advocate, or had the

good fortune to be tried by a stupid jury"; and the court said that if the latter meaning was properly attributable to the article, it would be a "publication of which an innocent man would have just ground of complaint." The judge then concluded as follows: "Now, gentlemen, it is for you, in the first place, to form your own judgment upon what the effect — the intended effect — of that article was. Is it simply to say, as the defendant puts it, that, under all the circumstances, Risk Allah was innocent, but that appearances have been against him, and that his innocence had been proved? Or is it intended to suggest that, although Risk Allah had been pronounced not guilty by the verdict of the jury, given with the entire approbation of the court, it was only from the skillfulness of the defense and his own good fortune that he escaped conviction? That is the question for you, in the first instance. If you are of the opinion that the writer, upon reflection, rejoiced that his innocence was proved over all appearances of guilt, that is a thing nobody can complain of; but if you are of opinion that, either directly or indirectly, he asserts that the guilt of the man was confirmed, then you will have to consider how far he was justified by the privileges the law gives to those who discuss matters of public interest. There is no difference here about law. It is agreed by counsel on both sides. The discussion of public questions is so important to the well-being of society, and especially the discussion of what takes place in courts of justice and the results of trials, that those who in the public press of this country discuss those matters have a decided right and privilege to treat upon the administration of justice; and even if a public writer in the press should write that which turns out not to be founded upon the inferences he draws, and is unable to justify the conclusion he has arrived at, yet if he has acted in good faith in the discharge of his duty, bringing to it the amount of care, reason, and judgment which a man who takes it upon himself to discuss public questions is bound to bring, so that the jury is of opinion that he has acted reasonably and properly, he will be protected by that privilege, although he may turn out to have been in error. Therefore, it is for you to consider whether the circumstances were such as to warrant that article, even upon the assumption that they did intend to impute to Risk Allah the crime of murder, even after his recent acquittal. In considering this you must take all the circumstances of the case, and see what tells in his favor and what tells against him, and then see how far the writer, in the calm, fair, and dispassionate exercise of the judgment which he was bound to bring to the consideration of such a case, was justified in making these imputations. I can well understand that at the first outset any one who was made cognizant of the facts bearing against Risk Allah, as stated in the *acte d'accusation*, would have thought him guilty; and if the case stopped there I should not have blamed any one who, in discussing that matter, had come to that conclusion. But the question is, whether they could bring an accusation of guilt against him when all the facts were heard. It is for you to judge whether Risk Allah was innocent of the charge, or whether any man, in the exercise of sound judgment, and desirous of doing justice, could come to any other conclusion. I quite agree that if, by some oversight or want of firmness on the part of the judge or jury, a great criminal escapes, and by a miscarriage of justice a scandal is brought on its administration, and the criminal is let loose on society, rehabilitated and let loose when he ought to be suffering punishment, — in such a case a public writer would be doing no more than his duty in coming forward to remonstrate with the tribunal through whose want of firmness the man has been acquitted. If that is done through that fair and reasonable exercise of judgment which the case

demands, no jury ought to visit a public writer with damages, because he has fairly and conscientiously discharged a public duty. On the other hand, if you think there has been rashness and recklessness in quarreling with the verdict of acquittal, which has declared the man to be innocent, and especially under a criminal prosecution, your verdict will be based on those considerations. You will take all these things into your consideration, and you must also take into consideration that human judgment is liable to error, and must ask yourselves whether there was any intention to single out Risk Allah for animadversion on the part of the writer."

At the common law, the defense that a defamatory publication was true was admissible as a justification only in civil actions: 2 Bishop's Crim. Law, sec. 918. In the majority of the United States, either the constitutional or the statutory law provides, in substance, that "the truth may be given in evidence to be a defense only when the further fact appears that the publication was made with good motives, and for justifiable ends. In some of our states, the statute is even more favorable to defendants than this": Id., sec. 920; *Castle v. Houston*, 19 Kan. 417. Even in the absence of these statutes, the truth was sometimes received in evidence in criminal prosecutions. Thus in *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, Chief Justice Parsons said: "Although the truth of words is no justification, in a criminal prosecution, for a libel, yet the defendant may repel the charge by proving that the publication was for a justifiable purpose, and not malicious, nor with intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame." Hence when one is an officer, or a candidate for office, a newspaper, for the purpose of showing whether he is fit for such office, may publish of him that which is clearly defamatory, and, in justification of what it did, prove the truth of the charges made by it, even though there is no statute conceding this defense in express terms: *Commonwealth v. Clap*, *supra*; *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Commonwealth v. Morris*, 1 Va. Cas. 175; 5 Am. Dec. 515; *State v. Burnham*, 9 N. H. 34; 31 Am. Dec. 217.

In many instances, publications may be both libelous and true, and yet made for unworthy motives. One might have the public thus kept in remembrance of an early indiscretion which he had long since repented, or advised of some physical defect or deformity for which he is in no wise blamable. In these instances, as the publication is true, he is not permitted to maintain any civil action therefor. If the publication was not made for justifiable ends, the publisher is guilty of a crime, for which he may be prosecuted and convicted; but he is not answerable in damages to the person libeled, however malicious or otherwise unworthy his motive may be: *Castle v. Houston*, 19 Kan. 417; *Perry v. Man*, 1 R. I. 263; *Rayne v. Taylor*, 14 La. Ann. 406; *Baum v. Clause*, 5 Hill, 196; *Heilman v. Shanklin*, 60 Ind. 441; *Sullings v. Shakespeare*, 46 Mich. 408; *Foss v. Hildreth*, 10 Allen, 76. In Massachusetts, in 1855, the law was changed by a statute which, in effect, prohibits a recovery of damages for a defamatory publication, though proved to be true, "unless malicious intention shall be proved." Under this statute, criminal prosecutions and civil actions are placed on a common ground. In either, if the defendant shows that the matters published were true, he makes out a complete defense, unless the government in the one case, or the plaintiff in the other, shows affirmatively "that the publication was made with malicious intention": *Perry v. Porter*, 124 Mass. 335. This

statute, therefore, shifts the burden of proof in criminal prosecutions. But for it, the defendant must assume the burden of establishing, in addition to the truth of the publication, that it "was published for good motives and justifiable ends": *Commonwealth v. Bonner*, 9 Met. 410.

The presumption respecting a libelous charge, in the absence of any statute upon the subject, is, that it is false, and without sufficient excuse. A defendant, whether in a civil action or a criminal prosecution, who desires to urge that what he said was true, must, therefore, assume the burden of establishing it by competent and sufficient evidence: *Russell v. Anthony*, 21 Kan. 450.

Whether one, knowing or suspecting that a libel is about to be published, to the injury of his property or his reputation, is entitled to any preventive relief, is a question upon which the adjudged cases are unsatisfactory and conflicting. The decision in *Prudential L. I. A. v. Knott*, 23 Week. Rep. 249, L. R. 10 Ch. App. 142, 44 L. J. Ch., 31 L. T. 866, 7 Chic. L. N. 405, seemed to settle the question in England, and to establish the rule that in no case would an injunction be issued to restrain the publication of a libel, whether against the person or the property of the complainant. While that decision has not, as far as we can ascertain, been overruled, it has been so frequently disregarded, and so many adjudications have been made at variance with it, that it can no longer be regarded as correctly stating the law. If a libel is one containing false and defamatory statements respecting the complainant's property or business, and is calculated to injure him in his property or business, the more recent as well as some of the earlier English decisions indicate that an injunction may properly issue: *Hayward v. Hayward*, 34 Ch. D. 198; *Quartz Hill C. G. M. Co. v. Beall*, 20 L. J. Ch. Div. 501; 51 L. J. Ch. 874; 46 L. T. 746; *Saxby v. Esterbrook*, L. R. 3 Com. P. Div. 339; 27 Week. Rep. 188; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763; 42 L. T., N. S., 851; 28 Week. Rep. 966; *Thomas v. Williams*, L. R. 14 Ch. Div. 864; 49 L. J. Ch. 605; 43 L. T. 91; 28 Week. Rep. 983. The decisions upon this subject by the American courts are infrequent, and are chiefly characterized by an attempt to follow the adjudications upon the same subject in England; and in this attempt the American courts have necessarily reached conclusions as irreconcilable as those which they sought to follow: *Singer Mfg. Co. v. Domestic Co.*, 49 Ga. 70; *Bell v. Singer Mfg. Co.*, 65 Id. 452; High on Injunctions, sec. 1015. With respect to libels which reflect upon the reputation of the person libeled, and which do not directly otherwise injure his person or property, no attempt, so far as we are aware, has ever been made to prevent their publication by injunction, and hence no reference can be given to any decisions, whether English or American, upon that topic.

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BEACH *v.* MILLER.

[130 ILLINOIS, 162.]

Dealings of directors of corporations.

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PEOPLES BK. *v.* FRANKLIN BK.

[88 TENNESSEE, 299.]

Liability of Bank for forged check.

BEACH v. MILLER.

[130 ILLINOIS, 162.]

CORPORATIONS — PROOF OF FRAUDULENT SALE BY. — Where the good faith of a sale by a corporation to one of its directors is attacked, evidence of the insolvency of the corporation at the time that the sale was made is admissible.

SOLVENT CORPORATION — DIRECTOR MAY CONTRACT WITH. — A director of a solvent corporation may, with the knowledge of the stockholders, deal with the corporation, loan it money, take security, or buy property of it in like manner as a stranger.

INSOLVENT CORPORATIONS — DIRECTORS CANNOT CONTRACT WITH. — The assets of an insolvent corporation are regarded as a trust fund for the payment of all its creditors; the directors occupy the position of trustees of such fund, and may be prohibited from purchasing the trust property, and thus securing a preference over other creditors.

INSOLVENT CORPORATIONS — RIGHTS OF CREDITORS. — The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of the other creditors.

INSOLVENT CORPORATION — PURCHASE BY DIRECTOR — RIGHTS OF CREDITORS. — A director of an insolvent corporation cannot lawfully purchase its property in satisfaction of his own debt, to the exclusion of other creditors, with whom he is only entitled to share equally, but he takes the property charged with the trust in favor of the other creditors, which may be enforced in equity, but it is not subject to the execution of another judgment creditor.

CORPORATION — SALE TO DIRECTOR — RATIFICATION. — A sale of corporate property, made by a corporation to a director, in payment of its notes held by him, though irregular because made without an order from the board of directors, is subject to ratification, and the fact that the corporation took up the notes canceled and retained them in its possession will be regarded as a ratification of the sale.

Weigley, Bulkley, and Gray, for the appellants.

Bennett and Green, for the appellee.

CRAIG, J. This was an action of trespass, brought by Joseph T. Miller, in the circuit court of Whiteside County, against Thomas S. Beach and George C. Keefer. The declaration contained four counts. In the first and second it is alleged that defendants, with force and arms, broke and entered two certain rooms in a certain warehouse, known as the warehouse of the Rock River Packing Company, which said rooms were then and there in the possession of the plaintiff. The third and fourth counts are trespass *de bonis asportatis*, for taking and carrying away 94,612 tomato-cans, 3,516 sheets of tin, and a few other articles, alleged to belong to the plain-

tiff. The defendants pleaded the general issue and several special pleas, in which they averred that on the twenty-third day of October, 1885, E. W. Blatchford & Co. recovered a judgment against the Rock River Packing Company, in the circuit court of Whiteside County, for \$1,415.40; that an execution issued on the judgment, which was placed in the hands of defendants, as sheriff and deputy sheriff, to collect. It is also alleged that the goods named in the declaration belonged to the Rock River Packing Company, and as such they were levied upon by defendants under and by virtue of the execution, and sold in satisfaction thereof. Issue was formed on the pleas, and on a trial the plaintiff recovered a judgment for \$1,996.41, which was affirmed in the appellate court.

In order to get a correct understanding of the questions presented by the record, a brief statement of the facts seems to be required. The Rock River Packing Company is a corporation organized in 1881, with a capital stock of sixteen thousand dollars, the incorporators being James A. Ingersoll, Edward H. Sears, William N. Herman, and Joseph T. Miller, the plaintiff here. The corporation was formed for "packing, pickling, canning, and bottling of meats, vegetables, and fruits, and dealing in the same," and was located at Sterling, where it provided itself with a factory and warehouse, in which its business was transacted. During the spring and summer of 1885, the corporation borrowed of Miller, who was then a director, money to be used in its business, amounting to the sum of two thousand dollars. To secure Miller for the money loaned, the corporation executed and delivered to him its four judgment notes, one dated May 30, 1885, amount five hundred dollars; one July 6, 1885, amount five hundred dollars; and one for one thousand dollars, on August 17, 1885. On the sixteenth day of October, 1885, these notes being due and unpaid, the president and secretary of the corporation sold Miller 80,000 cans and a small quantity of tin for \$1,877, to be applied as a payment on the notes. On the same day, Ingersoll, president and secretary of the corporation, leased Miller two small rooms in the north end of the company's warehouse. On the morning of the 17th, all property belonging to the company was removed from the two rooms, and the possession was turned over to Miller. Miller placed the goods purchased in the rooms, and nailed up the doors communicating with other parts of the warehouse, and placed new locks on the other doors. On the seventeenth day of October, 1885,

the corporation delivered to E. W. Blatchford & Co. a judgment note for \$1,415.40, upon which judgment was entered. On the twenty-third day of October an execution issued on the judgment, and on the 24th, defendant Beach, as sheriff, and defendant Keefer, as deputy sheriff, levied on the goods which had been purchased by Miller.

In the circuit court it was contended that the sale of the goods from the Rock River Packing Company to Miller was fraudulent as against creditors, and being fraudulent, the goods were liable to be seized and sold by the sheriff on the execution in favor of Blatchford & Co. against the Rock River Packing Company. For the purpose of showing the sale fraudulent, the defendants offered to prove that the Rock River Packing Company was, at the time of the sale, insolvent; that on the sixteenth day of October, 1885, the company executed a mortgage on its real estate for seven thousand dollars to three of its directors; that the company turned over one thousand dollars of its accounts to the Sterling National Bank to apply on a debt due from the company to the bank, which debt was secured by three of the directors of the company; that between the sixteenth and the twenty-third days of October, the corporation sold the product of their manufacture to a certain party in Chicago. This offered evidence, with other evidence of a like import, was ruled out by the court, and the decision is relied upon as error. We are of opinion that the court erred in excluding this evidence from the jury. If, at the time this sale was made, the corporation was insolvent, or if, at or about the time when the sale was made, large mortgages were placed on all of the property owned by the corporation, so that it had no property left liable to execution, these were facts proper for the consideration of the jury on the question whether the sale to Miller was fraudulent or made in good faith. What weight should be given to this character of evidence was a question for the jury. We only determine that it was competent evidence for the consideration of the jury on the issue presented by the pleadings. Where the good faith of a sale of property is attacked, it is always competent to prove that the vendor was embarrassed or insolvent: *Geisendorf v. Eagles*, 106 Ind. 38; *Bump on Fraudulent Conveyances*, 591.

But appellants rely upon another ground to defeat the sale, — that it was void for the reason that Miller was, at the time, a director of the corporation, and could not contract with it.

This proposition is discussed in the argument under several distinct heads, and various authorities have been cited in its support. There is a conflict of authority on this question, but on the general proposition whether a director may deal with the corporation we think the weight of authority is that he may. This court so held in *Merrick v. Peoria Coal Co.*, 61 Ill. 479, and in *Harts v. Brown*, 77 Ill. 226. The supreme court of the United States hold the same doctrine. In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, it is said: "It is very true that, as a stockholder, in making a contract of any kind with the corporation of which he is a member, he is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, and is properly held to a larger measure of candor and good faith than if he were not a stockholder. So when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing, in this regard, the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing is increased in the precise degree that his representative character has given him power and control, derived from the confidence reposed in him by the stockholders who appointed him their agent." See also the following authorities, where the same doctrine is announced: *Angell and Ames on Corporations*, sec. 233; *Whitwell v. Warner*, 20 Vt. 425; *Smith v. Lansing*, 22 N. Y. 526; *City of St. Louis v. Alexander*, 23 Mo. 483.

While a corporation remains solvent, we perceive no reason why a director, with the knowledge of the stockholders, may not deal with the corporation, loan it money, take security, or buy property of it in like manner as a stranger; but whether a director in an insolvent corporation may purchase the assets in payment of a debt, and thus secure a preference over other creditors, presents a different question. So long as a corporation remains solvent, its directors are agents or trustees for the share-holders. They owe no duties or obligations to others. But the moment a corporation becomes insolvent, its directors occupy a different relation. The assets of the corporation must then be regarded as a trust fund for the payment of all its creditors, and the directors occupy the position of trustees, and a fiduciary relation then existing, they may, with propriety, be prohibited from purchasing the trust property. The

relation that directors occupy to the property of a corporation is well stated in *Ogden v. Murray*, 39 N. Y. 202, as follows: "The appellants and their associates were not in a situation permitting them to secure to themselves a personal advantage in the matter. The stockholders and creditors were entitled not only to their vote in the board, but to their influence and argument in the discussion which led to the passage of the resolution, in pursuance of which they took title as trustees. This brings the case within the rule, which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of *cestuis que trust* or beneficiaries, viz., that trustees and persons standing in similar fiduciary relations shall not be permitted to exercise their powers, and manage or appropriate the property of which they have control, for their own profit or emolument, or, as it has been expressed, shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their *cestuis que trust*." See also *Drury v. Cross*, 7 Wall. 299.

In *Curran v. State of Arkansas*, 15 How. 307, Mr. Justice Curtis, delivering the opinion of the court, speaking of an insolvent banking corporation, says: "The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others not creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has often been decided, and rests upon the plainest principles."

In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263, on a bill in equity filed by creditors, it was held that directors and managers of insolvent corporations are trustees of the funds for the creditors, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves, to the injury of other creditors. It is there said: "Every agent and trustee who has claims of his own must be regarded as agent for himself and others, and bound to give his diligence and care equally to all the claims in his hands, and consequently to apply all moneys paid to him, without an appropriation by the debtor,

to the payment of all claims in his care, whether of his own or others, in just proportions to their amounts."

In Morawetz on Corporations, 1st ed., section 579, it is said: "It is the duty of the directors and other agents of an insolvent corporation to preserve its assets for the benefit of creditors. The legal ownership of the assets is not altered by insolvency, and the regular agents of the company retain the same powers of management with which they were originally invested. But upon the insolvency of the corporation, the equitable lien of creditors attaches upon all of the company's assets; and the directors, who originally stood in a fiduciary relation to the company's members, become placed in a fiduciary relation to its creditors. Accordingly, it has been held . . . that they cannot give away the company's property gratuitously, or sell it at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of other creditors."

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, where an action was brought to foreclose a mortgage given by the company to its directors to secure an indebtedness due from the company to them, on the hearing it appeared that at the time the mortgage was executed the company was insolvent, and it was insisted as a defense that the mortgage was invalid. The court, in deciding the case, said: "The main question is the validity of the mortgage in suit. There was abundant evidence to justify the finding of the circuit court that at the time it was given the company was insolvent. In such case the authorities seem to be uniform that the directors and officers of a corporation are trustees of the creditors, and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors. The directors are then trustees of all the property of the corporation for all its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees, as such." See also *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5; and *Lippincott v. Shaw Carriage Co.*, 21 Fed. Rep. 577.

The language used in *Merrick v. Peoria Coal Co.*, 61 Ill. 479, is broad enough to authorize a director of an insolvent corpo-

ration to deal with the corporation; but the question of the power of a director to purchase property of or deal with an insolvent corporation did not arise in that case, and what was said was mere *obiter dictum*. There the Peru Coal Company, a corporation, executed certain notes payable to the Michigan Car Company, and also drew certain drafts in favor of the company. These notes and drafts were purchased by Merrick, who was an officer of the corporation, with his own funds, and brought an action on the notes and drafts, and the only question was, whether he was entitled to recover, and the court properly held he might recover upon the notes and drafts.

Harts v. Brown, 77 Ill. 226, is another case where expressions may be found similar to those used in the Merrick case, which were not justified by the questions presented for decision. That was a bill brought by stockholders to vacate a sale under a trust deed given by the company to secure the payment of certain bonds issued by the company and sold to one of the directors. The question arose whether the company had the power to execute a trust deed, and whether it could borrow money of a director. It was held that the charter conferred power to borrow money and secure it by mortgage or deed of trust, and that the board of directors might borrow money of one of its members. The question before the court was properly decided, but the expression that a director may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons, was not authorized by the case made by the record.

After a careful examination of the authorities, we are inclined to the opinion that if this corporation was insolvent at the time of the sale, Miller, who was a director, could not lawfully purchase the property in satisfaction of his own debt to the exclusion of other creditors, but he took the property charged with the trust in favor of other creditors, which may be enforced in an appropriate action. Miller, being a creditor, would doubtless be entitled to share with the other creditors in the property, but he could not appropriate the entire amount to the payment of his own debt. This, however, conferred no right upon appellants to seize the property, and sell it in satisfaction of the debt of Blatchford & Co. As creditors of the corporation, they occupied no better position than Miller. It may be, and no doubt is, true, that if Blatchford & Co. had levied on the property while in the hands of the corporation,

before the sale to Miller, they would, under such circumstances, have been entitled to hold it. But after the sale and delivery to Miller they had no such right; the property had passed beyond the reach of their execution. It had passed into Miller's hands charged with a trust which a court of equity might enforce in favor of all the creditors of the corporation, or such as might invoke the aid of that court.

One other question remains to be considered. The sale was made to Miller without an order of the board of directors of the corporation, and upon this ground it is claimed to be invalid. Conceding that the sale was irregular, we think it might be ratified by the corporation, and the fact that it took up the notes held by Miller and canceled them, and retained them in its possession, may be regarded as a ratification of the sale. As to the lease of that part of the building where the goods were stored, whether it was strictly valid or invalid was of no moment. The only purpose of the lease was to give Miller possession of that part of the building, and there was ample evidence to establish possession independent of the lease.

For the error indicated, the judgments of the appellate and circuit courts will be reversed, and the cause remanded.

DIRECTOR AND CORPORATION, TRANSACTIONS BETWEEN. — Directors of a corporation are sometimes spoken of as its trustees, and at other times, with more accuracy, their relation to it is compared with that of a trustee to his *cestui que trust*. They are not trustees in the sense of holding the legal title to all or any of its property for the benefit of the corporation or of its stockholders or creditors. It is true that its directors are, upon sound principles of public policy, inhibited from dealing with the corporation under very much the same circumstances that a trustee is inhibited from dealing with his *cestui que trust*, and if they disregard the duties and proprieties of their position by undertaking to represent their own interest and that of the corporation at the same time, they will not be encouraged in thus walking in the path of temptation, nor be permitted to retain the fruits gathered while in pursuit of their own advancement when they should have pursued none other than that of the corporation: *Memphis & C. R. R. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81. The relation of director and corporation is, however, merely that of principal and agent, and transactions between a director and a corporation are sustainable when they could be sustained between a principal and agent, and not otherwise, with this exception, that as a corporation may have no other means of obtaining information respecting a transaction and its subject-matter than through its director, he may have more difficulty than if his principal were a private person in establishing that, in its dealings with him, the corporation was not overreached by means of his superior knowledge and its reliance upon him as its agent and representative.

Undoubtedly there are expressions in several decisions from which the inference might be drawn, either that a director is absolutely incompetent to

contract with his corporation, or to deal with it, in any matter in which he is personally interested, or, at least, that the corporation may at any time avoid or disregard such contract or other transaction, whether fair or unfair, advantageous or prejudicial: *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5; *Aberdeen R'y Co. v. Blakie*, 1 Macq. 461. These expressions, however, were generally arguments adduced in justification of judgments about to be entered, and while they doubtless adequately supported such judgments, they are of doubtful applicability in cases in which the real question is, whether or not a director was disqualified from contracting or otherwise dealing with his corporation. In *Pickett v. School District No. 1*, 25 Wis. 551, 3 Am. Rep. 105, the court said: "We think there is one fatal objection to the plaintiff's right to maintain this action, which renders it unnecessary to consider any of the other questions discussed. That is, that inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a member. The general principle upon which this position must rest is, that no man can faithfully serve two masters whose interests are in conflict. And as men usually and naturally prefer their own interests to those of others, where one attempts to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity. This principle has been most frequently illustrated in cases of sales by officers, agents, and trustees, in all of which it has been held that they cannot become the purchasers, because this would allow their interests to come in conflict with their duties to their principals. The same doctrine is as applicable to the question of taking a contract as that of making a sale. And the only doubt would be, whether it should be held applicable in a case where a board, consisting of several, are authorized to act in a fiduciary capacity, and attempt to deal in that capacity with one of their own members. I think it is; and that although the impropriety of it would not be so glaring as in the case of a single agent dealing with himself, yet the danger of undue and improper influences, and of frequent sacrifices of the interest of the principal in a manner not always open to detection, would be extremely great."

The court employing the language just quoted relied upon *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, and *People v. Township Board*, 11 Mich. 222, both of which were in point. In fact, the case last cited is an extreme one. It is vaguely reported. As we understand it, certain persons who were members of a board of freeholders, and, as such, authorized to participate in the letting of a contract, themselves bid for, obtained, and fully performed such contract, and being refused payment for the services rendered, applied for a writ of mandate to compel the allowance and payment of their demands. Though the applicants for the writ did not constitute a majority of the board of freeholders, and it did not appear that their votes were essential to procure them the contract, the court declared it void, and denied them relief. This is, perhaps, the only American case maintaining that the corporation may accept and knowingly retain the fruits of the contract, and yet avoid payment on the ground that the contract, being against public policy, is void to the extent that no rights whatever can be based upon it. In the Wisconsin case, previously quoted, the court conceded that "perhaps the true theory is, that in all cases where the principle we have discussed is applicable, the contract is rather voidable in equity at the option of the principal

than absolutely void at law. Undoubtedly, in such cases, the principal, having full knowledge of all the facts, may affirm the contract. And if he should do so, it would become binding. If it had been fully executed by the contracting party, and the principal should, knowing all the facts, elect to accept and retain the benefit of it, he might be held to have thereby ratified it according to all its terms and conditions. And where it had not been so executed, but had been partially fulfilled, and he elected to accept and retain such partial benefit, he might become liable, upon a *quantum meruit*, upon the same principles as in other cases." In *San Diego v. S. D. & L. A. R. R. Co.*, 44 Cal. 106, the plaintiff, a municipal corporation of the state of California, brought an action to have a deed declared void, and canceled as a cloud upon its title. The deed in question was executed to the defendant by two of the plaintiff's trustees, and purported to convey to the defendant certain lands belonging to the plaintiff, pursuant to an act of the legislature under which the trustees of plaintiff were authorized to select and convey certain lands to the defendant at such prices as such trustees might deem advisable, and upon such terms and conditions as they might determine. At the time when the resolution was passed by the plaintiff's trustees, directing a deed to be given the defendant, one of the trustees voted in the negative and two in the affirmative, and of the two thus voting in the affirmative, one was interested in the defendant corporation, being both a stockholder and a director therein. The deed made pursuant to the resolution was adjudged void, and canceled; but this adjudication might well be rested solely upon the ground that the vote by which it was carried included that of the director of the defendant corporation, and that without his vote no resolution whatever could have been passed.

It is unquestionably true that a director acting in his *quasi* legislative capacity as a member of a board of trustees is incompetent to act in matters in which his interest is adverse to the corporation. Probably an interested director may be counted as one of the parties whose presence is necessary to constitute a quorum of a board of directors, and if a resolution could have been adopted, had he voted against it, the mere fact that his presence was necessary to constitute a quorum will not deprive the resolution of validity: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516. His vote, however, cannot properly be counted when it is necessary to constitute a majority, if the question is one in which he is personally interested, and if, without his vote, the resolution could not have been carried by the requisite number of votes. In other words, it is not adopted at all, and he cannot enforce any claim or right which is based solely upon it: *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349; *Chamberlain v. Pacific Wool G. C. Co.*, 54 Cal. 103. Hence a resolution fixing the compensation of the president of a corporation cannot be regarded as binding upon it if his vote was necessary to the adoption of such resolution. *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235. If a resolution authorizes the renewal of two notes, one of which is in favor of a director, and the other in favor of a third person, and the vote of such director is necessary to constitute a majority of the quorum, by which alone the resolution can be passed, it will, if so passed, be absolutely void, and it can neither support the note of the director nor that of the third person: *Smith v. Los Angeles I. & L. C. Ass'n*, 78 Cal. 289; 12 Am. St. Rep. 53.

Where a director does not at the same time represent his own interest and that of a corporation, there is little or no doubt that he may contract with it, and buy or sell its property, or borrow its money and give his note therefor, or loan it his money and take in consideration thereof its notes and other

securities, and enforce their payment in case default should be made therein: *Ward v. Polk*, 70 Ind. 309; *Beach v. Miller*, 23 Ill. App. 151; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461; *Ten Eyck v. P. O. & P. A. R'y Co.*, 74 Mich. 226; 16 Am. St. Rep. 633. Contracts and other transactions between a director and his corporation are not void at law, though they are often voidable at the instance of the corporation: *Little Rock & F. S. Co. v. Page*, 35 Ark. 304. In fact, a purchase by a director of the property of his corporation cannot be regarded in a more unfavorable light than a purchase by a trustee of the property of his *cestui que trust*, in which event the latter may undoubtedly have the purchase set aside by repudiating it within a reasonable time after it comes to his knowledge: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Ashhurst's Appeal*, 60 Pa. St. 290. If a *cestui que trust* knew of and assented to the purchase before it was made, his right to subsequently set it aside, if its existence can be affirmed at all, must be placed upon the ground that his relation to his trustee is such as to give the latter an undue ascendancy over him, and to deprive him either of freedom of action or of power to properly judge of his own business affairs. Though the relations of a director and his fellow-directors are such as often to give him and them opportunity and inducement for collusive action to the detriment of the corporation, it cannot be said that a contracting director's relation to his fellow-directors is such as necessarily or ordinarily to give him an undue ascendancy over them, or to deprive them of the power to correctly understand and judiciously manage the affairs of the corporation. Therefore, if it is clear that a contract or other business transaction entered into between a director and the corporation was not tainted by collusion between him and his fellow-directors, and that they represented the corporation according to their best judgment, and that the contract or other transaction was open and fair, and without any concealment on the part of the contracting director, and without taking advantage of any information which he may have had to the exclusion of his fellow-directors, then his contract or other transaction should not be treated as voidable until avoided, but as unavoidable and therefore as enforceable, both at law and at equity, whether the corporation acquiesces in or resists such enforcement: *Watt's Appeal*, 78 Pa. St. 370; *Deane v. Hodge*, 35 Minn. 146; 59 Am. Rep. 321; *Beach v. Miller*, 130 Ill. 162; *ante*, p. 291; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461.

It is of the utmost importance that a corporation and its officers should know whether or not a director who is participating in its management has an interest adverse to that of the corporation, or is deriving secret profits out of transactions in which he is believed to have no interest, other than as a member or officer of the corporation. If a director is about to contract with a corporation, or to cause it to enter upon a business transaction, in or from which he may derive a profit or personal interest, he must let his fellow-officers know his true situation. Otherwise the corporation, upon becoming aware of his interest, may elect either to rescind the transaction, or to charge him as its trustee and compel him to account to it for any profits which he may have realized; and no device to which he may have resorted to conceal his true interest will be sufficient to protect him in equity from the operation of this rule.

One of the most familiar devices fraudulent in law resorted to by directors for the purpose of furthering their own interests to the detriment of the corporation is that of forming another corporation for the purpose of entering into advantageous contracts or transactions with the principal corpora-

tion. Thus, during the construction of the Union Pacific railway, the executive committee of the board of trustees entered into a contract with Godfrey and Wardell that the latter might prospect for coal along the whole line of the Union Pacific railway and its branches and extensions, and open and operate any mines discovered, and that the railroad company would purchase of them all marketable coal needful for engines, depots, shops, and other purposes, and pay therefor certain prices specified in the contract. Afterwards, a corporation was formed, called the Wyoming Coal and Mining Company, to develop and work coal mines, and a majority of the stock therein was taken by six of the directors of the railway company, and to this last formed corporation the contract with Godfrey and Wardell was by them assigned. Wardell was an officer and manager of the coal company, and the railroad company having by order of its directors taken forcible possession of the mines and other property of the coal company, he brought an action in his own name to have an account taken of coal delivered to the railroad company, and for the ascertainment and settlement of the rights and interests of the several parties to the action. To this suit the railroad company answered that the original contract with Godfrey and Wardell was a fraud upon the company; that it was made on its part by the executive committee of its board of directors, and that a majority of this committee had, before entering into the contract, made an agreement by which they were to be interested with the contractors, and on that account the terms of the contract were made so favorable to the contractors and were so unfavorable to the company as to enable the former to make large gains at the expense of the latter, and that the organization of the coal company was a mere device to enable these directors to participate in the profits, and that therefore the contract was of no validity and binding obligation on the railroad company. The trial court found the answer of the railroad company to be true, and determined that the contract was a fraud upon the company, and that the complainant was not entitled to any redress based upon the contract. In affirming this decision, the supreme court of the United States said: "It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another, whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases, duty would be overborne in the struggle': *Marsh v. Whitmore*, 21 Wall. 183. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railway company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they or some of them will take stock in it, and then that valuable contracts shall be given to it, in the profits which

they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration: *R. R. Co. v. Magnay*, 25 Beav. 556; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Flint R. R. Co. v. Dewey*, 14 Mich. 477; *European etc. R. R. Co. v. Poor*, 59 Me. 277; and *Drury v. Cross*, 7 Wall. 299. The scheme discloses here no feature which relieves it of its fraudulent character, and the contract of July 16, 1868, which was an essential part of it, must go down with it. It was a fraudulent proceeding on the part of the directors and contractors who devised and carried it into execution, not only against the company, but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands. By the very terms of the charter of the company, five per cent of its net earnings were to be paid to the government. These earnings were necessarily reduced by every transaction which took from the company its legitimate profits. It is true that some of the directors who approved of or did not dissent from the contract early stated that they held their stock in the coal company for the benefit of the railroad company, and transferred it, or were ready to transfer it, to the latter; but the majority expressed such a purpose only when the character and terms of the contract became known, and they were desirous to screen themselves from censure for their conduct": *Wardell v. Union Pacific Railway Co.*, 103 U. S. 651. A somewhat similar case was that of *Thomas v. Brownville etc. R'y Co.*, 109 U. S. 522, in which it appeared that the directors of the railroad company contracted with a construction company in which some of them were interested, and upon substantial consideration to other directors, and it was determined that this contract was fraudulent and void; that the construction company could maintain no suit upon it; and that the bonds given in pursuance of it could not be enforced unless they were negotiable instruments in the hands of innocent purchasers for value; but that, on a suit to foreclose a mortgage given in pursuance of the contract for the construction of the railroad, relief might be had upon a *quantum meruit* for the work actually done and accepted without regard to the prices fixed by the contract, and that the mortgage should stand as security for the reasonable value of what the railway company actually received in the way of construction.

If a director has any interest in a transaction of which the corporation is not informed, and he realizes profits therefrom, the corporation may, by proper suit, compel him to account for and to pay over to it such profits: *European and North American R. R. Co. v. Poor*, 59 Me. 277; *Great Luxemburg R. R. Co. v. Magenay*, 25 Beav. 586; *Benson v. Heatheron*, 1 Younge & C. 324. This rule is well sustained and illustrated by *Farmers' and Merchants' Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 62. In that case, it appeared that a director in a banking corporation loaned its moneys, taking proper notes for the repayment thereof, and exacting as a condition precedent to the granting of the loan an agreement that he should have a share in the profits of the purchase of lands, which the borrower expected to affect with the aid of the money so borrowed. The corporation, subsequently becoming advised of this agreement, demanded that its director assign the same to it, and this demand being refused, brought a suit to charge the director as its trustee. In sustaining the relief demanded, the court said: "Upon well-settled principles governing courts of equity, the defendant cannot be permitted to retain these profits for himself. They constituted part of the consideration which the borrower paid, or agreed to pay, in obtaining the

loan, and are as clearly the property of the corporation as is the interest accrued and stipulated to be paid on the face of the note itself. In making the loan, the defendant was acting as director of the corporation, plaintiff here. He was its trustee. All officers and directors of a corporate body are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages not common to the latter."

A trustee's authority to represent a corporation must be interpreted as extending only to cases in which he has no personal interest; and if he undertakes to exercise it in a case in which he has an interest, the transaction may be treated as unauthorized. Thus if a president of a bank which holds the note of a director purchases of the latter his stock in the bank, and directs the cashier to hold the stock in place of the note, and to surrender the note, this act, being in the personal interest of the president, is not within the limits of his authority. The surrender of the note by the cashier is therefore invalid, and its payment may still be enforced: *Rhodes v. Webb*, 24 Minn. 292. If a trustee or other officer of a corporation, acting in its behalf, enters into a contract for building and equipping a road, and afterwards a portion of the contract is assigned to him, he will not be permitted, as against the corporation, to retain any portion of the profits or proceeds of such contract: *Flint & P. M. R'y Co. v. Dewey*, 14 Mich. 477. If a note is made by the directors of one corporation, as individuals, and transferred to another corporation, and one of the makers of the note is also the payee and indorser thereof, and is president of both corporations, he cannot, as an officer of the corporation to which the note is thus transferred, consent to any arrangement releasing or impairing the individual liability of himself or of his co-directors: *Gallery v. National Exchange Bank*, 41 Mich. 169; 32 Am. Rep. 149. If a director is, by a resolution of the board, authorized to borrow money, and to execute therefor a mortgage of the corporation, the money so borrowed to be applied to the payment of the corporate debts, and he purchases such debts, assigns them to a firm of which he is a member, and then executes a mortgage to such firm in the name of the corporation, the execution of such mortgage will be treated as unauthorized: *Davis v. Rock Creek F. L. M. Co.*, 55 Cal. 359; 36 Am. Rep. 40. In this case, the court, in addition to holding that the execution of the mortgage was unauthorized, expressed the opinion that the mortgage was also incapable of enforcement, upon the further ground that the director, in executing it, and in the transactions preceding its execution, was representing conflicting interests. The language of the court upon this subject was as follows: "But, apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolf as a member of the firm of A. Wolf & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great discount as possible. The greater the discount, the greater the gain. If he succeeded in purchasing the debts at any discount, to that extent he secured to himself an advantage not common to all the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case, it does not appear that Wolf secured the demands against the corporation at any discount; neither does it appear that he did not. Nor does the policy of the law permit any inquiry into that question. Occupying, as he did, the position of

trustee, he should not have put himself in a position adverse to his *cestuis que trust*. One cannot faithfully serve two masters whose interests are diverse." Other cases illustrating the rule that directors, because of their fiduciary relations to the corporation, are inhibited from speculating with its funds for their own benefit, or from making secret profits on transactions entered into by them on its behalf, are cited in the note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 642, to which the reader is referred.

In all cases where a director acts secretly, as where he takes a contract or obligation of the corporation for his own benefit, in the name of a third person, there is little doubt that a court of equity will either vacate it or compel him to account to the corporation for all profits and advantages derived from or under it. Thus where a director of a corporation procured its notes and mortgage to be made to his partner, who, however, never had any real or beneficial interest therein, and never advanced any part of the consideration, and the director advanced a certain sum of money in the name of his partner, and procured therefor the notes and mortgage already mentioned, and the rate of interest stipulated in the notes was excessive, and the amount thereof greater than the sum actually borrowed, the excess being intended to secure the lender against taxes on the mortgage, it was determined that the corporation was entitled to have the notes and mortgages canceled, upon payment of the actual amount advanced, with reasonable interest thereon according to the current market rates at the time when the loan was made, and without paying any of the additional sum stipulated to be paid over and above the amount actually loaned: *Sutter Street R. R. Co. v. Baum*, 66 Cal. 44.

The cases assert in general terms the right of a corporation to elect to rescind or set aside all contracts between the corporation and one of its directors upon prompt and reasonable application. Thus *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456, 77 Am. Dec. 311, was a suit in equity seeking, among other things, to have declared void certain deeds by the plaintiff corporation to one of its directors and a third person. The plaintiff contended that the conduct of the director had been fraudulent; in fact, that he had brought about the sale of the lands in question through his influence as a director, and with a view to profit thereby to the detriment of the corporation. The court, however, was of the opinion that the evidence did not require it to brand the motives of the director and his fellow-grantee as willfully dishonest. It did not rest its judgment upon the ground that the director had taken advantage of his position or of superior information possessed by him, but maintained the broad proposition that a transaction between a corporation and one of its directors, like one between a *cestui que trust* and his trustee, is voidable at the instance of the former, and that no inquiry would be made to ascertain whether it was for his benefit as long as he was unwilling to remain bound by it. The court of errors and appeals of the state of New Jersey, in *Stewart v. Lehigh Valley R. R. Co.*, 35 N. J. L. 522, expressed its views upon this topic as follows: "The position thus assumed by the plaintiff rests upon the broad principle that it was the duty of the director to so deal with the property and franchises of the corporation — to so manage its affairs — as would most conduce to the corporate interest, and that he would not perform that duty while contracting with it in his own behalf, or if, by possibility, his own interest was consistent with the best interest of the company in so contracting, yet, so insidious are the promptings of selfishness, and so great is the danger that it will override duty when brought in conflict with it, that sound policy requires that such contract should not be enforced or regarded. After an examination of all the cases cited, and

such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is, that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust*, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract, such as the right to pass over its railroad, or transport his goods over its canal, on paying reasonable tolls, or to have money which he has loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his *cestui que trust*: for in the very bargain which gave rise to it, in which he should have kept in view the interest of that *cestui que trust*, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, the judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the *cestui que trust* than any one else, but the opportunities for self-advancement at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than those isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of the board of directors to support his contract with his company upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargain with his co-directors. The very words in which he asserts his right declare his wrong: he ought to have participated, and in the interest of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained; he must hold against them no advantages that he has got through neglect of his duty towards them. Many authorities exemplifying the rule may be found." Of the propriety of these views as applied to cases in which a purchasing or contracting director has undertaken to represent both himself and the corporation, there can be no doubt: *Gardner v. Butler*, 30 N. J. Eq. 702; *N. Y. Central I. Co. v. National Prot. Ins. Co.*, 14 N. Y. 85. So if contracts are entered into between two corporations, a majority of the boards of directors of each, consisting of the same persons, the interests which they assume to represent being adverse, such contracts may be set aside at the instance of any person having an interest which may have been sacrificed; and the contracts cannot be sustained by proving that the directors, though they represented conflicting interests, acted in good faith: *Pearson v. Concord R. R. Co.*, 62 N. H. 537; 13 Am. St. Rep. 590; *Goodin v. Cinn. & W. C. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Memphis & C. R. R. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81.

From the general rule, hereinbefore asserted, that a purchase made by a director from his corporation, or a contract entered into between him and it, is not void, but voidable only at the instance of the corporation, it follows that a third person cannot treat it as void, and proceed as though it had not been made, or if made, had already been avoided by the corporation: *Jones v. Arkansas A. & M. Co.*, 38 Ark. 17.

A director of a corporation, as is already shown, may contract with it in cases where he does not represent both parties, may purchase its notes and drafts or loan it moneys, and, to some extent at least, deal with it in the same manner as a stranger: *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226; *Garrett v. Burlington P. Co.*, 70 Iowa, 697; 59 Am. Rep. 461. It necessarily follows from this that he may accept or enforce payment of his debt under ordinary circumstances. Payments made in the usual course of business, and not in view of the probable insolvency of the corporation, and while it expects in good faith to proceed with its business, are not frauds upon the other creditors, and cannot be recovered by them of the directors to whom such payments were made: *Hoit v. Bennett*, 146 Mass. 437.

If a corporation does not voluntarily pay a debt due to it from one of its directors, he may undoubtedly coerce payment by any appropriate action. At a sale under the judgment which may be entered in such action, he may become a purchaser of the corporate property, and may retain the benefit of such purchase, unless it is for so inadequate a price as to excite suspicion that the director therein acted unfairly in the sale, or in not having the corporation effect a redemption: *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178. A director may also become a purchaser of the property of the corporation at a sale made under a mortgage executed by it: *Salt Marsh v. Spaulding*, 147 Mass. 224. He may also become a purchaser of the property at an execution or judicial sale, though in either event it is probable that the corporation may elect to compel him to hold the property for its benefit, or to disaffirm the sale and have the property resold: *Hoyle v. Plattsburg M. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *McAllen v. Woodcock*, 60 Mo. 174; *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501.

The right of a director to exact payment of a debt due him from the corporation must not be so exercised as to give him a preference over its other creditors, and if so exercised, the preference will be set aside: *Hopkins's Appeal*, 90 Pa. St. 69; *Smith v. Putnam*, 61 N. H. 632; *Adams v. Kehler Mining Co.*, 35 Fed. Rep. 433. Directors of an insolvent corporation are trustees of its funds and property, for its creditors as well as for the corporation and its stockholders, and are bound to apply such funds *pro rata* to the payment of the corporate debts, and not use them to pay their own debts or to exonerate themselves to the injury of their creditors: *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263. If a corporation is insolvent, and its directors, or some of them, are among its creditors, every device resorted to for the purpose of giving them a preference over its other creditors is fraudulent and void as against them. Hence a mortgage given for such a purpose cannot be enforced: *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; 59 Am. Rep. 466. A conveyance made to such directors in payment of their debts will be vacated at the instance of the other creditors injuriously affected thereby: *Beach v. Miller*, 130 Ill. 162; *ante*, p. 291; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88.

In Illinois, it has been decided that when a corporation was insolvent, and without means to discharge its debts or to redeem its property, which had been sold at judicial sale, and the directors gave all the stockholders an opportunity to make advances to relieve the company, which they refused to do, then that the directors who afterwards purchased the indebtedness due from the corporation, and acquired title to the corporate property by enforcing its sale under a deed of trust given to secure such indebtedness, were entitled to hold such property for their own benefit, and that the other stockholders, who refused to make such advances had no just cause of complaint:

Harts v. Brown, 77 Ill. 226. The courts of Iowa have proceeded one step further, and have placed directors who take and enforce the securities of an insolvent corporation on substantially the same basis as though they were strangers to the corporation, and have refused to permit such securities to be assailed except upon the ground that the directors were guilty of bad faith or dishonest practices, and this although the debts for which the security was given were in excess of the indebtedness prescribed by the articles of incorporation: *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461. The court in this case said that it could not assent to the proposition "that a director of an insolvent corporation cannot take from it security by mortgage or other conveyance creating a lien upon its property, even though given in good faith and without fraud in the transaction. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way take its property in security. If the property, money, or other consideration of the debt was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors."

A contract which is originally voidable because entered into between two corporations, represented by the same persons as trustees of both, or because entered into between a corporation and one of its directors, may subsequently be ratified, and becomes enforceable, and such ratification may be presumed from the long-continued acquiescence of the corporation: *U. S. Rolling Stock Co. v. Atlanta etc. R. R. Co.*, 34 Ohio St. 450. "The law governing questions of ratification in cases like the present is well settled. To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition. And, in addition to all this, the *cestui que trust* must not only have been acquainted with the facts, but apprised of the law, how those facts would be dealt with if brought before a court of equity": *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456; 77 Am. Dec. 311.

an opinion: *Pender v. Lancaster*, 14 S. C. 25; 37 Am. Rep. 720.

The view we have reached is in accord with the cases of *North v. Shearn*, 15 Tex. 174; *Trotter v. Dobbs*, 38 Miss. 198. We have been unable to find any holding to the contrary, and the learned counsel for appellants have cited us to none.

The decree must be affirmed.

HOMESTEAD — MARRIAGE. — The marriage of an execution debtor after levy upon personal property, but before sale, does not entitle him to a homestead exemption: *Pender v. Lancaster*, 14 S. C. 25; 37 Am. Rep. 720.

PEOPLE'S BANK v. FRANKLIN BANK.

[88 TENNESSEE, 299.]

FORGED CHECK, LIABILITY OF BANK FOR NEGLIGENTLY CASHING. — A bank which negligently cashes a forged check purporting to be drawn upon another bank, and upon its indorsement of the check receives payment from the drawee bank, is liable to the latter bank for the amount received, upon subsequent discovery that the check was forged.

NEGLIGENCE IN BANK CASHING FORGED CHECK, WHAT IS EVIDENCE OF. —

Where a bank that cashes a forged check is unable to give the name of the person who presented such check, or of the person to whom it was paid, or to state positively that it required identification of such party, this is sufficient evidence of its negligence to render it liable to the drawee bank to which it indorsed it. And the drawee bank will not be precluded from recovery because, relying upon the indorsement of the other bank, it paid the check without investigation as to its genuineness.

BILL to recover amount paid by mistake on a forged check. The opinion states the case.

Stark and Stark, for the complainant.

Leech and Savage, for the respondent.

FOLKES, J. Young was a depositor of the complainant bank. His name was forged to a check drawn on the complainant, payable to the order of one Morgan. Morgan's name was also forged as an indorser on the check. This check, with the forged name of Young, the maker, and of Morgan, the indorser, was presented to the defendant, the Franklin Bank, and was cashed or purchased by the defendant, and transmitted, after indorsement by the defendant, to the complainant bank, by mail. The complainant bank had and kept an account with the defendant bank, and upon

the receipt of the check, passed the amount thereof to the credit of the defendant bank. The complainant bank was located and did business at Springfield, in the county of Robertson; the defendant bank was located and did business at Clarksville, in Montgomery County. The check, which had been received by the complainant bank, and passed to the credit of defendant bank, as above stated, on December 8, 1888, was ascertained, thirty-one days thereafter, to be a forgery, this discovery being made by the depositor, Young, when he came to examine his pass-book, together with the checks returned therewith. Thereupon the complainant bank canceled the charge against Young, the depositor, and at once notified the defendant bank of the forgery, and demanded that the same be made good by the defendant bank. Upon refusal, complainant filed this bill to recover the amount of the check as having been paid by it, through mistake, upon the forged check, charging in the bill the facts above stated, and also the further fact that, when presented, the check bore the indorsement of the defendant bank, and that upon the faith of such indorsement, the complainant's teller accepted the check, and gave credit to the defendant bank, with less careful scrutiny of the genuineness of the drawer's signature, by reason of the confidence reposed in the genuineness of the paper as evidenced by the indorsement of the defendant bank. The defendant answered the bill, admitting that it had received and cashed the check, as charged, and stating that it was unable to furnish the name of the party or parties by whom the check had been presented, and to whom it had been paid by it, but presumed that it had required identification; but of this they do not remember. The allegations of the bill were sustained by the proof; but the chancellor, being of opinion that the plaintiff should, at its peril, know the genuineness of the signature of its depositor, refused the relief prayed for, and dismissed complainant's bill, from which complainant has appealed, assigning errors.

The general rule undoubtedly is, that the bank has, at its peril, to know the genuineness of the signature of its depositor; and if it pays a forged check, the loss must fall upon the bank, and not upon the depositor, except in cases where the negligence of the depositor has induced or brought about the payment by the bank. This duty, with reference to the bank, may be said to be an exception to the general rule that money paid by mistake can be recovered, and to the general

statement of another equally well-settled rule that the payment of a forged paper conveys no title; for it is well settled that the deposit of a forged bill or base coin creates no indebtedness, although credited to the depositor's account, for the reason that payment in such material could not discharge a debt, and cannot create one. The bank is not only responsible to the depositor, where the check with the depositor's signature forged is paid by the bank (except where the depositor has been guilty of negligence sufficient to mislead the bank), but the bank is precluded from recovering from a party to whom a forged check has been paid, where such party, being without fault, would be prejudiced by being required to refund to the bank, upon whom rests the duty of determining the genuineness of the depositor's signature. Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text-books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check; for, notwithstanding the negligence, to some degree, that the paying bank has been guilty of in paying the forged check, without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence, in purchasing and indorsing the forged paper. The bank upon whom the check is drawn, in the practical administration of banking business, may well be lulled to a less careful scrutiny of its depositor's signature of a check, where the same is indorsed by another bank with which it is in correspondence or interchange of business, than it would exercise in accepting and paying the same check, not so indorsed, to a stranger. The indorsement of the check, by the payee, may be said, ordinarily, to be a guaranty of the genuineness of the indorsements theretofore on the paper, and also of the genuineness of the drawer's signature, subject, perhaps, to some exception in particular cases, as, for instance, where the indorsement is made after the genuineness of the preceding signatures has been approved by the paying bank. Applying these principles to the case at bar, we are of opinion, and so adjudge, that the first fault was with the defendant bank. This bank accepted and cashed a check drawn on a bank in another county, to which the name of the drawer and the

payee had both been forged, and so far as this record discloses, without requiring any identification of the parties to whom such payment was made; certainly without reserving any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant bank, upon receiving such check, in due course of mail, for deposit to credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and if not, that the indorsement would stand as a guaranty to the paying bank from loss that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser. Such would not only seem to be sound in theory, and supported by authority, but is in accordance with the proof in this case, and it is a matter of such general information that perhaps the court might be warranted in taking judicial knowledge of it, that in dealings between banks, and especially with reference to clearings and clearing-houses, banks will adjust and pay differences between each other, or between itself and the clearing-house, upon the faith of the indorsement, by other banks, of the checks involved in such settlement, before they examine the signature to the checks involved or embraced in the settlement, relying on such indorsements as protecting it in such payment should a subsequent and more careful scrutiny of the signatures disclose forgeries in the making and indorsing of the checks so paid.

Mr. Daniel, in his work on negotiable instruments, after discussing and criticising the cases that are supposed to hold a bank liable at all hazards, and to the last extremity, where it pays the check with the signature of its depositor forged, lays down the rule substantially as we have above stated it: 2 Daniel on Negotiable Instruments, secs. 1655, 1655a, 1656, and 1657, with cases cited in the notes.

And the rule is stated by the learned contributor to the article on forged checks in 3 Am. & Eng. Ency. of Law, p. 223, as follows: "Where, however, the loss has been traced to the fault or negligence of the drawer or holder, it will be fixed upon him." See cases cited in note 1.

And on page 225 of 3 Am. & Eng. Ency. of Law, it is said: "Also, the holder, by indorsing a check, warrants the genuineness of all prior indorsements." See note 1, citing numerous

cases, amongst which is the case of *Harris v. Bradley*, 7 Yerg. 310, where Judge Green lays down the doctrine as to the effect of an indorsement in guaranteeing the genuineness of prior indorsements in the language as quoted. It is true that in the Yerger case the language was used with reference to a note, and not a check, and such may also be the case with other of the authorities cited in said note which we have not examined. Now, while we concede that there is quite a difference between this rule as applicable to indorsers on commercial paper and as applied to checks, so far as the liability of the drawee is concerned, yet we see no reason why the bank should not have the benefit of such rule, where the indorsement is made under circumstances which establish or impute negligence to the indorser. The cases of *Levy v. Bank of United States*, 4 Dall. 234, and *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, are relied on as authority for the judgment of the chancellor in the case at bar. The facts of the case in 4 Dallas are so briefly stated as to leave us uninformed as to the manner in which the question was presented. The case of *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, was where a forgery was by raising the notes of the defendant bank; the notes, coming in due course to the United States Bank, were presented to the Bank of Georgia, and passed to the credit of the United States Bank. Nineteen days thereafter, the forgery was discovered, and notice given. Upon refusal of the United States Bank to make good the loss, the credit was, by the Georgia Bank, withdrawn from the account, and the United States Bank brought its suit for money had and received. It was held that the plaintiff could recover. While the reasoning of the learned judge and much of the argument tends to sustain the contention of the defendant here, still, the court put its judgment in that case distinctly "upon the ground that the defendants were bound to know their own notes, and having received them without objection, they cannot recall their assent." While these two cases are criticised by Mr. Daniel as unsound, that criticism, so far as the latter case is concerned, may be well confined to the argument contained in the opinion; for the point decided is in no manner hostile, as we understand it, to the principle as announced by Mr. Daniel, and adopted by us in the disposition of the case at bar; for there is nothing to show that there had been any negligence on the part of the United States Bank in receiving the notes of the Georgia Bank, and we can well understand how

there could and ought to be a higher obligation upon the bank to know the genuineness of its notes of issue passing current as money than rests upon it to know the signature of the depositor on a check indorsed by a solvent correspondent. But putting them both on the same footing, there is wanting in the report of the case in 10 Wheaton any evidence of negligence on the part of the United States Bank.

The view we have expressed, and the principle upon which we reverse the chancellor, and award judgment here for complainant, is not only sustained by Mr. Daniel, but also by Mr. Chitty, Mr. Parsons, and Mr. Bolles, who fortify their conclusions by ample authority: See Chitty on Bills, 13th Am. ed., *431, *485; 2 Parsons on Notes and Bills, 80; Bolles on Banks and Depositors, sec. 189; *Hardy v. Chesapeake Bank*, 51 Md. 585; 34 Am. Rep. 325; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96, 112; *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; 74 Am. Dec. 438; *National Bank of N. A. v. Bangs*, 106 Mass. 441; 8 Am. Rep. 348; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *First National Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104.

It results, therefore, that the decree of the chancellor must be reversed, and judgment rendered here for the amount of the check, with interest and costs.

SNODGRASS, J., concurred in the result, on account of the negligence of the indorsing bank, but dissented from what might be implied from the argument of the prevailing opinion, that that bank would have been liable had it not been negligent, but had taken the check from a known and good-faith indorser. The view taken in the case in 4 Dallas is a sound one. As between itself and good-faith indorsees the paying bank should be the place of final settlement, where all prior mistakes and forgeries should be corrected. If they were not then corrected, the acceptance and payment should be treated as final. The paying bank and the time of payment are the proper place and time to settle and end these things as to innocent indorsers. If the paying bank fails to perform its duty to itself, to its depositors, and to all indorsers and parties interested, by then settling all questions that could arise, it should take the consequences. It will not do to say that the paying bank does not injure an indorsing bank by payment and delay. Any delay may be, and much delay must be, injurious. Nor is this question affected by the clearing-house arrangement. Banks are represented there as well as at their own counters, and they should not be allowed to escape liability for failure to exercise the usual care to detect errors and forgeries. If the arrangement is not safe, they should change it for one that is safe.

RIGHTS AND REMEDIES OF THE SEVERAL PARTIES WHEN A FORGED CHECK HAS BEEN PAID. — It is a well-established rule of law, both in England and in this country, that money paid under a mistake of fact may be recovered back,

however negligent the party paying may have been in making the mistake, where the party who has received the payment has no right to retain the money. And the tendency of the modern authorities is to extend rather than to curtail the operation of this rule. In delivering the opinion of the court in *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211, 215, Rapallo, J., said: "The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are molded so as to do equity between the parties. The exceptions which have been established by authority, and have been ingrafted upon the commercial law, it is not our purpose to disturb; but they should not be extended; unless a case is clearly brought within them, the general principles should govern."

EXCEPTIONS TO THIS RULE. — One generally received exception to the rule stated above is, that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a bill or check upon which the drawer's signature has been forged, he cannot, upon the discovery of the forgery, recover back the amount, if the party to whom he paid it was a *bona fide* holder. The drawee is held bound to know the signature of his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss: *Price v. Neal*, 3 Burr. 1355; *Smith v. Mercer*, 6 Taunt. 80; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190; *Laborde v. Consolidated Association*, 4 Robt. (La.) 190; 39 Am. Dec. 517; *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727; 26 Am. Rep. 105; *Commercial and Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; 96 Am. Dec. 554; *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325; *Mackintosh v. Elliot Nat. Bank*, 123 Mass. 393; *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294; *Star F. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *National Bank of Commonwealth v. Grocers' Nat. Bank*, 35 How. Pr. 412; *Salt Springs Bank v. Syracuse Savings Institution*, 62 Barb. 101; *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Levy v. Bank of United States*, 4 Dall. 254; 1 Binn. 27; 2 Daniel on Negotiable Instruments, 3d ed., secs. 1359, 1655; 2 Morse on Banks and Banking, 3d ed., sec. 463. Alvey, J., in delivering the opinion of the court in *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, said: "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank; for it acts at its peril, and pays out its own funds, and not those of the depositor." The exception under consideration was established by Lord Mansfield in the year 1762 in the case of *Price v. Neal*, 3 Burr. 1355. In that case the drawee of two bills of exchange had paid one bill and accepted and subsequently paid another. After paying them, he discovered that the drawer's signature had been forged, and brought suit against the holder to recover back the money paid. Lord Mansfield stopped the defendant's counsel, saying the case was one that could not be made plainer by argument; that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it; that he had made no objection to the bills at the time of paying them; that whatever neglect there was was on his side; and that the misfortune which had happened was without the defendant's fault or neglect. This case became a

leading one, and its authority has been generally accepted, as will be seen by reference to the list of cases cited above. Mr. Justice Story, in delivering the opinion of the court in *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, decided in 1825, referring to *Price v. Neal*, 3 Burr. 1355, said: "After some research we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." And Allen, J., in delivering the opinion of the court in *National Park Bank v. Ninth National Bank*, 46 N. Y. 81, 7 Am. Rep. 310, referring to *Price v. Neal*, 3 Burr. 1355, said: "But as applied to the case of a bill to which the signature of the drawer is forged, accepted, or paid by the drawee, its authority has been universally and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid. . . . A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded."

DISSENT FROM THE DOCTRINE OF THE EXCEPTION. — Writers of recognized learning and ability have, however, shown a disposition to question the correctness of the principle established by the exception under consideration. Daniel says: "Notwithstanding these high authorities and numerous other cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance or afterward, a distinction has been taken between the two cases which is clearly philosophical, and, as it seems to us, much better calculated to effectuate justice than the doctrine of Mansfield and Story. When the holder has received the bill after its acceptance, the acceptor stands toward him as the warrantor of its genuineness, and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed, the acceptor, being the primary debtor, stands just as the maker of a genuine promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance and payment, the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance and payment as such. If he indorses it, he warrants its genuineness; and his very assertion of ownership is a warranty of genuineness in itself. Therefore, should the drawee pay it or accept it upon such presentment, and afterward discover that it was forged, he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence": 2 Daniel on Negotiable Instruments, 3d ed., sec. 1361. And subsequently, in discussing the right of a bank to recover money paid on a forged check, he says: "But where the bank discovers the forgery immediately, and demands restitution, offering to return the check, before the holder has lost anything by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount. Mr. Chitty seems to have had the same opinion, and Professor Parsons has expressed it in favorable terms. And the better doctrine, as we think, is, that the bank should have the right to recover, unless the circumstances of the holder had been changed so as to render it unjust. Forgeries often deceive the eye of the most cautious expert; and when a bank has been so deceived, it is a harsh rule which compels it to suffer, although no one has suffered by its being deceived. It is also a rule which tends to render those who trade for checks incautious, if by any means they can procure their payment by the bank. Parties often pronounce forgeries of their own signatures genuine. Why blame a third party so severely? And why

make an exception to a rule so just in its universal application": 2 Daniel on Negotiable Instruments, 3d ed., sec. 1655 a.

Professor Parsons, discussing the same subject, says: "We think the law must be this: the bank can recover it from the payee if the payee were in fault, or if an innocent payee will then be in no worse condition than if the bank had refused to pay it": 2 Parsons on Notes and Bills, 80. And Chitty, discussing the case of the payment of a forged bill of exchange, says: "It may be observed that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason why he should profit by the accidental payment when the loss had already attached upon himself, and why he should be allowed to retain the money when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation or occasioned any delay or prejudice": Chitty on Bills, 13th Am. ed., 485, *431. The reasoning of the writers of the extracts quoted above seems sound and just, and the tendency of modern authorities is to limit and pare down the application of the exception, rather than to extend its operation: See 2 Morse on Banks and Banking, secs. 463 et seq.

FATE OF THE EXCEPTION IN PENNSYLVANIA.—Pennsylvania was the first state to recognize and adopt the exception under discussion, in the case of *Lery v. Bank of United States*, 4 Dall. 234, 1 Binn. 27, and it is also the first state to abrogate the exception by legislative enactment. The act of April 5, 1849, of that state, provides that "whenever any value or amount shall be received as a consideration in the sale, assignment, transfer, or negotiation, or in payment, of any bill of exchange, draft, check, order, promissory note, or other instrument negotiable within this commonwealth, by the holder thereof, from the indorsee or indorsees, or payer or payers, of the same, and the signature or signatures of any person or persons represented to be parties thereto, whether as drawer, acceptor, or indorser, shall have been forged thereon, and such value or amount by reason thereof erroneously given or paid, such indorsee or indorsees, as well as such payer or payers, respectively, shall be legally entitled to recover back from the person or persons previously holding or negotiating the same the value or amount so as aforesaid given or paid by such indorsee or indorsees, or payer or payers, respectively, to such person or persons, together with lawful interest thereon from the time that demand shall have been made for repayment of the same." In Pennsylvania, therefore, there is no longer any doubt but a bank paying out money by mistake on a forged check or draft may recover it back: *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205; *People's Savings Bank v. Cupps*, 91 Pa. St. 315.

LIMITATIONS AND MODIFICATIONS OF THE EXCEPTION.—In the present condition of the question, it is not easy to definitely state when a case may be said to fall without the exception, and consequently to come within the rule that money paid by mistake may be recovered back. But an analysis of the modern cases will, we think, show that where there has not been absolute good faith on the part of the payee in communicating circumstances of suspicion known to him at the time of payment, and not known to the drawee, the money may be recovered back; so where the holder has been negligent

in not making due inquiry as to the validity of the check or draft before taking it, and the drawee, having the right to presume that the holder had made such inquiry, is excused from making inquiry before paying it, the money paid may be recovered back; so, too, where the loss had already attached before the forged bill or check was paid, and the drawee has given immediate notice to the holder and indorser after discovering the forgery, he may recover back the money paid; and, generally, that the exception applies only to cases where the party who received the money on the forged check or draft has in no way contributed to the consummation of the fraud, or to the mistake of fact under which the payment was made: *First National Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104; *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; 74 Am. Dec. 438; *De Feriet v. Bank of America*, 23 La. Ann. 310; 8 Am. Rep. 597; *National Bank of North America v. Bangs*, 106 Mass. 441; 8 Am. Rep. 349; *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Rourant v. San Antonio Nat. Bank*, 63 Tex. 610; *United States v. National Park Bank*, 6 Fed. Rep. 852; *Wilkinson v. Johnson*, 3 Barn. & C. 428; 2 Daniel on Negotiable Instruments, 3d ed., sec. 1657.

The case of *First National Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104, was an action brought by Ricker to recover back the amount of a forged check paid by him to the defendant, the First National Bank of Quincy. The check purported to have been drawn by Manning Brothers upon Ricker's bank and was payable to the order of Hundrack & Co. The latter deposited the check in the defendant's bank, and drew against it nearly the full amount of it. Directly after, the defendant had reason to doubt the genuineness of the signature to the check, and sent it by one Mills, a clerk, to the plaintiff's bank for payment. Plaintiff's teller said that he was not familiar with the drawer's signature, but that if Mills would indorse it for his bank he would pay it. Mills indorsed it, got the money, and returned it to the defendant, and informed his cashier of what he had done, and the cashier replied it was all right. The check was discovered to be a forgery, and notice of that fact was given in a few hours after the payment was made, and the plaintiff offered to return the check, and demanded back the money paid. The plaintiff had judgment in the court below, and the supreme court affirmed the judgment. Scott, J., who delivered the opinion of the court, referring to the exception under discussion, said: "The rule, however, presupposes the good faith of the transaction, that the holder was a purchaser *bona fide* for a valuable consideration; for the law certainly is, the drawee or payer can recover where the payee or holder is himself at fault, or has been guilty of fraudulent practices which may have thrown him off his guard. . . . There is wanting in this case that element of good faith that is to be found in nearly all the adjudged cases where a recovery has been denied. It is doubtless true, the appellant bank received the check in the usual course of business of Hundrack, without any suspicion it was a forgery. But when it was presented for payment the bank officers had every reason to believe it was spurious. . . . Without imparting the information in their possession, the check was presented at appellee's bank. . . . No one can believe appellee would have paid the check had his teller been put in possession of the facts then known to the officers of the appellant bank or the Union Bank. The cashier was in possession of such facts as made it morally certain at least that it was a forgery, before he sent the check to appellee's bank for certification. This information was withheld. Was this good faith? These facts rendered it 'against conscience'. . . . for appellant to retain appellee's money." The

learned judge also said: "The forger had fled before the check was presented, and hence it cannot be said that the delay worked any injury to appellant, or prevented the bank from securing itself, or that the payment, if retracted, made its condition any worse than if appellee had refused payment in the first instance."

In *De Feriet v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597, the plaintiff kept a bank account with the defendant bank, his book-keeper kept the cash account and made the deposits, etc., and his relations toward the plaintiff were well known to the bank. This book-keeper forged the plaintiff's name to a check for two thousand five hundred dollars, and as that sum exceeded his deposit, the bank notified him and showed him the check. He denied having signed the check, but did not denounce it as a forgery, and after seeing the book-keeper, reported to the bank that it was all right. Some time after, the book-keeper forged another check of the plaintiff for seventeen hundred dollars, and the bank paid it. On discovering this, the plaintiff denounced the second forgery. It was held that the plaintiff's act in ratifying the first forgery exonerated the bank for having paid it; that his subsequent retention of the book-keeper in his employ misled the bank and threw it off its guard; and that as he had ratified the first forgery, the bank was excused for paying the second check, and he must therefore bear the loss.

Howell, J., in delivering the opinion in that case, said: "We are led to the conclusion that the peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depository must take care to pay none but the checks or drafts of the depositor himself, or his acknowledged special agent, and that this is a proper case to apply the equitable principle that where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other."

In the case of *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, the firm of E. D. & G. W. Bangs & Co., the defendants, on September 21, 1869, sold some gold to a person who gave them in return a check on the plaintiff bank payable to their order, signed W. D. Bickford. This check was on the same day indorsed by them in blank and deposited with their bank for collection. On the next day, it was passed through the clearing-house, and paid in the ordinary course of business by the plaintiff bank, of which W. D. Bickford was a customer and depositor. On October 4, 1869, Bickford, upon examining the checks sent to him by the bank two or three days before, pronounced this a forgery, and informed the bank of it, and on the same day the bank notified the defendants that the check was forged. The plaintiff was held entitled to recover back the money paid by it. Wells, J., delivering the opinion of the court, said: "The check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it, the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name. But to the defendants the presentation, by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate to them for value, was a transaction which should have aroused their suspicions. It ought to have put them upon inquiry for ex-

planations; and if inquiry had been properly made, it would have disclosed the fraud, and prevented the success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party, who acted in like good faith, and also without fault or want of due care."

In the case of *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, a check drawn upon one bank was presented to another, within a short distance of the former, and was discounted, without asking any questions of the presenter as to who he was or as to his right to the check. Later in the day, this check was presented to the drawee bank by the discounting bank, and was paid without examination. Ten days later, the check was discovered to be a forgery, and the discounting bank was so notified. In an action by the drawee bank to recover back the money paid, the plaintiff introduced evidence to show a custom among the banks of the city to inquire, when a stranger presented a check to the bank other than the one on which it is drawn, "in reference to his right to the check, and the identity of the person," and that there was "not generally so strict a scrutiny when checks came from other banks, it being presumed that caution had already been exercised." It was held that the plaintiff could recover, as the bank which discounted the check had been negligent in not making the proper investigation as to the validity of the check, and that the drawee was excused from making such inquiry, it having a right to presume that the discounting bank had done so. Ranney, J., who delivered the opinion of the court in that case, said: "To entitle the holder to retain the money obtained by mistake upon a forged instrument, he must occupy the vantage-ground by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with a good conscience retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule designed for his protection against the negligence of the drawee into one for doing injustice to him."

In the case of *McKleroy v. Southern Bank of Ky.*, 14 La. Ann. 458, 74 Am. Dec. 438, one Zimmer, assuming the name John Belmont forged a draft on the plaintiffs in the name of James Smith, a planter residing in the state of Arkansas. He also forged a letter of introduction in Smith's name to Shotwell and Son, of Louisville, Kentucky, whose house had been in correspondence with Smith for many years. Shotwell and Son, being deceived by the forger, indorsed the draft, to enable the holder to negotiate it. The draft, bearing the indorsements of John Belmont and of Shotwell and Son, was then presented to the Southern Bank of Kentucky for discount, and being considered good, was purchased by it. The draft was then remitted to the Louisiana State Bank, with this additional indorsement upon it: "Pay to R. J. Palfrey, cashier. J. B. Alexander, cashier," and in this form was presented to the plaintiffs, and accepted and paid at maturity to the defendant's agent. A few weeks after, James Smith, upon going through his account with the plaintiffs, informed them that the draft was a forgery, whereupon they gave prompt and formal notice to the banks and to Shotwell and Son. The suit was

afterwards brought to recover back the money paid on the draft. The supreme court gave judgment for the plaintiffs, holding that as the loss had already occurred before the bill was either accepted or paid the holder had suffered no loss, and it ought not to be permitted to profit by the mere accident of payment. See also *National Bank of Commerce v. National M. B. Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232.

In *Rouwant v. San Antonio Nat. Bank*, 63 Tex. 610, the holder of a check signed by a person in a certain name took it from the person, although he had previously taken from him a check signed in a different name. On presenting the check, which proved to be a forgery, to the bank for payment, he did not mention this fact, and he was held bound to repay the money, because of his neglect to impart this knowledge of suspicious circumstances at the time he received the money.

THE EXCEPTION NOT GENERALLY APPLICABLE TO RAISED OR ALTERED CHECKS OR DRAFTS. — The exception applies only to cases in which the drawer's signature to a check or draft has been forged. It does not apply to cases where the forgery consists in altering the body of the check or draft. The bank or drawee is not bound to know the handwriting in the body of the instrument. Where, therefore, money is by mistake paid by a bank upon a raised or altered check, or by a drawee upon a raised or altered draft, neither party being in fault, it may generally be recovered back, as paid without consideration; but if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1661; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190; *Parke v. Roser*, 67 Ind. 500; 33 Am. Rep. 102; *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 310; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; 23 Am. Rep. 129; *Hall v. Fuller*, 5 Barn. & C. 750. But see *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; 26 Am. Rep. 92.

In delivering the opinion of the court in *Marine Nat. Bank v. National City Bank*, 59 N. Y. 77, 17 Am. Rep. 312, Allen, J., said: "Moneys paid upon checks and drafts which have been forgeries, either in the body of the instrument or in the indorsements, or in any respect, except the name of the drawer, have uniformly been held recoverable as for money paid by mistake, and expressly upon the ground that payment, as an admission of the genuineness of the instrument, was the same as an acceptance, and only operated as an admission of the signature of the drawer. The doctrine is applied to cases of bills altered in the body by the raising of the amount for which they were drawn, and also to those in which the name of the payee has been feloniously changed, in several cases, and uniformly applied whenever the question has arisen in this state."

But if a bank on which a raised draft is drawn pays it through mistake, upon its presentation to it by a correspondent bank, as agent, to which it is forwarded for collection, the collecting bank cannot be compelled to repay it, where it has paid over to its principal before notice of the mistake: *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; *National City Bank v. Westcott*, 118 N. Y. 468.

NEGLIGENCE IN FILLING UP CHECK, EFFECT OF. — If the customer of a bank draws his check in such a careless or incomplete manner that a material alteration may be readily made without leaving a perceptible mark, or giving the check a suspicious appearance, he may, if a fraud be perpetrated, be held to suffer the loss. In the case of *Young v. Grote*, 4 Bing. 253, a depositor in a bank, on leaving home, gave to his wife several checks signed in blank, to be filled up according to her needs. She filled up one for fifty-two pounds two shillings, but began the word "fifty" with a small letter, and wrote it in the middle of a blank line. In writing the figures in the margin, she also left a considerable space between the mark "£" and the figures "52." She gave the check in this form to her husband's clerk, to get the money, and he inserted the words "three hundred" before the "fifty," and the figure "3" before the figures "52," and drew £352 upon it. The court held that the loss must be borne by the drawer, because the careless drawing of the check had made the forgery easy and simple: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1659; 2 Morse on Banks and Banking, 3d ed., sec. 480. But a merchant is not guilty of such negligence as will render him liable on his check in the hands of a holder in good faith, and for value, in sending to the post-office, by a clerk who knew its contents, a sealed letter containing such check, which was made payable to order, and which check the clerk abstracted, and passed, after altering it by forging the words "or bearer," and obliterating the words "or order": *Belknap v. National Bank of North America*, 100 Mass. 376; 97 Am. Dec. 105. And in *Mackintosh v. Eliot National Bank*, 123 Mass. 393, it was held that a bank which pays out money on a check purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk had, or was supposed by the bank to have, authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check-book, which was left lying about in his office during the day; that it was stamped with a hand-stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the officers of the bank as the person who was authorized to receive money on the depositor's checks.

It is a general rule that if the loss can be traced to the fault or negligence of any party, it will be fixed upon him: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1657; *First National Bank v. Tappan*, 6 Kan. 456; *Gloucester Bank v. Salem Bank*, 17 Mass. 32; *Clews v. Bank of N. Y. Nat. B. Ass'n*, 114 N. Y. 70. In the case last cited, a draft upon defendant was indorsed by the payee and mailed to the indorsee. It never reached him, but fell into the hands of a knave, who presented it to defendant to be certified. A memorandum showing the number and amount of the draft, and that it was certified, was entered in a register kept by the defendant. The drawer notified the defendant by letter of the loss of the draft, and not to pay it. The defendant then added to the memorandum: "Stop pay't; see letter." Subsequently, the knave raised the amount and changed the date and the name of the payee, and offered it to the plaintiffs in payment for certain bonds. In an action to recover the amount of the draft as raised, plaintiffs proved that they sent their messenger to the defendant to ascertain whether the certification was good. The person in attendance answered, "Yes," without referring to the register; and upon the messenger's return with this reply, the plaintiffs received the draft in payment for the bonds. The court held that there was sufficient evidence to justify the finding that the defendant was negligent in

failing to disclose the facts to the plaintiffs' messenger, and to authorize a recovery. But in *Goddard v. Merchants' Bank*, 4 N. Y. 147, the plaintiffs, in New York City, being informed that the draft of the drawer, residing in Ohio, had been protested, went to the notary to take it up, and the notary being out, left a check for the amount and the notary's fees. The notary paid the bank and got the draft, which plaintiffs discovered to be a forgery as soon as it was shown to them. It was held that they could recover back the money paid, and that they were not negligent, under the circumstances, in paying the money without seeing the draft.

MONEY PAID UPON FORGED INDORSEMENT OF CHECK OR DRAFT may be recovered back. The bank or drawee is not bound to know the signature of an indorser. And the holder, whether he indorses the instrument or not, warrants the genuineness of all prior indorsements. If, therefore, a check or draft upon which the name of a prior indorser has been forged is paid, the amount may be recovered back from the party to whom it has been paid, or from any party who indorsed it subsequent to the forgery.

And if a check is drawn payable to the order of an existing person, and the indorsement of such person is forged, and thereafter payment is made by the bank, such payment will be no acquittance to it. A payment made otherwise than according to the depositor's directions is no discharge of the bank's obligations to him: 2 Daniel on Negotiable Instruments, sec. 1663; 2 Morse on Banks and Banking, sec. 474; *Atlanta Nat. Bank v. Burke*, 81 Ga. 598; *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481; 74 Am. Dec. 442; *Lery v. Bank of America*, 24 La. Ann. 220; 13 Am. Rep. 124; *Lennon v. Brainard*, 36 Minn. 330; *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294; *Star F. I. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Buckley v. Second Nat. Bank*, 35 N. J. L. 400; 10 Am. Rep. 249; *Johnson v. First Nat. Bank*, 6 Hun, 124; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coggill v. American Exchange Bank*, 1 N. Y. 113; 49 Am. Dec. 310; *Morgan v. Bank of State of New York*, 11 N. Y. 404; *Turnbull v. Boyger*, 40 N. Y. 456; 100 Am. Dec. 523; *Thomson v. Bank of B. N. A.*, 82 N. Y. 1; *Citizens' Nat. Bank v. Importers' and Traders' Bank*, 119 N. Y. 195; *Sheffer v. McKee*, 19 Ohio St. 526; *Dodge v. National Ex. Bank*, 20 Ohio St. 234; 5 Am. Rep. 648; 30 Ohio St. 1; *Pickle v. Muse*, 88 Tenn. 380, *post*, p. 900; *Leather Mfrs. Bank v. Merchants' Bank*, 128 U. S. 26.

If, however, the drawer puts in circulation a draft or check, with the indorsement of the payee already upon it, and it is purchased in the market by a *bona fide* holder, who presents it to the drawee, by whom it is paid, the drawee cannot recover back the money he paid to such *bona fide* holder: *Hortsmann v. Henshaw*, 11 How. 177; *Star F. I. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Meucher v. Fort*, 3 Hill (S. C.) 227; 30 Am. Dec. 364; *York Bank v. Asbury*, 1 Biss. 233; 2 Morse on Banks and Banking, sec. 476. And where the drawer of a bill of exchange payable to order himself indorses the bill, and passes it to a bank, which discounts it, and collects the amount from the drawee, the latter cannot recover back from the bank the money paid to it by him: *Coggill v. American Ex. Bank*, 1 N. Y. 113; 49 Am. Dec. 310. Bronson, J., in delivering the opinion in this case, said: "A *bona fide* holder may treat it as a bill payable to bearer. The bank had a good title to the bill as against the drawers and the payee, and that was a good title against all the world. No one is injured by this doctrine. The bill has answered the end for which it was drawn. The plaintiff has paid money for the drawers in pursuance of their request; and he has the same remedy against them that he would have had if the indorsement had been genuine."

CERTIFICATION OF CHECK, EFFECT OF, ON RIGHTS OF BANK PAYING FORGED CHECK. — The better opinion is, that a bank, by certifying a check, either verbally or in writing, warrants only the genuineness of the drawer's signature, and that it has funds to meet the check; that it does not thereby warrant the genuineness of the body of the check, or of any indorsement upon it; and that if there has been any fraudulent alteration, or forged indorsement, prior to the certification, the certification is not binding. And if the bank afterwards, through mistake, pays the sum to which the check has been raised, it may recover back the difference between that and the original sum for which it was drawn: 2 Daniel on Negotiable Instruments, sec. 1603; 2 Morse on Banks and Banking, sec. 482; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Park v. Roser*, 67 Ind. 500; 33 Am. Rep. 102; *National Bank of Commerce v. National M. B. Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; 23 Am. Rep. 129; *contra*, *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; 26 Am. Rep. 92.

NOTICE OF FORGERY AND DEMAND FOR RESTITUTION, WHEN TO BE GIVEN OR MADE. — It is only reasonable that a party who has paid money on a forged instrument, and seeks to recover it back, should be required to give notice of the forgery, and make demand of restitution within a reasonable time. The earlier cases, both in England and in this country, required notice to be given with very great promptitude: *Cocks v. Masterman*, 1 Barn. & C. 902; *Smith v. Mercer*, 6 Taunt. 76; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vt. 141; 33 Am. Dec. 188; 2 Daniel on Negotiable Instruments, sec. 1371; 2 Morse on Banks and Banking, sec. 488. In *Cocks v. Masterman*, 1 Barn. & C. 902, a delay of one day was held to be fatal.

But the doctrine established by the great weight of modern authority in this country is, that mere lapse of time in the abstract, however long, will not bar the right of the party to allege the forgery, and recover back the money paid, provided he gives notice and makes demand within a reasonable time after he discovers the forgery: 2 Daniel on Negotiable Instruments, sec. 1372; 2 Morse on Banks and Banking, sec. 487; *Schroeder v. Harvey*, 75 Ill. 368; *First Nat. Bank v. Tappan*, 6 Kan. 456; 7 Am. Rep. 568; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Corn Ex. Bank v. Nassau Bank*, 91 N. Y. 74; 43 Am. Rep. 655; *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628. But in *Weinstein v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23, it was held that a bank is not liable to a depositor for money paid on forged checks, where, by reason of the depositor's negligence and delay in examining his account and reporting the forgeries, the bank loses the opportunity of recovering the money which it would have had, if the discovery and report had been made in a reasonable time.

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made by the probate court for the sale of the land at public vendue. The land was appraised at one hundred and fifty dollars, and sold for ten dollars to Wm. H. Long; six years thereafter he sold by warranty deed to Andrew Hendricks for three thousand dollars. In April, 1884, Hendricks conveyed by like deed for same consideration to defendant.

By stipulation filed, it is agreed that the sole question to be determined is, whether the curator's deed is valid. There can be no hesitation on this point; it is a plain matter of statutory provision. Sections 28, 29, and 30, page 469, General Statutes, 1865, control this case.

The last-named section declares: "No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three fourths of its appraised value," etc. The probate court had no jurisdiction to approve such a sale. Its order of approval was therefore *coram non judice*, and the deed showing the facts already recited was void on its face.

We reverse the judgment, and remand the cause, with directions to enter a judgment for plaintiffs, after having taken an account of rents and profits.

JURISDICTION — STATUTORY AUTHORITY. — Where a statute prescribes the mode of acquiring jurisdiction, it must be strictly pursued, or all the proceedings will be mere nullities: Note to *Bloom v. Burdick*, 37 Am. Dec. 308, 309.

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[100 MISSOURI, 397.]

MEANING OF ORDINARY WORDS IN INSTRUCTIONS NEED NOT BE EXPLAINED WHEN. — It is not necessary that the meaning of ordinary words and phrases, such as "diligent inquiry," used in their usual and conventional sense in instructions to the jury, should be defined or explained.

FALSE REPRESENTATIONS, DILIGENT INQUIRY NOT ESSENTIAL TO RECOVERY IN ACTION FOR. — In an action for false representations, it is error to instruct the jury that although the defendant made false representations as to material existent facts, calculated to affect the plaintiff's estimate of the value of property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if by diligent inquiry he might have discovered that such representations were false, then he cannot recover. And such an instruction is especially erroneous in a case where the evidence makes it apparent that the means of knowledge were not in fact equally available to the plaintiff and to the defendant.

WAIVER OF RIGHT TO SUE FOR FALSE REPRESENTATIONS, WHAT IS NOT. — A plaintiff does not waive his right to sue for damages for false repre-

sentations by offering, after the purchase of the property, to sell it at the price which the defendant represented to be its value, nor by allowing four or five months to elapse before bringing his suit.

SUBSTANTIAL MISDIRECTION OF JURY, GROUND FOR NEW TRIAL.—The supreme court cannot say that a judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion.

ACTION to recover damages. The opinion states the case.

C. H. Krum, for the appellant.

John C. Orrick, for the respondent.

BRACE, J. The plaintiff in this action seeks to recover damages for false representations alleged to have been made by the defendant in a trade in which the plaintiff, in exchange for fifty shares of paid-up stock in the Globe Panorama Company, sold and conveyed to the defendant a certain lot of ground in the city of St. Louis. The verdict was for the defendant, and from the judgment thereon in his favor the plaintiff appeals. Many grounds are assigned in the motion for a new trial, but the only one urged here why the court should have granted a new trial is, the alleged error of the court in giving the seventh instruction for the plaintiff, which is as follows: "7. If you find, from the evidence, that plaintiff, by diligent inquiry, might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then the court instructs you that he cannot recover in this action."

1. It is urged against this instruction that it is merely an abstract proposition of law, and does not define or explain to the jury what meaning the law gives to the expression "diligent inquiry," and is therefore erroneous; and in support of this contention, we are cited to many cases in which instructions were held to be erroneous, because legal propositions and the meaning of technical legal phrases or words were therein submitted to the jury; e. g., *Fugate v. Carter*, 6 Mo. 267, and *Anderson v. McPike*, 86 Mo. 293, in which the jury were called upon to determine what was "a material averment"; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508, to define "malice"; *Boogher v. Neece*, 75 Mo. 383, in which the question of what was "adverse possession" and "color of title" was left to the jury; *Wiser v. Chesley*, 53 Mo. 547, what was "gross negligence"; and *Atteberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579,

in which it was left to the jury to determine the meaning to be applied to the words "in substance," in an action of slander. In all these cases, it will be observed, either a question of law or the meaning of certain words and terms to which a special and peculiar meaning had, by law, been applied, was left to the jury, and it was properly held that this was error. It is possible that cases might arise in which the words "diligent inquiry," might become the proper subject of judicial interpretation, but in this case it is evident they were used by the court and could have been understood by the jury in no other than in their usual, ordinary, and conventional sense, and such sense is presumed to be as well comprehended by the jury as the court, and needs no definition. It is not necessary that the meaning of ordinary words and phrases used in their usual and conventional sense should be explained in instructions.

2. It is further argued against said instruction, that it asserts an incorrect legal proposition, and ignores the difference between the situations of the parties in regard to the property concerning which the representations are alleged to have been made. The facts upon which the court, in its first instruction to the jury, authorized a finding for the plaintiff, were: "That if, at the time when the defendant traded to plaintiff the panorama stock in the petition described, defendant was, and from the opening of the enterprise had been, business manager of the Globe Panorama Company, and in charge of the business in St. Louis, and that, with a view to the trade of the stock aforesaid to the plaintiff, and as an inducement thereto, he stated to plaintiff, in substance, that the intrinsic and actual value of said panorama stock was one hundred dollars per share, and that none of said stock had been sold or could be bought for less than par, or one hundred dollars per share, and if he further stated, at the time and with the purpose aforesaid, that the actual cost price of the panorama property in St. Louis was seventy-five to eighty thousand dollars, and that from the opening of the business the company had been, and was still, doing a profitable business, and that from the time the business opened, the company had been earning and paying a dividend of two per cent or two dollars per share per month; and if you further find that said statements were untrue, that they were made for the purpose of deceiving and misleading plaintiff as to the true character or value of said stock; and if you find that plaintiff

traded the Pine Street lot for said stock on the faith of said representations, and that he would not have made the trade but for those statements and representations; and if you further find that the defendant, in making said representations, knew they were untrue, or if he made them as of his own knowledge, without knowing whether they were true or false, and with the intent of deceiving and misleading the plaintiff,—then the court instructs the jury that your verdict must be for the plaintiff.”

The other instructions given, except the one under consideration, were in harmony with this one. There was evidence to support this instruction, and with the legal propositions, it asserts that no fault has been found. Nevertheless, the jury were told in the seventh instruction that although they should find all these facts to exist, yet if the plaintiff, by diligent inquiry, might have discovered that defendant's said representations were false, then he could not recover. In other words, the jury were told in this instruction that although the defendant made false representations as to material, existent facts, calculated to affect the plaintiff's estimate of the value of the property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if, by diligent inquiry, he might have discovered that such representations were false, then he could not recover.

We do not understand this to be the law. “It has indeed been laid down as a broad proposition of law that if the means of knowledge be at hand and equally available to both parties, and the subject of the transaction be open to the inspection of both alike, the injured party must avail himself of such means, if he would be heard to say that he was deceived by the representation of the other party, unless there was a warranty of the facts”: Bigelow on Fraud, 522. This instruction cannot be maintained even upon the broad terms of this proposition; for by it the plaintiff is precluded from recovery if he could have discovered the truth by diligent inquiry, whether the means of knowledge were at hand, or whether they were equally available to him as to the defendant or not.

It may be well, however, to note the continuing remarks of Mr. Bigelow on the general proposition. He says, pages 523, et seq.: “But there is serious ground for doubting the correctness of this proposition in its broad form. It will be seen

upon reflection that the situation of the person to whom the misrepresentation was made is quite different in regard to means of knowledge from that of the person who made it. The latter may well be held to the duty to know the facts; no one has prevented him from knowing them. The former has been put off his guard and misled by the very representation which has been made. Indeed, a representation may as well mislead, even where the means of knowledge are directly at hand, as where they are not. The supposed rule in regard to means of knowledge came to be applied in this country before this distinction had been pointed out. . . . Recent authority has, however, gone far towards setting the matter right in principle; the proposition has now become very widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. . . . It may be improbable that a man with the truth in reach should accept a representation in regard to it; but the improbability can be no more than matter of fact. If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has been well declared, that a person misled may be said in some loose sense to have been negligent, . . . for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'You were yourself guilty of negligence.'" After citing many cases illustrative of the principle here stated, the learned author sums up thus, page 528: "The result appears to be, not only in principle, but by the weight of authority, that the party to whom the representation is made is affected by means of knowledge or by notice, only where the language or conduct was not of a kind to withdraw his attention from what otherwise he would be bound to know; i. e., only where the representation was not calculated to put him off his guard, as in cases of representations of value or opinion."

To use the language of another author: "The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn": Kerr on

Fraud, 80. "No man can complain that another has relied too implicitly on the truth of what he himself stated": Kerr on Fraud, 81. The same general principle has been expressed by this court in the following terms: "It is no excuse for, nor does it lie in the mouth of, the defendant, to aver that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying, 'You trusted me, therefore I had the right to betray you'": *Pomeroy v. Benton*, 57 Mo. 531. The same idea is expressed in another opinion, thus: "We doubt if it is equity to allow a sharper to insist on the fulfillment of his bargain on the ground that his victim was so destitute of sagacity as to make no further inquiries": *Wannell v. Kem*, 57 Mo. 478.

It is not seen how instruction No. 7 can be maintained without doing violence to the just and equitable principles announced in these authorities, even conceding that the parties at the time were upon an equal footing, and therefore to be treated as dealing at arm's-length; but when it is considered that the defendant was the originator and promoter of the enterprise, its business manager, fully conversant with every fact of its past history and present condition, having actual knowledge of the cost of the plant, the amount of the stock, and the dividend it was actually yielding, and that the plaintiff was a stranger to the enterprise, it becomes at once apparent that the means of knowledge were not in fact equally available to the plaintiff as to the defendant, and the instruction has nothing to stand upon; for "where the parties do not stand upon equal footing, the objection to a plea or claim of false representations that the party to whom they were made was 'negligent' in not making inquiry or examination has still less force, and would nowhere be allowed": *Bigelow on Fraud*, 534; *Wannell v. Kem*, 57 Mo. 478. So that in any view of the case this instruction must be condemned.

3. There is nothing in the contention that the plaintiff waived his right to sue for damages for false representations by reason of the fact that after the purchase of the stock, and before suit, he may have offered the stock for sale at par, or that four or five months elapsed between the time when he acquired the stock and the institution of his suit. Nor is it within the power of this court to say the judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law

bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion. For the error of the court in giving the seventh instruction, the judgment is reversed, and cause remanded for new trial.

ACTION TO RECOVER FOR FALSE REPRESENTATIONS.—An action for false representations, called also an action of or for deceit, may be maintained against a party who makes a false representation of a fact with knowledge of its falsity, to one who is ignorant of the falsity, with intent that it shall be acted upon, where the person to whom it is made acts upon it, and by so doing suffers injury: *Pasley v. Freeman*, 3 Term Rep. 51; *Taylor v. Ashton*, 11 Mees. & W. 401; *Ormrod v. Huth*, 14 Mees. & W. 651; *Peek v. Derry*, 59 L. T., N. S., 78; *Bigelow on Fraud*, 466; *Marshall v. Buchanan*, 35 Cal. 264; 95 Am. Dec. 95; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Merwin v. Arbuckle*, 81 Ill. 501; *Hiner v. Richter*, 51 Ill. 299; *Wheeler v. Randall*, 48 Ill. 182; *Keith v. Goldston*, 22 Ill. App. 457; *Stanhope v. Swafford*, 80 Iowa, 45; *Rhoda v. Annis*, 75 Me. 17; 46 Am. Rep. 354; *Buschman v. Codd*, 52 Md. 202; *McAleer v. Horsey*, 35 Md. 439; *Pendergast v. Reed*, 29 Md. 398; 96 Am. Dec. 539; *Litchfield v. Hutchinson*, 117 Mass. 195; *Medbury v. Watson*, 6 Met. 246; 39 Am. Dec. 726; *Busterud v. Farrington*, 36 Minn. 320; *Humphrey v. Merriam*, 32 Minn. 197; *Wilder v. De Cou*, 18 Minn. 470; *Cartwright v. Carpenter*, 7 How. (Miss.) 328; 40 Am. Dec. 66; *Schwenk v. Naylor*, 102 N. Y. 683; *Miller v. Barber*, 66 N. Y. 558; *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30; *White v. Merritt*, 7 N. Y. 352; 57 Am. Dec. 527; *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; *Benton v. Pratt*, 2 Wend. 385; 20 Am. Dec. 623; *Upton v. Vail*, 6 Johns. 181; 5 Am. Dec. 210; *Lum v. Shermer*, 93 N. C. 164; *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874; *Cox v. Highley*, 100 Pa. St. 249; *Routh v. Caron*, 64 Tex. 289; *Paddock v. Fletcher*, 42 Vt. 389.

In such an action the motive of the defendant in making the false representation is wholly immaterial. The law infers an improper motive, if what he says is false within his own knowledge, and occasions damage to the plaintiff: *Keith v. Goldston*, 22 Ill. App. 457; *Hiner v. Richter*, 51 Ill. 299.

BENEFIT TO PARTY MAKING FALSE REPRESENTATION NOT NECESSARY TO LIABILITY.—It is not necessary, in order to maintain an action to recover damages for a false representation, to show that the defendant was in any way benefited by the making of such representation, or that he was in collusion with some one else who was benefited: *Pasley v. Freeman*, 3 Term Rep. 51; *Hart v. Tallmadge*, 2 Day, 381; 2 Am. Dec. 105; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Fisher v. Mellen*, 103 Mass. 503; *Patten v. Gurney*, 17 Mass. 182; 9 Am. Dec. 141; *New York L. I. Co. v. Chapman*, 118 N. Y. 288; *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30; *Hubbard v. Briggs*, 31 N. Y. 518; *White v. Merritt*, 7 N. Y. 352; 57 Am. Dec. 527; *Upton v. Vail*, 6 Johns. 181; 5 Am. Dec. 210.

REPRESENTATION MUST BE FALSE AT TIME IT IS MADE.—In determining the question of the liability of the person making a representation, its truth or falsity must be ascertained by the fact as it was at the time when the representation was made. Any change in the condition of affairs that takes place after the time when the representation was made cannot affect the question of the liability of the person who made it: *Corbett v. Gilbert*, 24 Ga. 454; *Reeve v. Dennett*, 145 Mass. 23.

FALSE REPRESENTATIONS MAY BE BY ACTS AS WELL AS WORDS.—Such a fraud as will sustain the action for false representations may grow out of

actions as well as words. A party may make a false and fraudulent affirmation or representation by acts as well as by language: *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Chisholm v. Gadsden*, 1 Strobl. 220; 47 Am. Dec. 550; *Croyle v. Moses*, 90 Pa. St. 250; 35 Am. Rep. 654; Bigelow on Fraud, 467.

SUPPRESSION OF THE TRUTH EQUIVALENT TO FALSE REPRESENTATION.—A false representation may consist in the suppression of the truth as well as in the assertion of a falsehood, and an action lies in either case if the intention to deceive exists and is the cause of the suppression or assertion: *Kidney v. Stoddard*, 7 Met. 252; *Allen v. Addington*, 7 Wend. 9; *Croyle v. Moses*, 90 Pa. St. 250; 35 Am. Rep. 654.

OPINION, WHETHER CONSTITUTES LEGAL REPRESENTATION.—As a general rule, a false representation for which a party is liable to an action must be a representation of a fact, and not a mere expression of opinion. Generally speaking, an opinion does not constitute a legal representation. It is, perhaps, safe to say that a mere expression of an opinion is not sufficient to sustain an action for false representations: Bigelow on Fraud, 473; *Gordon v. Butler*, 105 U. S. 553; *Crown v. Carriker*, 66 Ala. 590; *East v. Worthington*, 88 Ala. 537; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Tuck v. Downing*, 76 Ill. 71; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Sieveling v. Litzler*, 31 Ind. 13; *Buschman v. Codd*, 52 Md. 202; *Belcher v. Costello*, 122 Mass. 189; *Haven v. Neal*, 43 Minn. 315; *Starr v. Bennett*, 5 Hill, 303; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Fulton v. Hood*, 34 Pa. St. 365; *Lyon v. Briggs*, 14 R. I. 222; 51 Am. Rep. 372. Bigelow, in his work on the law of fraud, page 473, says: "It is very difficult, however, to distinguish opinion from fact in cases lying along the border; so much so, that the courts will often be found in conflict with each other. Sometimes the same court will be found in conflict with itself." In the confusion which exists on this subject, it is difficult to formulate a rule that can be regarded as general. The proposition that no man is liable for the expression of his opinion or judgment cannot be accepted without qualification as universally true. It is true only when the opinion stands by itself, and is intended to be taken as distinct from anything else. If a party positively affirms an opinion upon a matter of fact susceptible of actual knowledge in such a manner that the person to whom he makes the statement, instead of being put upon inquiry is put off his guard, and the latter, relying upon such statement, is injured, an action will lie: Bigelow on Fraud, 475; *Hickey v. Morrell*, 102 N. Y. 454; 55 Am. Rep. 824. Danforth, J., in delivering the opinion of the court in that case, said: "So as to every representation concerning a matter of fact by which one man is induced to change his position to his injury or the benefit of another. It may be so expressed as to bind the person making it to its truth, whether it take the form of an opinion or not": See *Teachout v. Van Hoesen*, 76 Iowa, 113; 14 Am. St. Rep. 206.

REPRESENTATIONS BY VENDOR AS TO VALUE OF PROPERTY.—Representations as to the value of property, made by a vendor thereof to the vendee, are ordinarily regarded as mere statements of opinion, and the party to whom they are made is not generally justified in relying upon them. Such representations, though false, are not usually sufficient to sustain an action for false representations: *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Sieveling v. Litzler*, 31 Ind. 13; *Hunter v. McLaughlin*, 43 Ind. 38; *McAleer v. Horsey*, 35 Md. 459; *Medbury v. Watson*, 6 Met. 259; 39 Am. Dec. 726; *Kimball v. Bangs*, 144 Mass. 321; *Bristol v. Braidwood*, 28 Mich. 191; *Haven v. Neal*, 43 Minn. 315; *Walker v. Mobile etc. R. R. Co.*, 34 Miss. 245; *Anderson v. Mc-*

Pike, 86 Mo. 293; *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166. In *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379, Grover, J., delivering the opinion of the court, said: "Upon the question of value, the purchaser must rely upon his own judgment; and it is his folly to rely upon the representation of the vendor in that respect." In *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523, it was held that the question whether a representation as to value is merely the expression of an opinion or an affirmation of fact is a question for the jury. And in *Haven v. Neal*, 43 Minn. 315, it was held that such representations are admissible in evidence when connected with and serving to characterize other material statements. But if the buyer is induced by the seller not to make inquiries as to the value in regard to any extrinsic facts affecting the quality or value of the property, he may rely upon the assurance of the seller; and if he does so rely, and such assurances are fraudulently made to induce him to buy, he may have an action for the injury he sustains: *Hanger v. Evins*, 38 Ark. 334; *Nysewander v. Lowman*, 124 Ind. 584; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315; *Bradbury v. Haines*, 60 N. H. 123; *Stewart v. Stearns*, 63 N. H. 99; 56 Am. Rep. 496; *Weidner v. Phillips*, 39 Ill. 1; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379. '

If the value of property sold can be known only to an expert, and the seller, representing himself as knowing its value, makes false representations in reference thereto, which are relied on and acted upon by the buyer to his injury, an action for damages will lie: *Hanger v. Evins*, 38 Ark. 334; *Allen v. Hart*, 72 Ill. 104; *Teachout v. Van Hoesen*, 76 Iowa, 113; 14 Am. St. Rep. 206; *McKee v. Eaton*, 26 Kan. 226; *Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515.

Some authorities hold that a false and fraudulent statement as to the number of acres in a tract or piece of land sold is actionable: *Starkweather v. Benjamin*, 32 Mich. 305; *Coon v. Atwell*, 46 N. H. 510; *Whitney v. Allaire*, 1 N. Y. 305; *Bardsley v. Duntley*, 69 N. Y. 577; *Hill v. Brower*, 76 N. C. 124. But see *contra*, *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217; *Credle v. Swindell*, 63 N. C. 305. In *Lewis v. Jewell*, 151 Mass. 345, however, it was held that a seller of certain carpets laid upon various floors, halls, and stairs of a large dwelling-house was liable to the buyer for false representations as to the number of yards, and that the latter was not bound to ascertain, by measurement or otherwise, the number of yards he was buying. It was stated in that case that the rule as to land adopted in that state did not extend to such a case. In Iowa, it is held that a buyer may rely upon the representations of the seller as to ownership of real property, its location, and the like; and in order to recover for false representations in reference to such matters, it is not necessary for the plaintiff to show that he instituted inquiry by consulting plats or records, or by employing a surveyor, or the like: *McGibbons v. Wilder*, 78 Iowa, 531; *Carmichael v. Vandebur*, 50 Iowa, 651; *Hale v. Philbrick*, 42 Iowa, 81. And the same doctrine seems to prevail in Indiana also: *Ledbetter v. Davis*, 121 Ind. 119; *West v. Wright*, 98 Ind. 335; *Campbell v. Franken*, 65 Ind. 591.

In some states it is held that false representations made by a vendor of real estate as to the price which he paid for it are not actionable: *Holbrook v. Connor*, 60 Me. 578; 11 Am. Rep. 212; *Bishop v. Small*, 63 Me. 12; *Medbury v. Watson*, 6 Met. 246; *Hemmer v. Cooper*, 8 Allen, 334; *Mooney v. Miller*, 102 Mass. 217; *Cooper v. Lovering*, 106 Mass. 77. But in other states the contrary doctrine is held: *Ives v. Carter*, 24 Conn. 392; *Green v. Bryant*,

2 Ga. 66; *McAlee v. Horsey*, 35 Md. 439; *Van Epps v. Harrison*, 5 Hill, 63; *Sandford v. Handy*, 23 Wend. 260.

In the case of *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615, it was proved that the defendant represented to the plaintiff that he had been offered a certain sum for the land he was selling him, and fraudulently induced the person who, he said, had made him the offer to corroborate his statement. The plaintiff, relying on the statement and its corroboration, bought the land, paying for it much more than it was worth. Judgment was rendered in favor of the plaintiff. Scholfield, J., who delivered the opinion of the court, affirming the judgment of the lower court, said: "The general rule of law is, that the mere statements of the vendor as to the value of land, or what he has been offered by others for it, are not of themselves such evidence of legal fraud as will authorize a recovery; but that does not apply here, where the statement comes from a third party, unknown to have any interest in magnifying the value of the land. The plaintiff, being himself uninformed as to the value of the land, was entitled to expect that he could get honest information from others, and was not to anticipate they were in a conspiracy with the defendant to deceive him. By this conspiracy the defendant caused a source of information to which the plaintiff had a right to resort, and on which to rely, to become corrupted, and thereby prevented his obtaining correct information, and so the plaintiff was both morally and legally defrauded." It is well settled that false representations as to the character and pecuniary standing of a third person, made with knowledge of their falsity, and with intent to deceive, to one who, relying upon them, is thereby injured, will sustain an action. This subject is discussed in the note to *Lord v. Colley*, 25 Am. Dec. 447-451; and see *Bigelow on Fraud*, 481; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572. In the following states, however, statutes have been enacted requiring representations concerning the credit of another to be in writing, in order to bind the party making them: Alabama, California, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, South Carolina, Vermont, Virginia, West Virginia, and Wyoming.

On the question whether a purchaser of property is liable to an action for deceit for misrepresenting his own financial ability, the authorities are divided. In Vermont, it is held that an action for deceit will not lie against one who makes a false representation of his own pecuniary resources in order to obtain, and thereby obtains, a credit for goods sold him: *Fisher v. Brown*, 1 Tyler, 387; 4 Am. Dec. 726; *Dyer v. Tilton*, 23 Vt. 313; *Jude v. Woodburn*, 27 Vt. 415; *Best v. Smith*, 54 Vt. 617. And in *Lyon v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372, it was decided that the action will not lie against one obtaining credit by fraudulently representing that he is "a person safely to be trusted and given credit to." *Bigelow*, on the other hand, says: "The matter of one's own solvency is a fact capable of actual knowledge and there is no good reason for holding a representation concerning it to be of less effect than a representation concerning the solvency of a third person." And see *Cain v. Dickenson*, 60 N. H. 371.

PROMISE IS NOT REPRESENTATION. — It is well settled that a promise to perform an act, although accompanied at the time with an intention not to perform it, is not such a representation as can be made the basis of an action for false representations. Strictly speaking, a promise is not a representation: *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; *Gage v. Lewis*, 68 Ill. 604; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Burt v. Bowles*, 69 Ind. 1; *Long v. Woodman*, 58 Me. 49; *Dawe v. Morris*, 149 Mass. 188; 14 Am. St.

Rep. 404; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; *Gallager v. Brunel*, 6 Cow. 347; *Lexon v. Julian*, 21 Hun, 577; *Farrar v. Bridges*, 3 Humph. 566; *Fenwick v. Grimes*, 5 Cranch C. C. 439.

MISREPRESENTATIONS OF LAW NOT GROUND OF ACTION. — Generally speaking, a misrepresentation of law affords no basis for an action of deceit: *Bigelow on Fraud*, 487; *Upton v. Tribilcock*, 91 U. S. 45; *Jordan v. Pickett*, 78 Ala. 331; *Lehman v. Shackelford*, 50 Ala. 437; *Beall v. McGehee*, 57 Ala. 438; *Townsend v. Cowles*, 31 Ala. 428; *Fish v. Cleland*, 33 Ill. 243; *Burt v. Bowles*, 69 Ind. 1; *Russell v. Branham*, 8 Blackf. 277; *Reed v. Sidener*, 32 Ind. 373; *Carter v. Harden*, 78 Me. 528; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Grant v. Grant*, 56 Me. 573; *Burns v. Lane*, 138 Mass. 350; *Jagge v. Winslow*, 30 Minn. 363; *Lexon v. Julian*, 21 Hun, 577; *Etna Ins. Co. v. Reed*, 33 Ohio St. 283; *Gormely v. Gymnastic Ass'n*, 55 Wis. 350.

REPRESENTATION MUST BE OF MATERIAL FACT. — A false representation, to be the ground of an action for deceit, must be of a material fact: *Bigelow on Fraud*, 497; *Jordan v. Pickett*, 78 Ala. 331; *McGar v. Williams*, 26 Ala. 469; 62 Am. Dec. 739; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Schoubacker v. Riddle*, 99 Ill. 343; *People v. Healey*, 128 Ill. 9; 15 Am. St. Rep. 90; *Ward v. Luneeu*, 25 Ill. App. 160; *Dawe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404; *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25; *Hall v. Johnson*, 41 Mich. 286; *Lebby v. Ahrens*, 26 S. C. 275. In delivering the opinion of the court in *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25, Morton, C. J., said: "In order to maintain an action of tort for deceit, it is necessary for the plaintiff to show that the false representations alleged in his declaration are representations of material facts calculated to deceive him and induce him to act. Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient."

NOT NECESSARY THAT IT SHOULD HAVE BEEN SOLE INDUCEMENT. — It is not necessary, however, that the false representation should have been the sole inducement to the contract. A person who has by misrepresentation induced another to enter into a contract will not generally be heard to deny the materiality; and if the party deceived can show that the misrepresentation had a substantial effect in inducing the contract, it will be sufficient: *Jordan v. Pickett*, 78 Ala. 331; *Winter v. Bandel*, 30 Ark. 362; *Hale v. Philbrick*, 47 Iowa, 217; *Safford v. Grout*, 120 Mass. 20; *Fishback v. Miller*, 15 Nev. 428; *Addington v. Allen*, 11 Wend. 374; *Lebby v. Ahrens*, 26 S. C. 275; *James v. Hodsdon*, 47 Vt. 127.

REPRESENTATIONS MUST BE MADE WITH KNOWLEDGE OF THEIR FALSITY. — To make a party liable in an action at law for false representations, it must be shown that he made the representations with actual knowledge of their falsity, or without knowing whether they were true or false, or under such circumstances that he ought to have known that they were false, whether he did or not: *Bigelow on Fraud*, 509; *Joliffe v. Baker*, L. R. 11 Q. B. D. 255; *Reese River Mfg. Co. v. Smith*, L. R. 4 H. L. 64; *Bartholomew v. Bushnell*, 20 Conn. 271; 52 Am. Dec. 338; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Schwabacker v. Riddle*, 99 Ill. 343; *Tone v. Wilson*, 81 Ill. 529; *Walker v. Hough*, 59 Ill. 375; *Hiner v. Richter*, 51 Ill. 299; *Mitchell v. Deeds*, 49 Ill. 416; *Phelps v. James*, 79 Iowa, 262; *Allison v. Jack*, 76 Iowa, 205; *McKown v. Ferguson*, 47 Iowa, 636; *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195; *Kingsbury v.*

Taylor, 29 Me. 508; 50 Am. Dec. 607; *Lamm v. Port Deposit Ass'n*, 49 Md. 233; 33 Am. Rep. 246; *Bowker v. Delong*, 141 Mass. 315; *Cole v. Cassidy*, 138 Mass. 437; 52 Am. Rep. 284; *Emerson v. Brigham*, 10 Mass. 197; 6 Am. Dec. 109; *Tryon v. Whitmarsh*, 1 Met. 1; 35 Am. Dec. 239; *Stone v. Denny*, 4 Met. 151; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Cox v. Highley*, 100 Pa. St. 249; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492; *Jackson v. Stockbridge*, 29 Tex. 394; 94 Am. Dec. 290.

The law raises no presumption of knowledge on the part of the party making the representation from the mere fact that the representation is false. If he honestly believed it to be true at the time he made it, he cannot be held liable in this form of action: *Lord v. Goddard*, 13 How. 198; *Schwabacker v. Riddle*, 99 Ill. 343; *Holdom v. Ayer*, 110 Ill. 448; *Avery v. Chapman*, 62 Iowa, 144; *Hartford Ins. Co. v. Matthews*, 102 Mass. 221; *Sollund v. Johnson*, 27 Minn. 455; *Sims v. Eiland*, 57 Miss. 83; *Cowley v. Smyth*, 46 N. J. L. 388; 50 Am. Rep. 432; *Stitt v. Little*, 63 N. Y. 427; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Crown v. Brown*, 30 Vt. 707. But one who makes a representation without knowing whether it is true or false is, in morals and in law, as blamable as if he made it knowing it to be false. If, therefore, a party states as of his own knowledge material facts susceptible of knowledge, which are false, he is guilty of a fraud which renders him liable to the person who relies and acts upon his representations as true, and it is no defense that he believed the representations to be true: *Bigelow on Fraud*, 513; *Juzan v. Toutmin*, 9 Ala. 662; 44 Am. Dec. 448; *Munroe v. Pritchett*, 16 Ala. 785; 50 Am. Dec. 203; *Einstein v. Marshall*, 58 Ala. 153; 25 Am. Rep. 729; *Hanger v. Evins*, 38 Ark. 334; *Mayer v. Salazar*, 84 Cal. 646; *Foard v. McComb*, 12 Bush, 723; *Ingalls v. Miller*, 121 Ind. 188; *West v. Wright*, 98 Ind. 335; *Brown v. Blunt*, 72 Me. 415; *McAleer v. Horsey*, 35 Md. 439; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Met. 151; *Loddell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Stone v. Covell*, 29 Mich. 359; *Beebe v. Knapp*, 28 Mich. 53; *Bullitt v. Farrar*, 42 Minn. 8; *ante*, p. 485; *Busterud v. Farrington*, 36 Minn. 320; *Humphrey v. Merriam*, 32 Minn. 197; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Wilder v. De Cou*, 18 Minn. 470; *Sims v. Eiland*, 57 Miss. 607; *Walsh v. Morse*, 80 Mo. 568; *Caldwell v. Henry*, 76 Mo. 254; *Phillips v. Jones*, 12 Neb. 213; *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, 45 N. Y. 169; *Lunn v. Shermer*, 93 N. C. 164; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313; *Peek v. Derry*, 59 L. T., N. S., 78; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925; *Taylor v. Ashton*, 11 Mees. & W. 401. In the late case of *Peek v. Derry*, 59 L. T., N. S., 78, Sir James Hannen said: "If a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is then damnified, the person so damnified is entitled to maintain an action for deceit." So, too, if a party in conscious ignorance of the fact, recklessly represents that a thing is true, especially under circumstances where he ought to have known it to be false, he will be liable, in an action for false representations, to the person who,

relying on his statements, has suffered injury: *Derry v. Peck*, L. R. 14 App. Cas. 337; *Peck v. Derry*, 59 L. T., N. S., 78; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Beebe v. Knapp*, 28 Mich. 53; *Ingalls v. Miller*, 121 Ind. 188; *Lunn v. Shermer*, 93 N. C. 164.

INTENT TO DECEIVE ESSENTIAL TO MAINTAIN ACTION. — In order to maintain an action for false representations, it must be shown that the representations were fraudulently made with intent to deceive the person to whom they were made, and to induce him to act upon them: *Terrel v. Bennett*, 18 Ga. 404; *Holdom v. Ayer*, 110 Ill. 448; *Schwabacker v. Riddle*, 99 Ill. 343; *Avery v. Chapman*, 62 Iowa, 144; *Hartford Ins. Co. v. Matthews*, 102 Mass. 221; *Tucker v. White*, 125 Mass. 344; *Sims v. Eiland*, 57 Miss. 83; *Griswold v. Sabin*, 51 N. H. 167; 12 Am. Rep. 76; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Marsh v. Falker*, 40 N. Y. 562; *Zabriskie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 551; *Young v. Correll*, 8 Johns. 23; 5 Am. Dec. 316; *Huber v. Wilson*, 23 Pa. St. 178; *Lebby v. Ahrens*, 26 S. C. 275; *Crown v. Brown*, 30 Vt. 707; *Smith v. Mariner*, 5 Wis. 551; 68 Am. Dec. 73. But if a false representation is made with knowledge of its falsity, an intent to deceive will be conclusively presumed: *Judd v. Weber*, 55 Conn. 267; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; *Hulmut v. Gardner*, 59 Mich. 341; *Haven v. Neal*, 43 Minn. 315; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Hine v. Champion*, L. R. 7 Ch. D. 344. Loomis, J., in delivering the opinion of the court in *Judd v. Weber*, 55 Conn. 267, said: "It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent, if one, with a view of benefiting himself by intentional falsehood, misleads another in a course of action which may be injurious to him."

REPRESENTATIONS MUST HAVE BEEN RELIED UPON. — In an action to recover damages for false representations, the plaintiff must show that he relied upon the representations made to him by the defendant, and that he was deceived thereby: *Bennett v. Gibbons*, 55 Conn. 450; *Merrin v. Arbuckle*, 81 Ill. 501; *Tuck v. Downing*, 76 Ill. 71; *Hiner v. Richter*, 51 Ill. 299; *Wheeler v. Randall*, 48 Ill. 182; *Bowman v. Carithers*, 40 Ind. 90; *Hagee v. Grossman*, 31 Ind. 223; *Jenkins v. Long*, 19 Ind. 28; 81 Am. Dec. 374; *Proctor v. McCoid*, 60 Iowa, 153; *White v. Smith*, 39 Kan. 752; *Windram v. French*, 151 Mass. 547; *Inhabitants of Webster v. Larned*, 6 Met. 522; *Cobb v. Wright*, 43 Minn. 83; *Humphrey v. Merriam*, 32 Minn. 197; *Priest v. White*, 89 Mo. 609; *Anderson v. McPike*, 86 Mo. 293; *Dunn v. White*, 63 Mo. 186; *Nelson v. Luling*, 62 N. Y. 645; *Ming v. Woolfolk*, 116 U. S. 599.

DAMAGE MUST BE PROVED TO SUSTAIN ACTION. — In order to sustain an action for false representations, the plaintiff must prove that he has sustained damage by reason of his reliance upon the representations. Fraud without damage is no ground for an action: *Ming v. Woolfolk*, 116 U. S. 599; *Jordan v. Pickett*, 78 Ala. 331; *Holton v. Noble*, 83 Cal. 7; *Freeman v. McDaniel*, 23 Ga. 354; *Danforth v. Cushing*, 77 Me. 182; *Fuller v. Hodydon*, 25 Me. 243; *Byard v. Holmes*, 34 N. J. L. 296; *Munro v. Gairdner*, 3 Brev. 31; 5 Am. Dec. 531; *Nye v. Merriam*, 35 Vt. 438.

DAMAGES MUST BE PROXIMATE CONSEQUENCE. — The damages recoverable in an action for false representations must be the natural and proximate consequence of the false representations made, and such as can be clearly defined and ascertained: *Duwe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404;

Bradley v. Fuller, 118 Mass. 239; *Lamb v. Stone*, 11 Pick. 527; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Jex v. Straus*, 122 N. Y. 293.

MEASURE OF DAMAGES.—In an action for false representations in the sale of property, the measure of damages is the difference between the value thereof as sold and what its value would have been if it had been as represented: *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Nysegander v. Lowman*, 124 Ind. 584; *Page v. Wells*, 37 Mich. 415; *Stiles v. White*, 11 Met. 356; 45 Am. Dec. 214; *Vail v. Reynolds*, 118 N. Y. 297; *Lunn v. Shermer*, 93 N. C. 164. The measure of damages for a fraudulent representation that the vendor's title to slaves was absolute, when it was only a life estate, is the difference in the value of the two estates at the time of the sale: *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195. Where stocks are sold upon a false representation of their value, the measure of damages is the difference between their value as represented and as it was in fact at the time of the sale: *Miller v. Barber*, 66 N. Y. 558; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625. In an action for false representations which induced the plaintiff to compromise with the defendant, the measure of damages is the difference between what he received and what he would have received if no fraudulent concealment had been made: *Grabenheimer v. Blum*, 63 Tex. 369. In an action for a false representation by a vendor of land, that a certain privilege was annexed thereto, the measure of damages is the difference between the value of the land as it was and what its value would have been with the privilege annexed: *Monell v. Colden*, 13 Johns. 395; 7 Am. Dec. 390. On the question of damages, Bigelow says: "The true rule in cases of fraud, as in cases of negligence, probably is, that the defendant is liable for all loss which happens in the direct and natural course of things from the wrong": Bigelow on Fraud, 634.

FALSE REPRESENTATIONS IN PROSPECTUSES.—The directors of a company are liable to an action for damages for false statements contained in prospectuses issued by them, where they knew or ought to have known their falsity, and the plaintiff, relying on such statements, has acted upon them to his hurt: *Peek v. Derry*, 59 L. T., N. S., 78; *Terwilliger v. Great Western Tel. Co.*, 59 Ill. 249; *Booth v. Wonderly*, 36 N. J. L. 250; *Morgan v. Skiddy*, 62 N. Y. 319; *Cross v. Sackett*, 6 Abb. Pr. 247; *Fenn v. Curtis*, 23 Hun, 384; *Paddock v. Fletcher*, 42 Vt. 389.

FALSE REPRESENTATION INTENDED TO BE COMMUNICATED TO ANOTHER.—Where false and fraudulent representations are made to one person with the expectation and purpose that they should be communicated to another, and they are so communicated to the latter, by whom they are acted upon to his damage, the party making the representations will be liable: *Chubbuck v. Cleveland*, 37 Minn. 466; *Eaton v. Avery*, 83 N. Y. 31; 38 Am. Rep. 389.

But where the fraudulent representations were not intended to be acted upon by such third person, no action will lie therefor: *Wells v. Cook*, 16 Ohio St. 67; 88 Am. Dec. 436, and note 442-445, where this question is fully considered.

LIABILITY OF PUBLIC OFFICER FOR FALSE REPRESENTATIONS.—A public officer making false and fraudulent representations in respect to property sold by him is liable to an action for damages. His official character does not protect him: *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; Bigelow on Fraud, 515. But see *Tucker v. White*, 125 Mass. 344.

ACTION NOT BARRED BY RETAINING PROPERTY.—The fact that the plaintiff has retained the property received by him will not bar his right to an

action for damages for false representations: *Nysegander v. Lowman*, 124 Ind. 584; *Johnson v. Culver*, 116 Ind. 278; *St. John v. Hendrickson*, 81 Ind. 350; *Nauman v. Oberle*, 90 Mo. 666; *Parker v. Marquis*, 64 Mo. 38; *Grabenheimer Blum*, 63 Tex. 369. Neither will the fact that the plaintiff performed his part of an executory contract after learning of the fraud: *Nauman v. Oberle*, 90 Mo. 666; *Parker v. Marquis*, 64 Mo. 38; *Grabenheimer v. Blum*, 63 Tex. 369.

WAIVER OF RIGHT. — If a person induced by false representations to enter into a contract, upon afterwards obtaining full knowledge of the fraud and of all the material facts, declines to repudiate it, but expressly ratifies it, he cannot maintain an action for damages: *Noumnan v. Sutter County Land Co.*, 81 Cal. 1; *St. John v. Hendrickson*, 85 Ind. 350. Or if he discovered the fraud in time to save himself, and failed to do so, he cannot recover: *Whiting v. Hill*, 23 Mich. 399; *Vernol v. Vernol*, 63 N. Y. 45. But to constitute a waiver of a right to sue for damage resulting from a contract procured by fraud, the party who sustained the loss must act with full knowledge of his rights and of the material facts in the case, and clearly manifest his intention to abide by the contract and abandon any remedy he may have: *Johnson v. Culver*, 116 Ind. 278. A waiver is not shown by the fact that the plaintiff received part of the goods under the contract: *Haven v. Neal*, 43 Minn. 315; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625. Where one of the joint makers of a note, not knowing that he was not liable on it, stated to a person about to purchase it that it was a good note, and that he intended to pay it, it was held that this did not render him liable for false representations: *Black v. Miller*, 75 Mich. 323.

CONSUMERS' GAS COMPANY OF KANSAS CITY v. KANSAS CITY GASLIGHT AND COKE COMPANY.

[100 MISSOURI, 501.]

EQUITY WILL NOT ENJOIN CLAIM OF EXCLUSIVE FRANCHISE WHEN. — A court of equity will not restrain, by injunction or otherwise, a person from asserting a claim of exclusive privilege in the manufacture and sale of a commodity, where there is no interference with the property of the complainant, further than by making the claim of exclusive privilege or franchise.

PETITION for an injunction. The facts are stated in the opinion.

C. O. Tichenor, and Broadhead and Haeussler, for the appellant.

Gage, Ladd, and Small, for the respondent.

BARCLAY, J. Giving to the petition the construction most favorable to the pleader, it yet states no cause of action for equitable relief. Plaintiff claims the right to manufacture and vend gas to the people of Kansas City, and to adopt the needful and usual measures for that purpose. It asserts that

CRAIG v. VAN BEBBER.

[100 MISSOURI, 581.]

DISAFFIRMANCE OF DEED OF MINOR AFTER ATTAINING MAJORITY. — Where a minor executes a deed of conveyance of land, and after attaining majority, conveys the same land to a third person, the second deed is a disaffirmance of the first. Such a deed may also be avoided by a suit in ejectment, and in such suit a petition which is in the ordinary form of an action of ejectment is sufficient.

INFANT MAY REPUDIATE CONTRACT WITHOUT RETURNING CONSIDERATION WHEN. — The rule that requires an infant who, upon coming of age, repudiates a contract executed by him during his minority, and which has been in whole or in part executed by the adult party thereto, to return the property or consideration received, applies only where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered it during infancy, he can repudiate the contract without making a tender thereof.

UNPAID PURCHASE-MONEY NOT RECOVERABLE BY INFANT WHO REPUDIATES HIS DEED. — Where an infant, upon attaining his majority, repudiates his deed, he cannot recover the unpaid purchase-money.

RATIFICATION OF MINOR'S DEED, CONDITIONAL OFFER TO CONVEY IS NOT. — An offer by an infant, after attaining full age, to make a deed ratifying a conveyance made by him during his minority, upon condition that the unpaid purchase price is paid or secured, is no evidence of a confirmation.

DEED DISAFFIRMED BECAUSE OF MINORITY OF WIFE IS AVOIDED AS TO HUSBAND, who joined her in executing it.

EJECTMENT. The opinion states the case.

Silver and Brown, and W. J. Patterson, for the appellants.

H. K. West and A. W. Mullins, for the respondents.

BLACK, J. This is an action of ejectment for one hundred acres of land commenced by Ella Craig and her husband, Daniel Craig, against Van Bebber, Tully, and Sprankle. The plaintiff Ella Craig inherited the land from her father, and she and her husband conveyed the same to Henderson Tabor by a deed dated the 28th of July, 1884, for the consideration of \$1,463. Of this amount Tabor paid in cash \$350, and executed to them his four notes due in one, two, three, and four years for the balance of the purchase price, and secured the same by a deed of trust on the land. The sale was made through an agent, and the agreement was, that the plaintiffs should have the first deed of trust. It seems, however, that Tabor gave a deed of trust on the land to secure a debt of eight hundred dollars, which was, by some manipulation, made prior in point of time to the one given the plaintiffs for purchase-money. This prior deed of trust was made by

Tabor to one J. B. Watkins as trustee. By virtue of authority set out in the deed of trust, Watkins constituted W. J. Patterson his attorney in fact to act for and in his behalf. Patterson, as such attorney in fact for Watkins, advertised and sold the property to defendant Sprankle on the 8th of October, 1886. The other defendants are the tenants of Sprankle.

The plaintiff Ella Craig was a minor sixteen years of age when she and her husband executed the deed to Henderson Tabor. The notes executed by Tabor are now in the possession of the plaintiffs, and have not been paid. Mrs. Craig became eighteen years of age on the eighteenth day of March, 1886, and this suit was commenced in November, 1886, to disaffirm the deed made by her while a minor.

Plaintiffs did not offer to refund the \$350. The evidence offered to show a ratification is, in substance, this: As soon as the plaintiffs learned that their deed of trust was a second lien instead of the first, they demanded a first deed of trust according to their contract, but their demand was refused. They also demanded payment of the notes, which was refused. They executed a new deed after the wife became of age, and offered to deliver it provided the notes were paid or secured by a first deed of trust, but upon no other condition. The plaintiff Daniel Craig being asked if any suit had been brought for the collection of the notes, said: "I think there has been; at Linneus, I think." It does not appear when the suit was brought, or what became of it. The notes, it is agreed, are in the possession of plaintiffs.

1. The point made here, and by a refused instruction, that the plaintiffs should have in terms set out in their petition and pleaded disaffirmance of the deed, is not well taken. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first: *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441. So, too, the deed executed while a minor may be avoided by a suit in ejectment after majority: 1 Hare and Wallace's Am. Lead. Cas., 5th ed., 317; Tiedeman on Real Property, sec. 793. A petition which is in the ordinary form of an action of ejectment is sufficient.

2. Defendants asked, but the court refused to give, the following declaration of law: "The infancy of Ella Craig does not entitle plaintiffs to recover, as no offer or tender was made by them to return to Sprankle funds or consideration received

by Ella Craig, arising from the sale and conveyance of the land by her to Tabor."

The theory of this instruction is, that plaintiffs were bound to make a tender to Sprankle of the \$350 paid them by Henderson Tabor, the grantee in the deed which the plaintiffs seek to avoid. Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age, repudiates the transaction, he must return the property or consideration received. This general rule has often been stated without any qualification whatever. But the weight of authority is, that the rule can only apply where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender: Tyler on Infancy, 2d ed., sec. 37; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Reynolds v. McCurry*, 100 Ill. 356; *Brandon v. Brown*, 106 Ill. 519; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Walsh v. Young*, 110 Mass. 396. The privilege of repudiating a contract is accorded an infant, because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed. *Kerr v. Bell*, 44 Mo. 120, *Highley v. Barron*, 49 Mo. 103, and *Baker v. Kennett*, 54 Mo. 82, are cited as affirming the general rule before stated, without any exception, and some expressions used would seem to lead to that result; but a careful consideration of the facts of these cases will show that there was no occasion for considering the exception. The remarks there made must be read and understood in the light of the facts before the court. We entertain no doubt but the rule, with the qualification before stated, is the correct one.

The instruction is, therefore, faulty, and especially so in view of the evidence that Mrs. Craig did not have any money or property save the land in question. The notes are in the hands of the plaintiffs, and the fact of disaffirmance will discharge the maker; for the law is well settled that the infant, having repudiated his or her deed, cannot recover the unpaid purchase price.

3. The evidence fails to make out a *prima facie* case of ratification. There is no evidence that either Mrs. Craig or her hus-

band ever received any part of the purchase price after she attained her majority. She and her husband did offer to execute and deliver a confirmatory deed upon being paid the balance of the purchase price, namely, \$1,113, or upon receiving a first deed of trust upon the land securing that amount; but it did not suit the purposes of Tabor, or any other of the interested parties, to comply with that condition.

A mere acknowledgment that a debt exists or that a contract has been made will not constitute a ratification: *Baker v. Kennett*, 54 Mo. 82. There must be an intention to affirm the deed. A deed of confirmation is not necessary, but the act relied upon must be of such a nature as to show a clear intention to confirm the deed. An offer to make a deed of ratification upon the condition that the unpaid purchase price is paid or secured is no evidence of a confirmation. It rather shows a disposition to disaffirm should the proposed condition not be performed.

4. This suit was brought for the very purpose of disaffirming the deed made by Mrs. Craig, and she was a proper and a necessary party plaintiff. Her husband is but a nominal party to the suit. But it is insisted that the wife cannot recover, because the husband is entitled to the possession of her land, and that he cannot recover, because by joining her in the deed he parted with his possession and right of possession.

Mrs. Craig held the land in question as her general property under section 3295 of the married woman's act. That section declares that a conveyance made by the husband during coverture of any interest in such real estate shall be invalid, unless the deed is executed jointly by the wife and husband, and by her duly acknowledged. This statute, it has been held again and again, very materially modifies the common-law marital rights of the husband in the lands belonging to the wife. It is, so far as he is concerned, a disabling statute; so that he is utterly powerless to charge or convey the land, or the rents, issues, or products thereof, except by a deed jointly executed by himself and wife: *Mueller v. Kaessmann*, 84 Mo. 323; *Gitchell v. Messmer*, 87 Mo. 131; *Gilliland v. Gilliland*, 96 Mo. 522; *Wilson v. Albert*, 89 Mo. 537.

If the deed jointly executed by husband and wife is invalid as to the wife, because not properly acknowledged by her, or because her signature has been procured by fraud, then it is ineffectual to convey the husband's limited marital interest:

Goff v. Roberts, 72 Mo. 571; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Mo. 538; *Hord v. Taubman*, 79 Mo. 101. These authorities show that a conveyance by husband and wife of the lands of the wife, to be valid as against the husband, must be valid as against the wife. Now, it is true that in the cases cited the deeds were worthless from the beginning, whilst here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole.

The law of this case is with the plaintiffs, and the judgment is affirmed.

CONTRACTS OF INFANTS. — There is, perhaps, no subject of the law about which there has been more apparent as well as real conflict of opinion than upon the effect to be given to the contracts of infants. It is true that there is less conflict at the present day than formerly, and that some of the erroneous positions previously taken have been abandoned, but there is yet much confusion, inconsistency, and difference of opinion. Some sentimental notions entertained at the beginning concerning the incapacity of infants, and the favor with which the persons and property of infants should be regarded, are no doubt responsible for much of the uncertainty and error which time has found so difficult to remove. Experience has fully demonstrated that when courts permit sound sense and principles of justice to all concerned to be overshadowed with the idea that one of the parties must be favored, the results are certain to be unsatisfactory. While infants should be protected from the consequences of their inexperience and immaturity of judgment, it should not be forgotten that their protection does not require the situation of persons who have dealt with them in good faith to be entirely overlooked.

Infants, the law says, are destitute of sufficient understanding to enter into contracts generally which shall be binding upon them. "The law, therefore," in the language of Chief Justice Parsons in *Baker v. Lovett*, 6 Mass. 78, 80, "protects their weakness and imbecility so far as to allow them to avoid all their contracts by which they may be injured. But in favor of infants, they are bound by all reasonable contracts for their maintenance and education, and also by all acts which they are obliged by law to do." Yet we are to understand by this, in the light of modern authority, as will be seen hereafter, that in the exercise of their right to avoid their general contracts, they are the exclusive judges of the fact whether or not they may be injured; or to speak more accurately, they may avoid their contracts without regard to the question whether or not such contracts are injurious or are beneficial to them.

It is very evident that this incapacity to contract could not be practically determined as a matter of fact in each particular case, without considerable or even great difficulty, and that it would be better to adopt an arbitrary age under which all persons are incapable, as a matter of law, of entering into binding contracts in general. This age the common law has fixed at twenty-

one years. "The law," says Parsons, C. J., "has drawn no line between an infant of six years old and one of twenty years old; for all infants are entitled to equal protection": *Baker v. Lovett*, 6 Mass. 78, 81. "A minor who has nearly attained his majority may be as able to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years": *McCarty v. Carter*, 49 Ill. 53, 55; 95 Am. Dec. 572, 573, per Lawrence, J.

It is undoubtedly competent, however, for the legislature to change the age at which a person shall reach his majority, and have an unrestricted ability to contract, from twenty-one years to any other age it may see fit. Thus in a number of states of this country, females, by statute, reach their majority at eighteen. Again, the legislature may fix a legal age for persons to enter into particular kinds of contracts only, as, for instance, in the various statutes passed by Congress relating to enlistments into the army and navy of the United States. Indeed, if the legislature should entirely remove the disability of age, we should say there would be no legal objection. In fact, it has done this in certain cases, in which statutes are made to apply without special regard to age; although a somewhat variable age of maturity or discretion may be contemplated, as in the statutes which impose upon a father the obligation of supporting his bastard child, and which render a contract providing for such support binding.

The very protection afforded by the law to infants, by which they are enabled to avoid their general contracts, requires them, as will be more fully seen hereafter, to answer for the reasonable value of necessities with which they may be furnished. An infant must sometimes himself engage for maintenance, clothing, shelter, and the like, and he should, consequently, be held bound to pay what they are justly worth, if they are requisite and suitable for him. His obligation to pay for the reasonable value of necessities constitutes, therefore, a common-law exception to the general rule that an infant is not bound by his contracts.

Another exception, which is sometimes said to exist to the general rule, is, that if an infant does an act which by the law he might have been compelled to do, the act shall be binding upon him. But this, as will be shown, has really very little to do with the subject of contracts.

Aside from these exceptional cases, the rule is elementary, as has been said, that infants shall not be bound by their contracts. The difficulty has been as to whether any or all of the contracts were void or simply voidable.

VOID AND VOIDABLE. — There have been some expressions of opinion, and even adjudications, to the effect that the general contracts of infants were void. As late as the year 1810, the narrow-minded Sir James Mansfield is reported as saying that he "never could understand the rule of law that an infant's contract was not void, but voidable": *Gibbs v. Merrill*, 3 Taunt. 307, 313; also *Burgess v. Merrill*, 4 Taunt. 468, 469. Three classes of infants' contracts have been, however, more usually made; namely, those which are binding, those which are void, and those which are voidable. The class of binding contracts, noticed above, is pretty well defined; but it has not been so easy for the courts to determine which contracts were void and which voidable. Various criterions to solve the problem have been suggested, but they are so unsatisfactory that one writer remarks: "What contracts of an infant are void, and what are merely voidable, nobody knows."

It may be well to notice here the meaning of the words "void" and "voidable." A "void" contract, if we may use the expression, is a mere nullity, and good for no purpose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid. A "voidable" contract, on the other hand, is one that is good, both as between the parties to it and as to third persons, until it is avoided by the party entitled to avoid it. It is valid and binding until thus disaffirmed, and its infirmity may be completely cured by a ratification by the party at whose instance it might have been avoided. It is important to note this distinction between "void" and "voidable." Much of this confusion of this subject of infants' contracts has resulted from the careless use of the word "void" as meaning only "voidable," and an examination of many cases which have been supposed to support the proposition that infants' contracts were "void" will show that nothing more was intended by the courts, or at least was necessary for the decision, than to hold that the contracts were merely "voidable."

The test by which to ascertain whether an infant's general contracts were void or voidable, as laid down by Perkins, an early writer, in his work on conveyancing, section 12, is as follows: "All such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable by himself and his heirs, and by those who have his estate." The view was at one time entertained that Perkins, in this passage, referred to the delivery of the thing granted, and not to the delivery of the instrument; and therefore a feoffment with livery of seisin by the infant in person was always voidable, and not void, "not only because he is allowed to contract for his benefit, but because there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him": *Bac. Abr.*, tit. Infancy and Age, I., 3. But in the leading case of *Zouch v. Parsons*, 3 Burr. 1794, 1804, the rule of Perkins was approved by Lord Mansfield, and interpreted to mean the delivery of the instrument. Thus he says: "The words 'which do take effect' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. . . . There is no difference in this respect between a feoffment and deeds which convey an interest. The reason is the same."

As thus interpreted by Lord Mansfield, Perkins's rule is expressly approved in *Allen v. Allen*, 2 Dru. & War. 307, 338, and in a number of cases, mostly early ones, decided in this country: *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Phillips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243; 19 Am. Dec. 71, 77; *Kline v. Beebe*, 6 Conn. 494, 504; *Dana v. Coombs*, 6 Me. 89, 90; 19 Am. Dec. 194, 195; *Wambole v. Foote*, 2 Dak. 1. This criterion, comprehending, as it does, only gifts, grants, and deeds, is not sufficiently extensive in its application, and has been well said in *Cummings v. Powell*, 8 Tex. 80, 89, to have "very little foundation in reason," and to "afford but a very flimsy protection, which is the object of the rule."

Another test is that given by Lord Chief Justice Eyre in *Keane v. Boycott*, 2 H. Black. 511, 515, as follows: "We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void; namely, such as the court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice,

are voidable only, and it is in the election of the infant to affirm them or not." This criterion had really been previously announced by Lord Hardwicke in *Harvey v. Ashley*, 3 Atk. 607, 610; and by Lord Mansfield in *Earl of Buckinghamshire v. Drury*, 2 Eden, 72; 4 Bro. C. C. 507, note (*sub nom. Drury v. Drury*); in *Zouch v. Parsons*, 3 Burr. 1794; and *Grey v. Cooper*, 3 Doug. 65; and is afterwards approved by Lord Ellenborough in *Baylis v. Dinely*, 3 Maule & S. 477. In *United States v. Bainbridge*, 1 Mason, 71, 82, Mr. Justice Story says that the distinctions of the lord chief justice "seem founded in solid reason." And see the rule further expressly approved in *Tucker v. Moreland*, 10 Pet. 59, 66; 1 Am. Lead. Cas. *224, *226; *Wheaton v. East*, 5 Yerg. 41, 61; 26 Am. Dec. 251, 252; *McMinn v. Richmonds*, 6 Yerg. 9, 18; *McGan v. Marshall*, 7 Humph. 121, 125; *Langford v. Frey*, 8 Humph. 443; *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Robinson v. Weeks*, 56 Me. 102, 106; *Fridge v. State*, 3 Gill & J. 103, 115; 20 Am. Dec. 463, 468; *Levering v. Heighe*, 2 Md. Ch. 81, 83; 3 Md. Ch. 365, 368; *Cronise v. Clark*, 4 Md. Ch. 403, 406; *Monumental Building Ass'n v. Herman*, 33 Md. 128, 132; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436, 439; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696.

Other cases adopt this latter test in a somewhat qualified form, asserting that no contracts of an infant are void, unless they necessarily, or clearly or certainly, operate to his prejudice: *Oliver v. Houllet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Vent v. Osgood*, 19 Pick. 572, 573; *West v. Penny*, 16 Ala. 187, 189; *Hastings v. Dollarhide*, 24 Cal. 195, 209; and see *Bradford v. French*, 110 Mass. 366, per Gray, J. Thus in *Oliver v. Houllet*, 13 Mass. 237, 239, 7 Am. Dec. 134, 135, Wilde, J., says: "It would be more correct to say that those acts of an infant are void which not only apparently, but necessarily, operate to his prejudice. The benefit to the infant is the great point to be regarded, the object of the law being to protect his imbecility and indiscretion from injury, through his own imprudence or by the craft of others. The general rule is, that infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, that his contracts, although voidable by him, shall bind the person of full age. This rule seems to require that all contracts of infants should be held voidable, rather than void. But however this may be, all the books agree that those which are beneficial, or have a semblance of benefit, to the infant, are only voidable." In *Vent v. Osgood*, 19 Pick. 572, 573, Putnam, J., says that if the contract of an infant be clearly prejudicial to him, it is void; if it may be for his benefit or to his damage, it is voidable, at his election; and if it be clearly beneficial to him, it is void; yet it is difficult to reconcile this statement with his expression of opinion, in the same case, that an infant is not bound by an account stated.

The rule of *Keane v. Boycott*, 2 H. Black. 511, 515, is not necessarily inconsistent with that of Perkins. In fact, the two have been frequently applied together, the former being usually regarded as the more general rule, and the rule of Perkins a special rule. While it is said that all deeds of an infant which do not take effect by delivery of his hand are void, yet if the deeds do take effect by delivery of his hand, and are not upon their face a prejudice to him, or in other words, have a semblance of benefit, by purporting to be executed for a valuable consideration, they are voidable simply: *Bigelow v. Kinney*, 3 Vt. 353, 358; 21 Am. Dec. 589, 590; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243, 245; 19 Am. Dec. 71, 77, 79; *Kline v. Beebe*, 6 Conn. 494; and it would be in strict accordance with this theory to hold the deed of an infant,

executed without consideration, to be absolutely void: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639. In one case, however, it was said that acts of an infant which take effect by delivery are in all cases voidable only; while with respect to promises which do not take effect by delivery, the distinction was between those which have and those which have no semblance of benefit to the infant, the latter being absolutely void, and the former voidable only: *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 77; 10 Am. Dec. 709, 710.

The courts exhibited a strong inclination at an early day to break away from the criterions of Perkins and Lord Chief Justice Eyre. In some of the cases a trace of Perkins's rule only was retained in *dicta* to the effect that the only exception to the rule that the deeds and contracts of infants were voidable merely was to be found in their deeds delegating a naked authority, which were absolutely void: *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; Woodworth, J., saying in the first of these cases that "there is no doubt that all the contracts which an infant can make, with a very few exceptions, are at least voidable, without regard to the question whether they are beneficial to him or not." While in other cases, among which are those which purport to adopt Chief Justice Eyre's rule with the interpretation as intending that no contracts of an infant are void unless they are necessarily prejudicial to him, the only portion of either rule which practically remains is enough of the benefit and detriment theory to warrant the expression of opinion that an infant's contract of suretyship is void: *Hastings v. Dollarhide*, 24 Cal. 195, 209, per Shafter, J.; *West v. Penny*, 16 Ala. 187, 189, per Collier, C. J.; compare *Flexner v. Dickerson*, 72 Ala. 318, 322. In *Weaver v. Jones*, 24 Ala. 420, 424, Chilton, C. J., says: "The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of nonage; that is to say, the infant may ratify them after he arrives at the age of legal majority."

Even in *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71, which approves both the rules of Perkins and Chief Justice Eyre, Robertson, J., remarks: "It is doubtful whether it would not be better for infants that none of their contracts should be avoided by any other persons than themselves, and consequently whether it would not be best that all their contracts should be only voidable." And in *Whitney v. Dutch*, 14 Mass. 457, 461, 7 Am. Dec. 229, 231, Parker, C. J., says: "The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts, and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree, is stated by Lord Mansfield in the case of *Zouch v. Parsons*, cited in the argument; viz., that whenever the act done *may be* for the benefit of the infant, it shall not be considered void, but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities. The application of this principle is not, however, free from difficulty; for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and when he came of age had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle that all simple contracts by infants which are not founded on an illegal consideration are strictly not void, but only voidable, and may be made good

by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults. With respect to contracts under seal, also, they are in legal force as contracts, until they are avoided by plea. Whether they can in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided." In *Reed v. Batchelder*, 1 Met. 559, Chief Justice Shaw also observes: "The question, what acts of an infant are voidable and what void is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them, when he comes of age, as his own views of his interest may lead him to elect."

Finally, it may now be considered as the settled rule that none of an infant's contracts are void because of his nonage, but all of them are voidable merely, with the exception of his contracts for the reasonable value of necessities, and his contracts made in pursuance of statutory authority, which are binding. The distinction that his contracts which cannot be for his benefit are absolutely void has become to be recognized as unreasonable and absurd; for the object of the law, which is to protect the infant against the consequences of his own indiscretion or the imposition of others, is completely secured by conferring upon him the power of disaffirming his contracts, or of ratifying them, after reaching proper age, at his pleasure. Again, there are serious difficulties in the way for the court to determine, either from the face of the transaction or from a collateral inquiry, whether the contract was for the benefit or detriment of the infant. Every argument, therefore, is in favor of leaving the question entirely to the infant to say whether the contract shall or shall not be binding upon him: *Hyer v. Hyatt*, 3 Cranch C. C. 276, 277; *Cheshire v. Barrett*, 4 McCord, 241, 244; 17 Am. Dec. 735, 738; *Cole v. Pennoyer*, 14 Ill. 158, 160; *Cummings v. Powell*, 8 Tex. 80, 85-90; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 337; 76 Am. Dec. 209, 211; *Fetrow v. Wiseman*, 40 Ind. 148, 151-155; *Harner v. Dipple*, 31 Ohio St. 72, 77; 27 Am. Rep. 496, 500.

These cases are among the leading ones upon the proposition. The courts, in *Cole v. Pennoyer*, 14 Ill. 158, 160, and *Fetrow v. Wiseman*, 40 Ind. 148, 151, 155, nevertheless repeat the error that an infant's power of attorney or appointment of an agent is void; and if this be true, a contract entered into by the agent, pursuant to his authority, is also void; yet there is no more reason for so holding than to hold that any other contract of an infant is void; and this is the view that is at present taken, as will be shown hereafter.

The singular doctrine has occasionally been advanced that the executed contracts of infants are binding until avoided, but their executory contracts are invalid until affirmed: *Edgerly v. Shaw*, 25 N. H. 514, 516; 57 Am. Dec. 349, 350; *State v. Plaisted*, 43 N. H. 413; *Minock v. Shortridge*, 21 Mich. 304, 315; *Morton v. Steward*, 5 Ill. App. 533, 535. Thus, says Gilchrist, C. J., in *Edgerly v. Shaw*, 25 N. H. 514, 516, 57 Am. Dec. 349, 350: "The executory contracts of an infant are said to be voidable; but this word is used in a sense entirely different from that in which it is applied to the executed contracts of an infant. In the latter case the contract is binding, until it is avoided by some act indicating that the party refuses longer to be bound by it. In the former case it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified." And again, in *Minock v.*

Shortridge, 21 Mich. 304, 315, Graves, J., remarks: "The executory contract of an infant, such as a promissory note, is not void in the sense of being a nullity, because it may be confirmed, but it has no binding force until it is confirmed. Being executory, and not binding until confirmed, it is said to be voidable; but as thus applied, this word is to be understood in a sense quite different from that which belongs to it when applied to the executed contract of an infant. The general rule is, that an executed contract is binding until avoided by words or conduct which show that the party refuses longer to be bound by it. But when it is said that the executory contract of an infant is voidable, the idea represented is, that the contract is susceptible of confirmation or avoidance by the promisor, though it is not binding until it is ratified." This is a senseless and erroneous distinction. Executory contracts of infants are no more invalid than executed contracts. Both are binding until disaffirmed. No one would contend that infants' executory contracts could be disregarded as nullities by the adult contracting parties, or by third persons, until they had been ratified; yet this is precisely what the doctrine leads to. It may be that a ratification will result from less positive acts or conduct in case of executed contracts than in case of executory; but this does not prove that the one class has a greater binding effect than the other.

It may finally be observed that the rules concerning the binding effect of infants' contracts are, in general, the same at law and in equity. This proposition is well expressed by Dorsey, J., in *Brewner v. Franklin*, 4 Gill, 463, 468, as follows: "It is a general rule and well-settled principle, as well at law as in equity, that no person under the age of twenty-one years is competent to make a contract, binding upon him, unless it be for 'necessaries.' No executory contract, by him *bona fide* entered into during his minority, unless confirmed by him after arriving at years of maturity, can be decreed to be specifically performed by a court of equity, or enforced in a court of law. Nor, in the absence of such confirmation, when pursuing his legal rights, in contravention of such contract, can he be restrained from so doing, by a court of equity interposing a prohibition, by way of injunction." It is true that certain special rules, different from those at law, are enforced by courts of equity, as, for example, compelling infants to repay money advanced to them to procure necessities, and, perhaps, imposing conditions upon them when they seek the aid of equity for relief; but the general rule still remains, that their contracts have no more but the same binding force in courts of equity as in courts of law.

STATUTORY REGULATION. — It has already been said that persons under the age of twenty-one are sometimes permitted by statute to enter into contracts to which nonage is no defense. Special statutes have also been passed relating to the disaffirmance and ratification of contracts by infants, and concerning some other matters. These statutes, and the cases decided under them, will be found discussed under their appropriate heads. There are, however, some general statutes and some decisions which require a separate notice.

It has been held that a statute conferring capacity upon married women to contract generally does not thereby remove the disability of infancy: *Cummings v. Everett*, 82 Me. 260; nor can a statute giving validity to the marriage settlements of minors be held to further remove the disabilities of married infants to enter into contracts: *Burr v. Wilson*, 18 Tex. 367, 374; *Hemp-hill*, C. J., also saying (p. 376): "The general power of making contracts is not expressly or impliedly included in any of the laws conferring rights on married infants; and consequently they have the right to avail themselves

of their privilege, when any such contracts are attempted to be enforced." Where an early statute of Maryland provided that the orphans' court should have the power to appoint guardians to infant females until they attained the age of sixteen, or married, when the guardianship should cease, and the property delivered up to the wards or their husbands, it is held that the disabilities of infancy are not thereby removed, with the exception that a female infant on attaining the age of sixteen has capacity to receive from her guardian her real and personal estate. She cannot, therefore, under the age of twenty-one, make a binding disposition of her personal property: *Davis v. Jacquin*, 5 Har. & J. 100; nor is she even bound by a settlement with or release to her guardian: *Bowers's Adm'x v. State*, 7 Har. & J. 32; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. Statutes enabling married women to convey their lands and release their claims to dower in the lands of their husbands, and providing the manner in which the conveyances shall be executed likewise, do not remove the disability of infancy: See *post*, "Deeds of Infant Females Covert."

The legislation in England concerning infants' contracts has been radical and really extraordinary. By section 1 of the Infants' Relief Act, 1874, 37 and 38 Victoria, chapter 62, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable"; and by the second section: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." There is no room for question that all contracts of infants falling within the provisions of this statute are mere nullities, and good for no purpose.

The Civil Code of California contains several sections on this subject, which, as amended, exhibit a minimum acquaintance with the general law and a maximum obscurity of thought. The sections certainly have not the "pride of ancestry," and we will venture to predict that in an intelligent community they have not the "hope of posterity." The principal sections are as follows: Sec. 33. "A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." Sec. 34. "A minor may make any other contract than as above specified, in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this title, and subject to the provisions of the titles on marriage, and on master and servant." Sec. 35. "In all cases other than those specified in sections 36 and 37 [sections concerning contracts for necessities, and obligations entered into under the express authority or direction of statutes], the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." Sections 15, 16, and 17 of

the Civil Code of Dakota are the same in language as the foregoing sections of the Civil Code of California, except that instead of the words "or within a reasonable time afterwards," in section 35 of the California code, section 17 of the Dakota code reads, "or within one year's time afterwards," and adds to the section, "with interest." It should be remarked that both in California and Dakota males attain their majority at twenty-one years, and females at eighteen years.

The result of this half-way legislation seems to be that any appointment of an agent by a minor during his or her entire minority is absolutely void, and consequently any contract made by such agent in pursuance of his appointment is absolutely void; See *Wambole v. Foote*, 2 Dak. 1. Furthermore, leaving out of consideration such contracts as are expressly made binding, any contract whatever made by a female minor during her whole minority, and by a male minor under the age of eighteen, relating to real property, is absolutely void. All purchases, sales, and leases of real property by and to such minors are consequently void. Again, any contract made by such minors, relating to any personal property not in his or her immediate possession or control, is also void. It seems that the contract of a male minor above the age of eighteen, relating to real property, is simply voidable; also, that the contract of a female minor or of a male minor under the age of eighteen, relating to personal property in his immediate possession or control, is likewise only voidable; also, that the contract of a male minor above the age of eighteen, relating to personal property, whether in his immediate possession or control, or not, is voidable; also, all other contracts, not relating to real or personal property, entered into by male or female minors of any age, are simply voidable. The provision concerning disaffirmance will be noticed hereafter, under the appropriate head. These distinctions made by the codifiers are perfectly senseless. It is difficult to appreciate the reason why it should be provided that if a female minor or a male minor under the age of eighteen owns personal property, she or he may make a voidable sale of it, if it be in her or his immediate possession or control, while if the property be not in such possession or control, the sale should be void; or why the purchase by such minor of personal property not in her or his immediate possession or control, or as would be usually the case, in the possession or control of the seller, should be absolutely void, while if such minor have possession of the property as a bailee for any purpose, the purchase be merely voidable.

In Georgia, it is provided that "the contracts of an infant under twenty-one years of age are void, except for necessities; and for necessities they are not valid unless the party furnishing them proves that the parent or guardian fails or refuses to supply sufficient necessities for the infant. If, however, the infant receives property or other valuable consideration, and after arrival at age, retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him"; Code 1882, sec. 2731. It is plain, both from this section in itself, and other sections connected with it, that although the legislature has used the word "void," what it really meant was "voidable"; for a void contract is not subject to ratification. Compare *Shuford v. Alexander*, 74 Ga. 293.

An early statute of Connecticut enacted "that no person under the government of a parent, guardian, or master shall be capable to make any contract or bargain which in the law shall be accounted valid, unless the said person be authorized or allowed so to contract or bargain by his or her parent, guardian, or master, in which case such parent, guardian, or master

shall be bound thereby." Under this statute it was held that a contract made by an infant who was under the care of a parent and guardian was absolutely void, and consequently could not be made valid by a ratification by the infant after he came of age: *Alsop v. Todd*, 2 Root, 105, 109. In other cases, however, it was held that the contracts of an infant under the government of a parent, guardian, or master, if against his interest, were void, and incapable of ratification, whileh is contracts with a semblance of advantage were voidable only: *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149. In reaching these conclusions, no stress seems to be placed on the fact whether the parent, guardian, or master authorized the infant to contract, except for the purpose of holding the parent, etc., liable. If the infant be not under the government of a parent, guardian, or master, his contracts, at least those which have a semblance of benefit, are voidable only: *Larence v. Gardner*, 1 Root, 477; *Kline v. Beebe*, 6 Conn. 494. Furthermore, it is held that an infant, to be incapacitated from contracting under the statute, must be under the legal and actual government of his parent, guardian, or master: *Kline v. Beebe*, 6 Conn. 494.

PARTICULAR CONTRACTS OF INFANTS. — The application of the foregoing general principles as to the binding effect of infants' contracts to the principal kinds of contracts will now be considered. It might be observed that while many of the cases discussing questions of disaffirmance and ratification of their contracts by infants may not expressly state that the contracts are voidable, as distinguished from void, yet the proposition is necessarily assumed, and the cases are really authorities to that effect.

DEEDS OF CONVEYANCE. — An infant's deed of conveyance, whether it be a feoffment, a deed operating under the statute of uses, or a statutory grant, it is well settled, is voidably only, and not void: *Whittingham's Case*, 8 Coke, 42 b; *Zouch v. Parsons*, 3 Burr. 1794; — *v. Hancock*, 17 Ves. 383; *Allen v. Allen*, 2 Dru. & War. 307, 338; *Tucker v. Moreland*, 10 Pet. 59, 70, 71; 1 Am. Lead. Cas. *224, *228, *229; *Irvine v. Irvine*, 9 Wall. 617; *Freeman v. Bradford*, 5 Port. 270; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Hastings v. Dollarhide*, 24 Cal. 195; *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Cole v. Pennoyer*, 14 Ill. 158; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Hartman v. Kendall*, 4 Ind. 403, 404; *Pitcher v. Laycock*, 7 Ind. 398; *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; *Johnson v. Rockwell*, 12 Ind. 76; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Jenkins v. Jenkins*, 12 Iowa, 195; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; 5 T. B. Mon. 344; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243; 19 Am. Dec. 71, 77; *Vallandigham v. Johnson*, 85 Ky. 288; *Hoffert v. Miller*, 86 Ky. 572; *Webb v. Hall*, 35 Me. 336, 338; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318, 319; *Key's Lessee v. Davis*, 1 Md. 42; *Ridgely v. Crandall*, 4 Md. 435; *Kendall v. Lawrence*, 22 Pick. 540; *Allen v. Poole*, 54 Miss. 323, 330; *Ferguson v. Bell's Adm'r*, 17 Mo. 347, 351; *Youse v. Norcoms*, 12 Mo. 549; 51 Am. Dec. 175; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Eagle Fire Co. v. Lent*, 6 Paige, 635, affirming 1 Edw. Ch. 301; *Gillett v. Stanley*, 1 Hill, 121; *Van Nostrand v. Wright*, Hill & D. Sup. 260; *Dominick v. Michael*, 4 Sand. 374, 418; *Voorhies v. Voorhies*, 24 Barb. 150, 152; *McIlvaine v. Kautel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *Ihley v. Padgett*, 27 S. C. 300; *White v.*

Flora, 2 Over. 426, 431; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Scott v. Buchanan*, 11 Humph. 468; *Cummings v. Powell*, 8 Tex. 80; *Bigelow v. Kinney*, 3 Vt. 353, 358; 21 Am. Dec. 589, 590; *Bedinger v. Wharton*, 27 Gratt. 857; *Wilson v. Branch*, 77 Va. 65, 70; 46 Am. Rep. 709, 712; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381, 382; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445, 446. He may, therefore, ratify or disaffirm the deed at his majority, at his pleasure. This is so by statute in Georgia: Code 1882, sec. 2694; *Nathans v. Arkwright*, 66 Ga. 179.

The cases, it will be seen, are quite unanimous in support of the rule; yet they differ, as has been already seen, in the reasons which they assign. Many of the cases, especially the older ones, apply the criterion of Perkins, that the particular deed under consideration took effect by the delivery of the infant's own hand; and others apply the criterion of Lord Chief Justice Eyre, that the deed did not appear to be to the prejudice of the infant; and in still others, both criterions are adopted. The result might have been otherwise if the deed were executed by an agent appointed by the infant: See *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Philpot v. Bingham*, 55 Ala. 435; *Wamble v. Foote*, 2 Dak. 1; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; but see *Cummings v. Powell*, 8 Tex. 80, 88, per Hemphill, C. J.; *Ferguson v. Houston etc. R'y*, 73 Tex. 347; and see *post*, "Delegation of Authority"; or if it were a deed of gift: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; but see *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463; and see *post*, "Gifts." It is doubtful, however, whether any well-considered case at the present day would adopt these distinctions; but that all deeds of infants would be held to be voidable only, and not void, without regard to the question whether they were executed by the grantors personally or by their agents, or whether they were executed with or without consideration.

The effect of the deed should not be misunderstood. Being simply voidable, the deed operates to transmit the title, which continues in the grantee, or those who claim under him, unless divested by some act of the grantor: *Irvine v. Irvine*, 9 Wall. 617; *Law v. Long*, 41 Ind. 586; *Phillips v. Green*, 5 T. B. Mon. 344; *Van Nostrand v. Wright*, Hill & D. Sup. 260; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *Ihley v. Padgett*, 27 S. C. 300, 302; *White v. Flora*, 2 Over. 426, 431; *Matherson v. Davis*, 2 Cold. 443, 451. And hence it has been held that the grantee who takes possession of the premises under the deed does so rightfully, and consequently the grantor is not at liberty to treat him as a trespasser, until, by avoiding the deed, he places him in that position; and speaking of the old action of ejectment, the court saying: "The action of ejectment necessarily supposes the defendant to be a trespasser, and we are of the opinion that it cannot be maintained in a case like the present without a previous act on the part of the plaintiff's lessor, avoiding the deed made by him while an infant, and under which the defendant is in possession": *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; but see *post*, "Disaffirmance by Suit." The operation of the deed was well stated by Lane, J., in *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253: "To us it appears that the word 'voidable,' *ex vi termini*, shows that such a deed transmits the title; and that after vesting, it continues in the grantee until divested by some act of the maker of the deed"; and in *Ihley v. Padgett*, 27 S. C. 300, 302, McGowan, J., says: "From its very nature, a thing only voidable needs no positive confirmation, but stands good until impeached by a proper party. In the first instance, confirmation has no proper application to it; but when there is an effort to avoid the act, it becomes important to inquire whether there has been confirmation; for if so,

the matter has passed beyond the control of the party, and is no longer voidable."

Under the theory that the appointment of an agent by an infant is void, it has been asserted that a deed executed on behalf of an infant, pursuant to an authority conferred by him for that purpose is void, and not merely voidable: *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Philpot v. Bingham*, 55 Ala. 435. But the better view is to the contrary: *Cummings v. Powell*, 8 Tex. 80, 88; *Ferguson v. Houston etc. R'y*, 73 Tex. 344, 347; *post*, "Delegation of Authority."

It may be here observed that there are some deeds of infants which are not even voidable, but on the contrary, cannot be attacked for nonage. In the language of the supreme court of the United States, "They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do": *Irvine v. Irvine*, 9 Wall. 617, 626. In fact, *Zouch v. Parsons*, 3 Burr. 1794, was really such a case, and Lord Mansfield cites Co. Lit. 172 a, to the effect that, "generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." This proposition is fully discussed and illustrated *post*, "Acts Which Infant would have been Compelled by Law to do."

But an infant is not estopped from disaffirming his deed, and maintaining an action to recover the land conveyed, by the mere fact that when the deed was executed he appeared and was believed by the grantee to be an adult: *Buchanan v. Hubbard*, 96 Ind. 1. Nor even would he be estopped at law by a false declaration at the time he made the deed or a recital in the deed that he was of full age: See *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676. But it might be otherwise in equity: *Ferguson v. Bobo*, 54 Miss. 121; *Schmitheimer v. Eiseman*, 7 Bush, 298; compare *Sims v. Everhardt*, 102 U. S. 300; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Fallingdunham v. Johnson*, 85 Ky. 288. See further on this question, *infra*, "Infant's Concealment or Misrepresentation as to Age."

An infant's deed to secure the repayment of money advanced for necessities is voidable: *Martin v. Gale*, L. R. 4 Ch. D. 428; and see *Askey v. Williams*, 74 Tex. 294; but compare *Cooper v. State*, 37 Ark. 421.

A deed takes effect from delivery. Therefore, where a married woman, while an infant, signed and acknowledged, with her husband, a deed of her lands, and authorized him to deliver it, and he delivered it with her consent after she became adult, it was held that such deed could not be avoided by her on account of infancy: *Sims v. Smith*, 99 Ind. 469; 50 Am. Rep. 99.

DEEDS OF INFANT FEMES COVERT. — Where a married woman, who is also an infant, executes a deed conveying her own realty or relinquishing her right of dower in the lands of her husband, in conformity with a statute which provides that married women may convey their lands or release their claims to dower by deeds executed according to certain formalities, or in a prescribed manner, the question has been, not so much whether her deed is void because of her nonage, but whether it is not valid under the statute, notwithstanding her infancy. It is well settled, however, that marriage does not emancipate a person under age from the condition of infancy, and that the statute simply removes the disability of coverture. Hence a deed executed by an infant *feme covert* pursuant to the statutory requirements stands on precisely the same footing as a deed executed by an infant *feme sole*. In other words, the deed is not binding, nor is it void; but it is voidable: *Greenwood v. Coleman*, 84 Ala. 150; *Schuffer v. Lavretta*, 57 Ala. 14; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Hartman v. Kendall*, 4 Ind. 403, 404; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52

Ind. 68; *Hoyt v. Swar*, 53 Ill. 134; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Prewitt v. Graves*, 5 J. J. Marsh. 114, 120; *Oldham v. Sale*, 1 B. Mon. 76, 77; *Webb v. Hall*, 35 Me. 336; *Walsh v. Young*, 110 Mass. 396; *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Cunningham v. Knight*, 1 Barb. 399; *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Epps v. Flowers*, 101 N. C. 158; *Hughes v. Watson*, 10 Ohio, 127; *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; *Scott v. Buchanan*, 11 Humph. 468; *Matherson v. Davis*, 2 Cold. 443, 451; *Burr v. Wilson*, 18 Tex. 367, 375. The same rule applies to a mortgage of her estate, executed by an infant married woman; *Magee v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196; *Losey v. Bond*, 94 Ind. 67.

"It is inconceivable," says the court in *Greenwood v. Coleman*, 34 Ala. 150, "that it was designed to confer upon her, when under coverture, an authority to contract which did not pertain to her if sole and unmarried, and to dispense with the disability of infancy." In *Sanford v. McLean*, 3 Paige, 117, 121, 23 Am. Dec. 773, 775, Chancellor Walworth uses the following language: "The statute which makes valid the deed of a *feme covert* when executed with her husband, and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife. There is a plain and obvious distinction between the disability of coverture and that of infancy. The first arises from a supposed want of will, on account of the legal power and coercion which the husband may exercise over the volition of the wife. This disability is removed by the private examination of the wife in the absence of her husband, by which it is legally ascertained that such power and coercion have not been exercised in that particular case. But the disability of infancy arises from the supposed want of capacity and judgment in the infant to contract understandingly." Again, Buskirk, C. J., says, in *Scranton v. Stewart*, 52 Ind. 68, 91: "The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, and neither can derive any additional force from being coupled with the other. Under our statute, a *feme covert* cannot convey her lands unless her husband joins with her in the deed, and unless the deed is executed in the mode prescribed by the statute; and when a deed is thus executed, the disability of coverture is removed, and that of infancy alone remains. The deed of a married woman is void when the statutory requirements are not complied with. The deed of an infant, whether married or unmarried, is not void, but voidable merely."

In *Sherman v. Garfield*, 1 Denio, 329, where an infant *feme covert* joined with her husband in a conveyance of his lands, purporting to release her dower therein, it was held that her conveyance was void, she having no estate in the lands, and that, having survived her husband, she could maintain an action to recover her dower, notwithstanding her conveyance; the court saying: "Here the land belonged to the plaintiff's husband, and she had no estate or interest in it, but only a capacity to be endowed in the event she should survive him. There was nothing upon which the deed could operate. It was therefore merely void, and required no act on her part to disaffirm it." It is thus plain that this questionable decision was made to rest on other grounds than nonage. In an earlier case in the same state, also involving a release of dower by an infant *feme covert*, it was said that the deed was void for infancy; but what the chancellor must have meant was, that it was voidable; at least it was unnecessary to hold that it was anything more than voidable, since the question was simply as to the right of the infant to disaffirm the deed and recover her dower in the lands: *Sanford v. McLean*, 3

Paige, 117; 23 Am. Dec. 773. In *Schrader v. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538, the bad report of a case shows that the deed of a *feme covert* executed and acknowledged by her while an infant, but dated after she attained full age, is "absolutely void," that is, may be avoided by her. It is impossible to tell whether the deed was post-dated at the time it was executed, or a blank left for the insertion of the date, which was afterwards filled in; presumably it was the latter. It is, of course, idle to comment on such a case.

The deed of an infant *feme covert* has the same effect, when executed according to the requirements of the statute, as the deed of an unmarried infant. In other words, it operates to vest the title in her grantee, or to relinquish her right of dower, as the case may be, subject to her affirmance or disaffirmance on arriving at full age: *Matherson v. Davis*, 2 Cold. 443, 451; *Law v. Long*, 41 Ind. 586.

In Minnesota, by 1 General Statutes, 1888, chapter 40, section 2, "a husband and wife may convey any real estate by their duly authorized agent or attorney, and may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed if she was unmarried; nor shall the minority of the wife in any case affect the validity of such deed." In 1843, 1861, and 1866, statutes were passed in Indiana which have been reproduced in 2 Revised Statutes, 1888, sections 2939, 2940, 2943, providing for the joinder of married women under the age of twenty-one years, with their husbands, in conveyances of the real estate of the latter. The first of these statutes provided that "any married woman over the age of eighteen years and under the age of twenty-one years may release and relinquish her right in any lands of her husband, sold and conveyed by him, by executing and acknowledging the execution of such conveyance as provided in the last preceding section, if the father or guardian of such married woman shall declare before the officer taking such acknowledgment that he believes that such release and relinquishment of dower is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands thus conveyed." Under this statute it was held that a married woman under the age of eighteen years could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband. The father or guardian had no power to give his consent, unless she was over eighteen and under twenty-one years of age: *Law v. Long*, 41 Ind. 586. It was also held, in a suit against a husband and wife to foreclose a mortgage executed by them in 1872, that an answer by the wife that when she executed the mortgage she was an infant, without alleging that the land was her separate property, or that her husband was an infant, was bad on demurrer, since under the statute of 1866 it was competent for an infant wife of an adult husband to join with him in the conveyance of his real estate: *Bakes v. Gilbert*, 93 Ind. 70.

EXECUTORY CONTRACTS TO SELL REAL PROPERTY. — An infant's contract to sell and convey his real estate is not void, but only voidable, and is therefore subject to his affirmance or disaffirmance: *Mustard v. Wofford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209. The infant may repudiate the contract, and recover back the money paid thereunder; and in such an action the vendor will not be entitled to deduct from the amount of the deposit sued for the expense of advertising and selling the property again, brought about by the plaintiff's rescission of the contract: *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; and see *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." If his vendee is in possession of the land contracted to be conveyed, he may maintain ejectment, it is held, without

giving notice of his disaffirmance of the contract, the action itself being a sufficient disaffirmance: *Clark v. Tate*, 7 Mont. 171. Nor will a court of equity restrain his proceedings at law to recover the lands in the possession of the vendee, his contract being no more binding on him in equity than at law: *Browner v. Franklin*, 4 Gill, 463. Of course, infancy is a good defense to an action against a vendor to recover damages for his failure to perform his contract: *Yeager v. Knight*, 60 Miss. 730. The contract to sell and convey not being void, but voidable only, his vendee who enters into possession of the land under the contract cannot be regarded as a trespasser, and therefore, upon the disaffirmance of the contract by the infant after arriving at full age, an action of *indebitatus assumpsit* for use and occupation may be maintained against the vendee; and it is held, the action being equitable in its nature, the vendee might recoup for valuable improvements erected by him in good faith upon the land: *Weaver v. Jones*, 24 Ala. 420.

The contract is none the less voidable because it is in the form of a bond for title with a penalty: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Weaver v. Jones*, 24 Ala. 420; *Bozeman v. Browning*, 31 Ark. 364. According to the theory of *Keane v. Boycott*, 2 H. Black. 511, 514, such a contract would be necessarily prejudicial to the infant, and would consequently be void; but Moncreu, J., in *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209, says that "the penalty of the bond is a mere matter of form, the substance of the contract being the condition"; and Chilton, C. J., in *Weaver v. Jones*, 24 Ala. 420, affirms that "the better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of nonage." See also, *post*, "Bonds."

Under the theory, however, that the appointment of an agent by an infant is absolutely void, it has been held that a bond for title executed by an agent of an infant was void, and consequently could not be ratified by him after attaining majority: *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; and see *Pyle v. Cravens*, 4 Litt. 17; but see the view that an infant's delegation of authority is void criticised *post*, "Delegation of Authority."

PURCHASES OF REAL PROPERTY.—An infant's contract of purchase of real property, whether executory or executed by a conveyance to him, is also simply voidable: *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Baker v. Kennett*, 54 Mo. 82; Wagner, J., in the latter case, saying: "The old distinction between the void and voidable contracts of infants is becoming exploded by the courts, and the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the acts and contracts of infants shall be deemed voidable only, and subject to their election, when they become of age, either to affirm or disavow them." If the deed to the infant reserves a lien on the land to the grantor for the purchase-money, it is nevertheless but voidable, and may be affirmed by the infant after he comes of age: *Hook v. Donaldson*, 9 Lea, 56. An infant cannot retain the land purchased by him, and repudiate his agreement to pay the price, or a note and mortgage executed by him as a part of the transaction of purchase to secure the price: See *post*, "Disaffirmance of Part of Transaction."

MORTGAGES OF REAL PROPERTY.—An infant's mortgage of his real estate, whether under the theory that the mortgage operates as a conveyance of the legal title, or under the theory that it operates to create a mere lien upon the land, is likewise merely voidable, at the election of the infant: *Hubbard v. Cummings*, 1 Me. 11; *Monumental Building Ass'n v. Herman*, 33 Md. 128,

132; *President etc. of Boston Bank v. Chamberlain*, 15 Mass. 220; *Mansfield v. Gordon*, 144 Mass. 168; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Palmer v. Miller*, 25 Barb. 399; *McGan v. Marshall*, 7 Humph. 121. So, also, if an infant takes a conveyance of land, and contracts therein for the payment of the purchase price, and that the purchase-money shall be a lien on the land, the instrument is not void, but voidable: *Hook v. Donaldson*, 9 Lea, 56. The reasoning by which most of these cases have reached this conclusion has been along the same lines by which many of the cases previously cited have held the deeds of conveyance of infants to be voidable simply; namely, that the instrument in the particular case before the court took effect by the delivery of the infant's own hand, and that it did not appear to be to the prejudice of the infant. Thus in *McGan v. Marshall*, 7 Humph. 121, it was held that a mortgage executed by an infant to secure payment for goods to be purchased, and which were to be paid for in two years, was not, on its face, prejudicial to the infant, and was consequently voidable, and not void, and proof of the subsequent injudicious application by the infant of the consideration received could not render it void. In *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38, Woodbury, J., says that "courts incline to construe infants' contracts voidable rather than void, because such construction oftener promotes public justice, and operates at the same time more beneficially to the minor himself, for whose sole advantage the privilege of avoiding a contract is conferred. As contracts which take effect by manual delivery convey usually an interest, and not a mere power, such, when made by an infant, whether the interest pass to or from him, are, in general, not void, but voidable."

In accordance with the rule that if the contract be such as the court can pronounce prejudicial to the infant it is void, it has been said that a mortgage of her reversionary interest in real and personal estate, executed by an infant *feme covert* to secure a debt due by a firm of which her husband was a member, is absolutely void and incapable of confirmation: *Cronise v. Clark*, 4 Md. Ch. 403; the court using the following language: "It is a contract from which she cannot possibly derive a benefit, and which the court cannot fail to see and pronounce to be to her prejudice. It must therefore be regarded as merely void and incapable of confirmation." The facts of the case, however, simply involved an inquiry into the right of the infant to avoid the mortgage. In *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686, the court also asserted that a mortgage given by an infant *feme covert* to secure the debt of her husband was absolutely void, and not merely voidable, since it could not be beneficial to her; but here, again, the case only involved the right of the infant to disregard the mortgage and the proceedings taken under it. See further, *post*, "Suretyship."

This reasoning has already been criticised. Modern cases entitled to any respect will undoubtedly reject it, and adopt the simple rule that it is more to the infant's advantage, and his rights are amply protected, if all his general contracts are held to be voidable only, without regard to the question whether they appear to be to his benefit or to his prejudice, or whether they take effect by delivery of his own hand or are executed by means of an agent appointed by him. According to the old theory, if a mortgage were executed by an agent of the infant it would be void, because an infant cannot appoint an agent; but it has been held that a power of sale given to the mortgagee, in a mortgage made by an infant, was voidable only, and a conveyance thereunder might be ratified by the infant: *Askey v. Williams*, 74 Tex. 294; the

court saying: "The great weight of authority is to hold an infant's naked power of attorney void; but the rule is different when the power is coupled with an interest." The court is mistaken in its opinion that "the great weight of authority is to hold an infant's naked power of attorney void." The truth is, "the great weight of authority," although perhaps not the greater number of cases, is to hold them not void, but voidable; or to speak with more exactness, to hold contracts entered into under them, on behalf of the infant, to be voidable instead of void: See *post*, "Delegation of Authority."

The mortgage being voidable, the defense of infancy is, of course, good in a suit to foreclose it; but a subsequent lien-holder cannot join in the defense: *Baldwin v. Rosier*, 1 McCrary, 384; and if a bond and mortgage be given by an infant, it is held that equity will, in a suit for that purpose by his personal representatives, order the same to be delivered up and canceled, and decree a perpetual injunction against all proceedings thereon at law: *Colcock v. Ferguson*, 3 Desaus. Eq. 482. If, also, an infant purchases real estate, and agrees, as a part of the consideration, to pay off a mortgage thereon, an action cannot be maintained on the agreement to pay off the mortgage, unless the agreement be ratified by the infant after he attains his majority: *Walsh v. Powers*, 43 N. Y. 23, 26, 27; 3 Am. Rep. 654, 655.

The mortgage of her lands executed by an infant *feme covert* pursuant to statutes which confer the power upon married women to convey or encumber their real estate, as has already been said, is not binding, nor is it void, but it is voidable: *Magee v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196; *Losey v. Bond*, 94 Ind. 67; see *ante*, "Deeds of Infant Females Covert."

The deed of an infant to secure the repayment of money advanced for necessities is voidable: *Martin v. Yale*, L. R. 4 Ch. D. 428; and see *Askey v. Williams*, 74 Tex. 294; but in one case a deed of trust to secure indebtedness, executed by a minor, was, with doubtful correctness, held valid and binding to the extent that it was for necessities: *Cooper v. State*, 37 Ark. 421.

An infant's mortgage, like his deed of conveyance or other contract, is valid until disaffirmed by the infant: *Palmer v. Miller*, 25 Barb. 399; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. "It requires no affirmative act to continue its validity," says Martin, C., in the last case, "but only an absence of any disaffirming acts." It remains valid in all respects, like the deed of an adult, until it has been disaffirmed by the maker after reaching his majority."

LEASES — LIABILITY FOR RENT. — The question as to the binding effect of a lease to which an infant is a party may arise where he is the lessor and where he is the lessee. It is a little singular that the cases discussing the question are so few in number; and it may be remarked that what there are involving the validity of a lease to him, or rather his liability for rent, leave the subject in quite an unsatisfactory condition. In the first place, it is held that an infant's lease of his lands, reserving rent, is not void, but voidable only: *Slutor v. Trimble*, 14 Ir. C. L. 342 (1861); and notwithstanding the rent reserved was not the best obtainable: *Slutor v. Brady*, 14 Ir. C. L. 61 (1863); Fitzgerald, B., saying in the latter case: "Doubtless some acts of an infant are absolutely void, while some are voidable only. According to some authorities, the criterion of the distinction is this: If the act *may* be for the benefit of the infant, it is voidable only; if it *cannot* be for his benefit, it is void. According to others, it is said to be this: All such gifts, grants, or deeds as do not take effect by the delivery of the infant's hand are void; but those which do take such effect are voidable only. It is unnecessary to de-

termine which of these is the more correct. By adopting either, it seems to me the result will be that the act in question here is voidable only." The learned baron reached the right result; but he should have said that neither criterion was correct. It has, however, been said that "if an infant appoints a person to make a lease, it does not bind the infant; neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act": Baron Parke in *Doe ex dem. Thomas v. Roberts*, 16 Mees & W. 778, 781; but see the view that the appointment of an agent by an infant is void criticised *infra*, "Delegation of Authority."

In regard to leases made to infants, it has been held in this country that such a lease was not void, but voidable only, and therefore a third person could not attack it on the ground of infancy, in an action in which the lease was drawn into question: *Griffith v. Schwenderman*, 27 Mo. 412; and again, where infants gave a written agreement to pay rent, a plea of infancy to an action thereon was good: *Fleener v. Dickerson*, 72 Ala. 318. In this latter case, the action was commenced before the infants attained their majority, and before the expiration of the term. In *Maddon v. White*, 2 Term Rep. 159, 161, Justice Buller is reported as saying that "all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit"; by which indefinite remark we may understand either or both of two things; namely, that if the premises leased are a necessary, the lease is binding to the extent, at all events, that he must pay a reasonable rent for their use; and although the premises are not a necessary, yet if the rent be no more or less than the use of the premises is fairly worth, he is bound by the lease, at all events to pay for the rent earned.

Justice Buller's dictum was probably based on a much-discussed case, variously reported as *Ketsey's Case*, Cro. Jac. 320; *Ketley's Case*, 1 Brownl. 120; and *Kirton v. Elliott*, 2 Bulst. 69. The reports of the case differ about as much as its name, but the following is a fair statement of them all: On demurrer to a plea of infancy in debt upon a lease, it was held that the lease was voidable only, at the election of the infant; for if it were for his benefit, it was not void, but the infant, at his election, might make it void, by refusing and waiving the land before the rent day came; but it was not shown that the rent was of greater value than the use of the land, and the defendant was of full age before the rent day came, and therefore it was adjudged for the plaintiff.

Four interpretations of this case are possible: 1. That an estate vests in the infant on his entry under the contract of tenancy, and renders him liable to the obligation to pay rent until he repudiates the estate, which he might do either within age, and after as well as before the rent day came, or on coming of age before the arrival of the rent day; 2. That the infant who enters into the possession and enjoyment of the estate may repudiate the letting at any time before the rent day came, but could not do so afterwards so as to relieve himself from the obligation to pay the rent due, notwithstanding his infancy; 3. That the premises were a necessary, and therefore the infant was liable for the rent, which did not appear to be unreasonable; and 4. That the infant ratified the lease by his acquiescence and retention of possession after he arrived at full age, and before the rent day came. We are inclined to believe that the case was decided on the last ground, but some authorities claim that it was decided on the first or second. Thus in *Leeds etc. Ry v. Fearnley*, 4 Ex. 26, which was an action for calls on railway shares, to which the defendant pleaded that at the time of making the calls,

and also at the time he became the holder of the shares, he was an infant, Baron Parke said: "This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a property in the possible profits of the concern. Now, according to *Kelsey's Case*, Cro. Jac. 320, and what is more distinctly laid down by Dodderidge, J., in *Kirton v. Elliott*, 2 Bulst. 69, he would be liable, unless he repudiated; then ought not the plea to aver that fact?" In *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, Baron Parke again gives his explanation of the case: "We collect that the principle upon which the court decided was, that every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bacon's Abridgement, title Infancy, I., 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord Ellenborough, in *Baylis v. Dinely*, 3 Maule & S. 481, intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle that as the estate vests, as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority."

The question of the liability of the infant for rent was actually involved in two Irish cases. In *Kelly v. Coote*, 5 Ir. C. L. 469, it was held that where an estate on which rent was reserved was cast upon an infant by operation of law, and he had not disaffirmed, he became liable for rent, notwithstanding his infancy. "Nothing is clearer than this," it was said; "that where an infant becomes entitled to property subject to a certain burden, the obligation to discharge that burden also vests in him." And in *Blake v. Concannon*, 4 Ir. Rep. C. L. 323, it was decided that an infant lessee who enters into possession and enjoyment of the land is liable for an installment of rent coming due during such holding, and while he is an infant, if he fails to repudiate the contract of tenancy, and the tenancy under it, before the installment falls due; but, on the other hand, he is not liable for an installment of rent falling due after such repudiation; the reason being, as expressed by Pigot, C. B.: "He is not, in an action of debt for the rent, held liable upon the contract of tenancy alone. His liability arises from his occupation and enjoyment of the land under the tenancy so created. If his liability arose from the contract alone, the repudiation of the contract, by annulling it, would annul its obligations, which would then exist only by reason of the contract. But the infant, though he can repudiate the contract of demise, and the tenancy under it, and can so revert the land in the landlord, cannot repudiate an occupation and enjoyment which are past, or restore to the landlord what he has lost by that occupation and enjoyment of the infant." *Kelsey's Case*, Cro. Jac. 320, was explained as intending that an occupation and enjoyment of the infant until after the rent became payable would render the infant liable, independently of the fact that the defendant was of full age before the rent day came; and the *dictum* of Baron Parke in *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, to the effect

that the avoidance by the infant could take place after the rent (calls) became due, was disapproved.

While we do not agree with Baron Parke as to the ground on which *Ketsey's Case* was decided, yet we believe that his views as to the liability of an infant for rent, as expressed in *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, are nearer correct than those of Chief Baron Pigot in *Blake v. Concannon*, 4 Ir. Rep. C. L. 323. There is no doubt that the infant's contract of tenancy is good; that an estate vests in him by his entry under the contract; and that the contract and estate continue until avoided by him. The tenancy may be ratified by him after he arrives at full age, when it would no longer be subject to his disaffirmance; and it may be ratified by his continuing in possession and enjoyment of the estate after he comes of age. He could not hold the estate, and repudiate his obligation to pay rent. In the event of such a ratification he would be liable for rent falling due thereafter; and since the ratification would render the letting valid from the beginning, he would also be liable for rent which became due during his infancy. But we fail to appreciate the force of any argument which holds the infant liable, notwithstanding his infancy, for rent falling due during his infancy, if he fails to repudiate the tenancy before the pay day arrives. It is true that the infant may have received a benefit from the occupation and enjoyment of the land, and that a restoration of the land to the lessor will not restore to him what he has lost by the occupation and enjoyment of the infant, yet it does not follow, according to the best authorities, that because the infant has received a benefit from his contract, and that a disaffirmance will not restore the other party to his original position, the infant is bound by his contract.

In *Lemprière v. Lange*, L. R. 12 Ch. D. 675, it was held that where an infant obtained a lease of a furnished house on an implied representation that he was of full age, the lease would be declared void and canceled at the suit of the lessor, and possession of the house ordered to be given up, and the defendant restrained by injunction from parting with the furniture; but that the defendant was not liable for use and occupation.

An infant may be liable for use and occupation of a dwelling, if it be a necessary: See *Crisp v. Churchill*, cited 1 Bos. & P. 340; *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30.

It was held in an old case, under the benefit and prejudice theory, that the surrender of an infant lessee by the acceptance of a new lease was void, if it be without increase of his term or decrease of his rent; for where there was not an apparent benefit, or semblance of benefit, his acts were void: *Lloyd v. Gregory*, Cro. Car. 501.

In an action of ejectment against an infant, the defendant is not estopped, by his contract of tenancy with the plaintiffs, from showing title in himself and others, and out of the plaintiffs: *McCoon v. Smith*, 3 Hill, 147; 38 Am. Dec. 623.

MECHANICS' LIENS. — A number of cases have decided that a mechanic's lien cannot be claimed on the land of a minor, against his objection of infancy, by one who has done work and furnished materials under a contract with him: *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572; *Hall v. Acken*, 47 N. J. L. 340; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; *Wornock v. Loar*, 88 Ky. 000. "A lien implies a contract, and as an infant cannot make a valid contract, no lien can be obtained against his property": *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. "The lien given by the mechanic's lien law is, except in the case of the land of married women, as to which there is an express provision for lien, incident only to a legal liability to pay which a minor is not competent

to incur for building upon his land": *Hall v. Acken*, 47 N. J. L. 340. "If the contract ceases to be binding, the lien necessarily fails. . . . A conveyance or mortgage by an infant of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property indirectly by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. . . . The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age": *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. These cases, therefore, decided that the particular mechanic's lien laws in question did not confer a lien on the property of infants. It would undoubtedly be competent, however, for the legislature to provide that the lien could be so claimed.

One to whom land has been conveyed, against which a mechanic's lien for materials furnished is sought to be enforced, may, after the grantor has disaffirmed the contract on the ground of infancy, avail himself of the disaffirmance in defense; and this, it is held, although the contract was disaffirmed by the grantor by a plea of infancy in the same action: *Price v. Jennings*, 62 Ind. 111.

MARRIAGE SETTLEMENTS. — There was at one time considerable dispute in the English courts as to whether a jointure settled on an infant wife before marriage was a bar of dower. It was finally settled, however, that the infant was bound at law by a legal jointure under the statute of 27 Henry VIII., chapter 10, and that an equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the parent or guardian of the infant before marriage, would, in analogy to the statute, constitute an equitable bar: See *Harvey v. Ashley*, 3 Atk. 607, 612, per Lord Hardwicke; *Earl of Buckinghamshire v. Drury* (*Drury v. Drury*), 2 Eden, 60; 4 Bro. C. C. 506, note, 3 Bro. P. C. 492, Wilm. Op. 177; *Williams v. Williams*, 1 Bro. C. C. 152; *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *Simpson v. Gutteridge*, 1 Madd. 609; *Williams v. Chitty*, 3 Ves. 545; *Smith v. Smith*, 5 Ves. 189; *Corbet v. Corbet*, 1 Sim. & S. 612; 5 Russ. 254; *McCartee v. Teller*, 2 Paige, 511. The leading case of *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 4 Bro. C. C. 506, note, 3 Bro. P. C. 492, Wilm. Op. 177, established that the statute of Henry VIII. applied to infants as well as adults, and that a jointure was not a contract, but a provision made by the husband for the wife. As before remarked, to make an equitable jointure binding on the infant wife, the provision should be beneficial to her and certain, and not precarious and uncertain. Furthermore, she will not be bound by her agreement to accept a pecuniary consideration, instead of an interest in land, in lieu of dower: *Shaw v. Boyd*, 5 Serg. & R. 309; *Drew v. Drew*, 40 N. J. Eq. 458. "As the *feme* must have a freehold, there is no reason to say a gross sum, which was to be received as a consideration for having executed a bond, shall be considered as a provision settled on the *feme* in lieu of dower": *Shaw v. Boyd*, 5 Serg. & R. 309. In Michigan, it is provided that "a woman may also be barred of her dower in all the lands of her husband, by a jointure settled on her with her assent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect in possession or profit immediately on the death of her husband," and that "such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by her joining with her father or guardian in such conveyance": 2 Howell's Ann. Stats. 1882, secs. 5746, 5747. A similar statute exists in New York: 4 R. S.,

Banks & Bros.' 8th ed., 2455, secs. 9, 10; and perhaps in some other states where dower is recognized. In some states, if the jointure was made when the wife was an infant, she may, after her husband's death, waive her jointure and demand her dower: New Jersey R. S. 1877, 322, sec. 10; Ohio R. S. 1890, sec. 4189.

With respect to the settlement of her own real and personal estate by a female infant upon her marriage, it also became established, after some fluctuation of opinion, that she was bound by the settlement of her general personal property, because such personalty became by the marriage the property of her husband, and the settlement was in effect his settlement, and not hers; but as to her real estate and also her personal property settled to her separate use, she was not bound, although the settlement was made with the approbation of her parents or guardian, or even the court of chancery: See *Harvey v. Ashley*, 3 Atk. 607, 613, per Lord Hardwicke; *Durnford v. Lane*, 1 Bro. C. C. 106, 115; *Clough v. Clough*, 5 Ves. 710, 717; *Milner v. Lord Harewood*, 18 Ves. 259, 275; *Simson v. Jones*, 2 Russ. & M. 365; *Johuson v. Johnson*, 1 Keen, 648; *Campbell v. Ingilly*, 21 Beav. 567; *In re Waring*, 21 L. J. Ch. 784; *Field v. Moore*, 25 L. J. Ch. 66; *Temple v. Hawley*, 1 Sand. Ch. 153; *Wetmore v. Kissam*, 3 Bosw. 321; *McIlvaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Tubb v. Archer*, 3 Hen. & M. 398; 3 Am. Dec. 657; *Healy v. Rowan*, 5 Gratt. 414; 52 Am. Dec. 94; *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 365; *Whitchote v. Lyle's Ex'rs*, 28 Pa. St. 73. This rule is nowhere better expressed than in *Simson v. Jones*, 2 Russ. & M. 365, by Sir John Leach, M. R., who says, at page 376: "The general personal estate of a female infant is bound by a settlement made on her marriage, because such personal estate becomes by the marriage the absolute property of the husband, and the settlement is, in effect, his settlement, and not hers. It is now established that the real estate of a female infant is not bound by the settlement on her marriage, because her real estate does not, by the marriage, become the absolute property of the husband, although by the marriage he takes a limited interest in it"; and again, he says, page 377: "Whatever doubts may have been entertained on the subject formerly, I take it to be clear that the real estate of a female infant would not be bound by a settlement made with the approbation of the court; and it appears to me to follow that the same principle is applicable to personal estate settled to her separate use." If she is not a party to the marriage articles, but they are entered into between her guardian and her intended husband, they are of no obligatory force upon her: *Healy v. Rowan*, 5 Gratt. 414; 52 Am. Dec. 94.

It may be, however, that she will not be permitted to disaffirm her voidable settlement because of infancy, during coverture, and perhaps not after issue born, on the ground that it might interfere with the rights of the husband and of the issue: See *Milner v. Lord Harewood*, 18 Ves. 259, 275; *Temple v. Hawley*, 1 Sand. Ch. 153, 168; *Wetmore v. Kissam*, 3 Bosw. 321; *McIlvaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Tubb v. Archer*, 3 Hen. & M. 398; 3 Am. Dec. 657. But she may affirm the settlement during coverture, after she becomes of age: *Temple v. Hawley*, 1 Sand. Ch. 153, 168, and in *Durnford v. Lane*, 1 Bro. C. C. 106, 115, the lord chancellor remarks: "If she had a settlement from her husband, and after his death she had taken possession of it, I think she would be bound by the equity arising from her own act"; that is, she would thereby affirm her settlement.

A male infant who marries an adult female, and unites with her in a settlement by which she covenanted that her estate should be settled to certain uses, is bound by her covenant: *Slocombe v. Glubb*, 2 Bro. C. C. 545; the lord

chancellor saying: "It is not necessary to discuss the other question, how far the infant husband could be bound by his own contract; for I go upon the covenant of the wife, who was adult. And the husband's covenant operates no more than to show his concurrence, and to take away every imputation of fraud from the transaction." But a settlement of his property executed by a male infant is not binding upon him; and notwithstanding he falsely represented to the solicitor, before executing the instrument, that he was of age, it appearing that the intended wife knew that he was not of age, and therefore was not deceived: *Nelson v. Stocker*, 4 De Gex & J. 458.

An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made, as a general rule, by the parties themselves, the instrument being merely voidable, and not void, at their election. It cannot therefore be avoided for nonage by the trustee acting under it, especially when a court of equity is asked to compel him to render an account: *Jones v. Butler*, 30 Barb. 641; nor by the creditors of the infant's son, whom the infant left surviving her: *Lester v. Frazer*, 2 Hill Eq. 529; *Riley Eq. 76*; but it may be avoided by the infant's privies in blood, after her death: *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 365. See further, as to who may avoid an infant's contract, *post*, "Who may Take Advantage of Infancy."

In England, the Infants' Settlements Act, 1855, 18 and 19 Victoria, chapter 43, provides that an infant above a certain age may, with the approbation of the court of chancery, make a valid settlement, or contract for a settlement, of his or her property. See, as interpreting this statute, *In re Dalton*, 6 De Gex, M. & G. 201; *In re Strong*, 2 Jur., N. S., 1241; *Powell v. Oakley*, 34 Beav. 575. In Georgia, section 1784 of the code (1882) enacts: "The minority of either party to marriage articles, or a marriage contract, shall not invalidate it; provided such party is of lawful age to contract marriage"; and section 2734 reads: "Marriage contracts and settlements made by infants, but of lawful age to marry, are binding as if made by adults." In Texas, the statute of 1840 giving validity to the marriage settlements of minors was held not to further remove the disabilities of married infants to enter into contracts: *Burr v. Wilson*, 18 Tex. 367, 374.

SALES, EXCHANGES, AND ASSIGNMENTS OF PERSONAL PROPERTY. — There can be no doubt, in the light of the foregoing discussion, that an infant's sale or exchange of his chattels, or his assignment of a thing in action, is not void, but voidable only: *Holmes v. Rice*, 45 Mich. 142; *Williams v. Brown*, 34 Me. 594; *Kingman v. Perkins*, 105 Mass. 111; and see *post*, "Bills and Notes," as to his transfer of commercial paper. And as in the case of an infant's deed of conveyance, or any other contract, as heretofore seen, his sale of goods is valid until rescinded by him: *Bulger v. Phinney*, 15 Mass. 359, 363; 8 Am. Dec. 105, 108. In an English *nisi prius* case there is, however, an expression of opinion to the effect that the contract of a sale of an infant is absolutely void, and is no answer to an action of trover brought by the infant to recover the value of the goods: *Latt v. Booth*, 3 Car. & K. 292. The report does not disclose whether there was a demand for the goods before the action was brought. If there was, it was unnecessary to hold the sale to be void. In some early New York cases it will also be found stated that a sale of chattels by an infant vendor is absolutely void, if the infant do not deliver the goods with his own hand; for an infant could not appoint an agent to make delivery for him: *Stafford v. Roof*, 9 Cow. 626, 627; *Fonla v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77; but see *post*, "Delegation of Authority."

A sale not being void, but voidable only, at the election of the infant, it

is not within the power of a stranger, certainly not of a wrong-doer, to set up the infant's incapacity to contract as a protection to himself: *Holmes v. Rice*, 45 Mich. 142. Nor can an assignment of a debt by an infant be avoided by his creditors on the ground of nonage: *Kingman v. Perkins*, 105 Mass. 111. See further on this question, who may take advantage of infancy, *post*, "Who may Take Advantage of Infancy."

It is no defense, it may be noticed, to an action by an infant to recover the possession of property exchanged by him, or damages for its conversion, based upon his rescission of the contract, that the property received by him in exchange had depreciated in value while in his hands, through his misuse of it, or otherwise: *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210; and see *Carpenter v. Carpenter*, 45 Ind. 142; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *contra*, *Bartholomew v. Finnemore*, 17 Barb. 428.

An infant's contract of sale or exchange is not rendered binding upon him at law from the fact that he fraudulently represented himself to be of full age at the time he entered into the contract, and the other party relied upon such representation: *Norris v. Vance*, 3 Rich. L. 164; *Carpenter v. Carpenter*, 45 Ind. 142. See *post*, "Infant's Concealment or Misrepresentation as to Age."

WARRANTIES IN SALES AND EXCHANGES OF PERSONAL PROPERTY. — An infant's contract of warranty on the sale of a chattel by him is also undoubtedly voidable. Of course, no action on the warranty can be maintained against his objection of infancy. Therefore infancy is a good defense to an action on a warranty of soundness of a horse: *Howlett v. Haswell*, 4 Camp. 118. And it is well settled that infancy is a good bar even to an action founded on a false and fraudulent warranty, whether the action is in form *ex delicto* or *ex contractu*: *Green v. Greenbank*, 2 Marsh. 485; *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235; *Morrill v. Aden*, 19 Vt. 505; *Hewitt v. Warren*, 10 Hun, 560; *contra*, *Word v. Vance*, 1 Nott & McC. 197; 9 Am. Dec. 683; and see *post*, "Torts of Infants Connected with Contracts."

CHATTEL MORTGAGES. — The chattel mortgage of an infant is likewise only voidable, and not void: *Cogley v. Cushman*, 16 Minn. 397; *Hangen v. Hachmeister*, 17 Jones & S. 34. Being simply voidable, the mortgage is good until disaffirmed by him: *Cogley v. Cushman*, 16 Minn. 397; *State v. Plaisted*, 43 N. H. 413; although the latter case gives as the reason why it is binding until it is avoided, that it is an executed contract; the court saying: "If the mortgage of the infant were to be regarded as an executory contract, it would be invalid until it was ratified; and if it is deemed an executed contract, it is binding until it is avoided." See this theory criticised *supra*, "Void and Voidable." It follows that all acts done under the mortgage by the mortgagee, and in accordance with the terms of the mortgage, are lawful; and therefore it is held the taking of the property by the mortgagee, as provided by the mortgage, on default made in its conditions, before the mortgage is rescinded by the mortgagor, is lawful, and to maintain an action against the mortgagee for the conversion of the property, it is necessary to allege a demand and refusal: *Cogley v. Cushman*, 16 Minn. 397. So where the plaintiff, while an infant, procured the defendant to sign a note for him, and turned over to the defendant certain property as security, with license to take away the property when he pleased, he cannot maintain trespass for the defendant's taking it away, where he had not previously avoided the contract concerning it, the contract being voidable, and not void: *Hoyt v. Chapin*, 6 Vt. 42. But in *Chapin v. Shafer*, 49 N. Y. 407, it was held that where an infant

mortgaged personal property, but never delivered possession to the mortgagees, the latter would be trespassers in taking the property, after the mortgage became due, from one to whom the infant subsequently, and before coming of age, sold the property. The reasoning in this case is a relic of the old theory that unless there was a delivery by the infant's own hand, a sale, or other similar transaction, was absolutely void. We think the case can better be supported because of the fact that the mortgage had been disaffirmed by the infant by his sale, before the mortgagees had taken possession, and hence after disaffirmance they had no right to take the property under their mortgage, which was then void.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors, made by an infant, is also at most merely voidable, at the election of the infant: *Yates v. Lyon*, 61 N. Y. 344; *Soper v. Fry*, 37 Mich. 236. It can be avoided only by the infant, or some one entitled to stand upon his rights. Third persons, even the creditors, cannot disregard it or claim to avoid it on account of the infancy: *Id.* Nor is an assignment made by copartners fraudulent and void in law because one of the assignors is an infant, under the rule that the assignment did not devote the property of the debtors absolutely to the benefit of the creditors; and where the infant has ratified the assignment after coming of age, no fraud in fact can be claimed because of the infancy: *Yates v. Lyon*, 61 N. Y. 344.

PURCHASES OF PERSONAL PROPERTY.—There is no doubt that an infant's purchase of personal property, not a necessary, is simply voidable, and not void, and is therefore capable of ratification by him: *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, 54. On the other hand, he may rescind the contract of purchase, and recover back the purchase-money paid by him, at least where he restores, or offers to restore, the property which he has received under the contract, to the seller: *Riley v. Mallory*, 33 Conn. 201; *Robinson v. Weeks*, 56 Me. 102; *Cooper v. Ailpont*, 10 Daly, 352; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; *McCarthy v. Henderson*, 138 Mass. 310. And in such an action the vendor will not be entitled to recoup for the use of the property while in the possession of the minor: *McCarthy v. Henderson*, 138 Mass. 310; and the infant's right of recovery will not be affected by the fact that the property sold had depreciated in value while in his possession, by reason of use or otherwise: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; and see also, in case of exchanges, *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210; *Carpenter v. Carpenter*, 45 Ind. 142; *contra*, *Bartholomew v. Finnemore*, 17 Barb. 428; but see, on the proposition that the money paid cannot be recovered back by the infant, *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, per Lord Mansfield; *Holmes v. Blogg*, 8 Taunt. 508; 2 Moore, 552; *Wilson v. Kearse*, Peake Ad. Cas. 196; *Crummey v. Mills*, 40 Hun, 370; and see further on this question, *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." The sale vests the title to the property in the infant: *Crymes v. Day*, 1 Bail. L. 320. But on disaffirmance by the infant of the purchase, the title revests in the vendor, who may reclaim the goods from the infant, if he still have them: *Budger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Boyd v. Boyd*, 9 Met. 519, 521; *Strain v. Wright*, 7 Ga. 568; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; see *post*, "Adult's Right to Recover back Consideration from Infant on Disaffirmance." If the infant claims to retain the property purchased, he should, on the plainest principles of justice, be compelled to pay

the price, or answer to any security which he may have given therefor: See *post*, "Disaffirmance of Part of Transaction."

An infant's purchase of personal property is not rendered binding upon him, either at law or in equity, from the fact that he traded as an adult and the vendor dealt with him on that supposition: *Carpenter v. Pridgen*, 40 Tex. 32, 35; *Folds v. Allardt*, 35 Minn. 488, 489; *Stikeman v. Dawson*, 1 De Gex & S. 90. Nor will he be estopped from avoiding the contract at law because of his false representations concerning his age, his means of payment, and the like, on which the vendor relied: *Brown v. McCune*, 5 Sand. 224; *Studwell v. Shapter*, 54 N. Y. 249; *Vinsen v. Lockard*, 7 Bush, 458; *Carpenter v. Carpenter*, 45 Ind. 142; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412; see further on this question, *post*, "Infant's Concealment or Misrepresentation as to Age."

If goods sold to an infant are delivered to a carrier by the vendor, addressed to the purchaser, while the latter is still under age, but they do not reach him until he has attained full age, infancy is a good defense to an action brought against him for the price, since when the goods were delivered to the carrier the property vested in the infant: *Griffin v. Langfield*, 3 Camp. 254. An officer selling property at public auction is not bound to receive the bid of an infant, since the infant is incapable of making a binding contract. And therefore, where an infant bid a certain sum for the property, and the officer, without regarding his bid, struck it off to another person for a less sum, the officer is not liable for the difference between the bids: *Kinney v. Showly*, 1 Hill, 544.

As to the binding effect of an infant's note given for the purchase price of personal property, see *post*, "Bills and Notes"; the validity of a chattel mortgage given by the infant on the property purchased to secure the price, see *ante*, "Chattel Mortgages"; an infant's liability for goods supplied him for trading purposes, see *post*, "Trading Contracts"; and as to his obligation to pay for necessities furnished him, see *post*, "Necessaries." It may be here noticed that in an action for goods sold and delivered to an infant, it is not presumed that they were necessities, but that fact must be specially shown: *Ive v. Chester*, Cro. Jac. 560.

TRADING CONTRACTS — BANKRUPTCY OF INFANT. — The question has been discussed in several early English cases as to whether an infant could incur any liability as a trader. In the first place, it has been held that he cannot be charged, as against his defense of infancy, with goods purchased by him to trade with: *Whittingham v. Hill*, Cro. Jac. 494; *Whywall v. Champion*, 2 Strange, 1083; nor for work and labor done for him in the course of his trading business: *Dilk v. Keighley*, 2 Esp. 480; although he thereby gains his living: *Whittingham v. Hill*, Cro. Jac. 494; *Dilk v. Keighley*, 2 Esp. 450. These cases do not really hold an infant's trading contracts to be void, yet they appear to have furnished the ground for the opinion entertained in *Thornton v. Illingworth*, 2 Barn. & C. 824, 4 Dowl. & R. 545, in which Bayley, J., is reported to have said (2 Barn. & C. 826): "In the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make a legal debt from the time of making the bargain." There is nothing peculiarly vicious about such a contract; and it was correctly held in *Warwick v. Bruce*, 6 Taunt. 118, affirming 2 Maule & S. 205, that the contracts of an infant might be avoided or not, at his option,

and this was true of his trading contracts, which were not void; and therefore the infant might maintain an action for the breach of such a contract. Of course, the infant would be liable, in any view, for so much of goods supplied to him to trade with as were consumed as necessities in his own family: *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693. That an infant is not rendered liable on his contracts at law from the mere fact that he traded as an adult, see *Mil'er v. Blankley*, 38 L. T. 527; *post*, "Infant's Concealment or Misrepresentation as to Age."

The inquiry is presented in this connection as to whether an infant may be adjudicated a bankrupt or insolvent. Since an infant was not bound by his general contracts, including his trade debts, it was settled under the early English bankrupt acts that he could not, as a rule, be declared a bankrupt with respect to such debts: *Rex v. Cole*, 12 Mod. 243; 1 Ld. Raym. 443; Holt, 360; *Ex parte Sydebotham*, 1 Atk. 146; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Layton*, 6 Ves. 434; *Ex parte Barwis*, 6 Ves. 601; *Ex parte Adam*, 1 Ves. & B. 494; *O'Brien v. Currie*, 3 Car. & P. 283; *Belton v. Hooges*, 9 Bing. 365. But while a commission of bankruptcy could not be supported by a mere trading during infancy (*Ex parte Moule*, 14 Ves. 602), yet it might be otherwise if he represented himself to be of age: *Ex parte Watson*, 16 Ves. 265. And where a bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage, a year before the fiat issued, he had made affidavit that he was then of full age, the petition was dismissed, with costs: *Ex parte Bates*, 2 Mont. D. & D. 337; the court saying: "Admitting the fact that the bankrupt was really not of age when the fiat issued, the affidavit that he made when he married, in which he swore that he was then of age, operates as an estoppel to the present application. This is a stronger case than that of *Ex parte Watson*, 16 Ves. 265, where the bankrupt merely represented that he was of age"; and in *In re Unity etc. Banking Ass'n*, 3 De Gex & J. 63, where an infant had obtained a loan on a representation, which he knew to be false, that he was of age, it was held that a proof for the loan was properly admitted in bankruptcy.

In this country, it seems to be held in a meagerly reported case that an infant might claim the benefit of the bankrupt law of 1841, since an infant was bound to pay certain debts, and the bankrupt law extended its benefits to all persons, without exception, who were in a state of bankruptcy: *In re Book*, 3 McLean, 317; but this case was doubted in *In re Derby*, 8 Nat. Bank Reg. 106, in which it was held that infants, as subjects of either voluntary or involuntary bankruptcy, were not embraced within the provisions of the act of 1867, at least in respect to their general contracts; Blatchford, J., saying: "The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy; for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority. . . . So in an involuntary case, the property of the infant bankrupt would be taken by the court, injunctions would, after adjudication, be granted against pending suits, a schedule of his creditors would be furnished by the bankrupt, and their debts would be proved to no purpose; for his disaffirmance of the debts after becoming of age would necessitate the restoration to him of his property, without any relief to the creditors." The court then points out further objections arising from the provisions of the act.

So far as state insolvent laws are concerned, it was decided in one case that proceedings in insolvency, *in incitum*, against an infant, who was not repre-

sented by a guardian *ad litem*, might be set aside on a bill in equity brought by a creditor who had an attachment upon the infant's estate, although the creditor's claim was one which might be avoided by the infant on plea and proof of his infancy: *Farris v. Richardson*, 6 Allen, 118. The court said: "We have not deemed it necessary to decide in the present case whether the provisions of our insolvent laws are at all applicable to infants; that is, whether proceedings by or against them can be maintained, if they are duly represented by a *prochein ami* or guardian *ad litem*. In England, it is well settled that an infant cannot be a bankrupt. The reason for the rule is, that the bankrupt acts are intended only for traders, and that an infant cannot be properly deemed a trader, or be declared a bankrupt for debts he is not obliged to pay: *Ex parte Sydebotham*, 1 Atk. 146; *Rex v. Cole*, 1 Ld. Raym. 443; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Barwis*, 6 Ves. 601. There is certainly fair reason to doubt whether the legislature intended to include infants among those entitled to the benefit or subject to the duties and limitations created by the insolvent laws. A discharge in insolvency would not relieve them from debts incurred for necessities; and from all other debts they can be relieved by plea and proof of infancy." Again, in *Winchester v. Thayer*, 129 Mass. 129, 133, Gray, C. J., says: "It has not been decided in this commonwealth whether an infant is subject to proceedings under the insolvent laws. But when in such proceedings instituted by a creditor of a partnership (of which he is a member) he has been represented by a guardian *ad litem*, and after coming of age has expressly ratified the partnership and the proceedings, it is difficult to see how he could afterwards avoid them. And even if he could avoid the proceedings so far as he is concerned, it is quite clear that his copartners, who were of full age when the proceedings were instituted, cannot."

Several cases have been decided in England since the passage of the Infants' Relief Act, which, as has been seen, provides that certain general contracts of infants theretofore voidable shall be void without possibility of ratification. In *Ex parte Kibble*, L. R. 10 Ch. 373, an infant, before the passage of the act, gave a bill of exchange, payable after his majority, for jewelry purchased. After his majority, and after the act came into operation, the creditor obtained judgment by default against the debtor, in an action on the bill of exchange, and then took out a debtor's summons, and on his failing to comply with it, filed a petition for adjudication against him. It was held that the court of bankruptcy would look into the consideration of the judgment; and that if the conduct of the debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill, such ratification was void by the second section of the act, and the petition for adjudication was consequently dismissed. In *Regina v. Wilson*, L. R. 5 Q. B. D. 28, a person was convicted under the debtors' act of 1869, because he had, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding twenty pounds, which ought by law to have been divided amongst his creditors. At the times when he quitted England and when he was adjudged a bankrupt, he was an infant, and the debts proved against his estate in bankruptcy were trade debts, contracted since the passage of the Infants' Relief Act, and it did not appear that any debts for necessities supplied to him existed. It was held that the conviction could not be supported. Miller, J., in *In re Rainey's*, 3 L. R. Ir. 459, was of the opinion that since the passage of the Infants' Relief Act the foundation of all exceptions to the general rule that an infant could not be made a

bankrupt were swept away in all cases falling within the provisions of the act; and Bacon, C. J., went to the opposite extreme in *Ex parte Lynch*, L. R. 2 Ch. Div. 227, in holding that notwithstanding the provisions of the act, a debtor who had simply traded while under age could, after he had attained full age, be adjudicated a bankrupt in respect of a trade debt contracted, and upon an act of bankruptcy committed during his infancy; but this latter case was overruled in *Ex parte Jones*, L. R. 18 Ch. Div. 109, where it was held that an infant who had traded could not be adjudicated a bankrupt on the petition of a person who had supplied him with goods on credit for trade purposes, but to whom he had made no express representation that he was of full age, even though he had previously filed a liquidation petition, the proceedings under which had become abortive. Whether, if the infant had expressly represented to the petitioning creditor that he was of full age, an adjudication could be made, was not decided, but there is an expression of opinion in the affirmative.

Finally, it may be observed that whether an infant comes within the scope of bankrupt or insolvent laws is plainly a question of legislative intent.

PARTNERSHIP AGREEMENTS AND TRANSACTIONS. — The question as to the binding effect of the partnership agreements and transactions of infants is one which has a close relation to the subject, just considered, of infants' trading contracts. An infant's contract of partnership is voidable only, at all events to the extent that he, and he alone, at his option, may, subject to the rules governing the matter of ratification and disaffirmance, ratify the contract and thereby render it valid and binding from the beginning, or disaffirm it and escape any personal liability on account of the partnership: *Goode v. Harrison*, 5 Barn. & Ald. 147; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Dunton v. Brown*, 31 Mich. 182; *Osburn v. Farr*, 42 Mich. 134; *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; *Betts v. Carroll*, 6 Mo. App. 518; *Conklin v. Ogborn*, 7 Ind. 553. The contract is good until avoided. Therefore it is held that if an infant contributes certain property to the capital of the firm, his copartner acquires an interest therein which is subject to attachment, unless the contract has been avoided; and the infant by claiming the property in replevin against the attaching officer does not signify his election to avoid the contract, but there must be some act of avoidance before the institution of the suit: *Betts v. Carroll*, 6 Mo. App. 518.

If the infant, after he arrives at full age, ratifies the contract of partnership, he will be liable as a partner to the creditors of the firm for its obligations incurred during his minority: *Penn v. Whitehead*, 17 Gratt. 503; and will subject himself not only to the liabilities of the firm of which he knew when he ratified the contract, but to liabilities about which he may have been entirely ignorant at the time: *Miller v. Sims*, 2 Hill (S. C.) 479. "One partner might bind the other by a contract made without his knowledge, to which he never assented, and by which, on being informed of it, he expressly refused to be bound": *Miller v. Sims*, 2 Hill (S. C.) 479; compare *Crabtree v. May*, 1 B. Mon. 259. The fact that the infant, by the contract of partnership, confers an authority upon his copartner to act as his agent for partnership purposes, is no obstacle to a ratification by the infant of a partnership contract made by the copartner, an infant's appointment of an agent not being void, but voidable only: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; and see *post*, "Delegation of Authority." If the infant partner, after attaining full age, transacts the business of the firm, receives its money, and pays its debts, these acts, unexplained, will amount to a confirmation of the partnership: *Miller v. Sims*, 2 Hill (S. C.) 479. It is held that if an infant acts

as a partner until within a short period of his coming of age, it is his duty to give notice of the termination of the partnership on reaching the age of twenty-one, and if he neglects to do so, he is responsible to persons who thereafter trust his former partner on the credit of the partnership: *Goode v. Harrison*, 5 Barn. & Ald. 147. As in other cases, if a party seeks to hold an infant member of a partnership, against the defense of infancy, on an obligation of the firm, the burden of proof is upon the plaintiff to show that after the infant came of age he affirmed and ratified the obligation: *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28. "Such ratification may be shown either by proof of an express promise to pay the debt, made by the infant after he came of age (which is not claimed in this case), or by proof of such acts of the infant after he became of age as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt": *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28. The ratification will not be inferred from a mere acknowledgment of the debt: *Conklin v. Ogborn*, 7 Ind. 553. See further on the question of ratification *post*.

It has been held that an infant could not disaffirm his contract of partnership during his infancy: *Dunton v. Brown*, 31 Mich. 182; but this is not correct on principle, and has been decided to the contrary: *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379. The infant may rescind a contract entered into by the firm, as to himself, and maintain a suit in enforcement of the disaffirmance: *Kerr v. Bell*, 44 Mo. 120; and infancy may be interposed by him as a bar to any claim of personal liability in an action upon a contract made by the partnership: *Folds v. Allardt*, 35 Minn. 488; *Mason v. Wright*, 13 Met. 306. "The goods having been furnished to a partnership of which defendant was known to be a member, the court ruled that he was liable, on the ground, substantially, that by engaging in business as a member of the firm, he held himself out as competent to bind himself by contract, and hence is estopped to set up his infancy as a sole defense. The rule is not, however, changed by the fact that he was a member of a partnership. His contracts are voidable as in other cases": *Folds v. Allardt*, 35 Minn. 488. So infancy is a good defense to an action against an infant, as a secret partner, to recover the price of goods purchased ostensibly by his co-defendant on the false representations of the infant as to the solvency of the co-defendant, in order that they might both profit by obtaining the goods, the action being founded on contract, and not seeking to avoid the sale and reclaim the goods, or to recover on the ground of fraud practiced by the infant: *Vinsen v. Lockard*, 7 Bush, 458. See the subject of disaffirmance fully discussed, *post*.

It was held in an early case that if a firm of partners accept a bill of exchange, and one of the partners is an infant, the contract being void as to the infant, the holder of the bill might declare on it as accepted by the adult partner only, and if the defendant pleads in abatement that the other partner ought also to be sued, the plaintiff might reply his infancy: *Burgess v. Merrill*, 4 Taunt. 468; and see *Gibbs v. Merrill*, 3 Taunt. 307, 313; but this ruling is certainly not now law, if indeed it ever was; and a short time afterwards it was correctly decided in this country that where one of the members of a partnership which executed a promissory note was an infant, the plaintiff could not treat the note as void as to the infant, and sue the adult partner only: *Wamsley v. Lindenberg*, 2 Rand. 478. See *post*, "Bills and Notes." Where, in a suit against two partners for a partnership debt, one of them pleads infancy, and judgment is taken against the adult partner, the judgment, it is held, was nevertheless for a partnership debt, and, as such, was a charge on the partnership property: *Gay v. Johnson*, 32 N. H. 167.

It has been stated above that an infant member of a partnership may plead his infancy in bar to any claim of personal liability made against him on contracts of the firm. This proposition cannot be doubted, the infant not having ratified the contract of partnership, nor the particular firm contract in question, which perhaps he might have ratified without ratifying other partnership engagements. And even according to the case of *Kerr v. Bell*, 44 Mo. 120, where a partnership of which one member was an infant purchased real estate, the infant had the right to rescind the contract as to himself, and to maintain a suit in enforcement of the disaffirmance, and to compel a restoration of the property received by the vendor, the vendor having been restored to the land sold. It is, however, a question of considerable difficulty to determine what are the rights of an infant partner, as against the firm creditors, with respect to the assets of the firm, and his rights, as against his copartners, with respect to capital contributed by him, services he may have rendered the firm, and money paid by him for an interest in the business. It has been held that where an infant partner renounces and disaffirms his contract of partnership, and files his petition in court asking the appointment of a receiver, he will be deemed to have thereby consented that the court shall deal with the assets and close out the business so as to settle the ultimate rights of the parties concerned, and in such case the court will treat the assets as partnership assets as in any other case, and apply them first to the payment of the firm debts, before paying the infant the amount invested by him: *Shirk v. Shultz*, 113 Ind. 571. There would seem to be no doubt of the correctness of this decision.

In *Yates v. Lyon*, 61 N. Y. 344, which was a case involving the validity of an assignment for the benefit of creditors, made by copartners, of whom one was an infant, Reynolds, C., said: "It cannot be doubted but that the law would devote the assets of this firm to the discharge of the partnership obligations whenever any court should be appealed to for that purpose, and I do not see that the supposed equity of an infant partner should in such a case prevail against that of the creditors of the firm. . . . We see no substantial difference whether, in such a case, the property of the firm is subjected to the payment of the proper debts of the firm by the process of the law, or by the voluntary act of the insolvent debtors. In either case the result is precisely the same, and the infant is bound if he simply says nothing. . . . It is not too much to say that if an infant goes into a mercantile adventure which proves unsuccessful, he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital, it hardly seems equitable that the creditor of the firm should, either directly or indirectly, be called upon for reimbursement. The utmost exemption that he ought to claim in such a case is, that he should not be made personally liable for debts beyond what the assets of the firm are able to pay; and even then the infant should claim the exemption." Again, in *Bush v. Linthicum*, 59 Md. 344, it was held that a plea of infancy was no bar to a suit for the dissolution of a partnership, the granting of an injunction restraining the defendant from collecting or disposing of the assets or contracting debts on account of the firm, and the appointment of a receiver to take charge of the assets of the firm and apply the same to the payment of its debts, Irving, J., saying: "Having formed this partnership, he cannot so far repudiate it during minority as to escape such consequences of partnership as do not involve personal liability for claims against the firm or costs incident to the legal settlement of its affairs. Such partnership must be dissolvable as any other,

and the partnership assets must be assignable to partnership creditors." The broad views expressed by these two latter cases, that the assets of a partnership should be appropriated to the satisfaction of firm creditors over the claims of an infant partner, appear to us to be a departure from the general principles governing the liability of infants on their contracts. Why the interest of the infant in the partnership assets should be subjected by implication of law to the claims of creditors of the firm, when it is perfectly well settled that an infant may repudiate any security, as a mortgage, expressly given by him, is not clear. Of course, if an infant would rescind a contract he may be obliged to restore the consideration he may have received, provided he still retains it; but the rule as stated here makes no distinction between such creditors who have disposed of property to the firm, which it still retains, and those creditors who are not in that condition. If it be said that the infant must restore an equivalent, if he have not the original consideration, the rule should not have stopped with the firm assets, but should at least make the infant answerable to the extent of any property which may belong to him. The question cannot be regarded as settled.

In the celebrated case of *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, there is a *dictum* accredited to Lord Mansfield, to the effect, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This *dictum* was approved by Gibbs, C. J., in *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, where it was held that an infant who took a lease of a house, occupied the premises for a time, and paid the rent, could not recover back the rent so paid, on avoiding the lease after he came of age, and quitting the premises. It was sought to apply the rule of this mischievous case to the case of an infant who agreed to enter into a partnership with a tradesman, and paid a deposit towards the purchase of an interest in the business, which was to be forfeited to the tradesman if the infant failed to fulfill the agreement, sought to rescind the agreement, and recover back the money so paid by him. It was held that he might recover, the court distinguishing *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, on the ground that there the infant had received something of value for the money he had paid, and could not put the defendant in the same position as before, while in this case the infant had derived no benefit from the transaction, and, besides, was subjected to a penalty: *Corpe v. Overton*, 10 Bing. 252; 3 Moore & S. 738; and see *Everett v. Wilkins*, 29 L. T. 846. In *Ex parte Taylor*, 8 De Gex, M. & G. 254, decided more than twenty years after *Corpe v. Overton*, 10 Bing. 252, 3 Moore & S. 738, an infant paid, by means of borrowed money, a premium upon entering into a partnership, and before he became of age disaffirmed the contract of partnership. It was held, approving *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, that the infant could not have recovered back the premium had his partners remained solvent, and therefore could not prove it under their bankruptcy.

In this country, *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, has been the subject of much adverse criticism. See *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." Yet, so far as the question under consideration is concerned, it has been held in *Page v. Morse*, 128 Mass. 99, that if an infant becomes a partner with another person, puts a sum of money into the business, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or the labor performed, in the absence of an express promise to pay him therefor. The court cites *Moley v. Brine*, 120 Mass. 324, a case the same in principle. The members of a partnership contributed to the common

stock in unequal proportions, with an agreement that the profits should be equally divided between them. Upon the dissolution of the partnership, the assets were insufficient to pay back the contributions of the several members in full. It was held, on a bill in equity to close up the partnership, that the assets must be divided in the proportions of the contributions, and the deficiency borne by the partners equally, and the fact that one of the members of the firm was a minor made no difference; the court saying: "The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his copartners the obligation of making up the deficiency"; citing, among other cases, *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560; *Ex parte Taylor*, 8 De Gex, M. & G. 254; and *Breed v. Judd*, 1 Gray, 455. In this latter case, an infant, in consideration of an outfit to enable him to go to California, agreed to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement, and recover back the amount so sent, deducting the amount of the outfit and other money expended for him by the other party in pursuance of the agreement. The court said the contract, in substance and effect, was, that the defendants should furnish the outfit, and the plaintiff his labor and time, and that the parties should divide the fruits of the enterprise in a certain proportion. And although such a construction made the contract one of partnership, and an infant could not be bound by such a contract so long as it remained executory, yet, said Thomas, J., "we know of no ground upon which, after arriving at full age, he can change the entire character of a contract so made and executed, treat the money so advanced by the defendants as a simple loan, and claim for himself all the fruits of an enterprise in which their money and his labor were the common stock, and this when the contract as originally made is found to have been fair, reasonable, and even beneficial to the plaintiff." The court went on to discuss the contract under other aspects, which need not here be considered. Again, it was held in *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, citing *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, that where money is paid by a minor in consideration of being admitted as a partner in a business, and he does become and remain a partner for a time, he would not be allowed, on voluntarily withdrawing from the partnership, to recover back the money thus paid, unless he was induced by fraudulent representations to enter into the partnership. But, on the contrary, it was held, with more correctness, in *Sparman v. Keim*, 83 N. Y. 245, that an infant might avoid an agreement of partnership, and recover back the money which he was induced to invest in the business on restoring the benefits received from the partnership.

LENDING AND BORROWING OF MONEY. — There can be no question that an infant who makes a loan of money may disaffirm his contract of lending, and recover back the money. It is even held that if an infant makes a usurious loan, taking the borrower's note, he may avoid the contract of lending, and recover the money loaned under a contract for money had and received: *Millard v. Hewlett*, 19 Wend. 301; Nelson, C. J., saying: "I put the case entirely upon the ground that the illegal contract is out of the question, unless we say that infants shall be bound by illegal contracts, though they are not by those which are legal, and then the objection of usury fails, and the right to recover becomes very plain."

On the other hand, an infant's contract of borrowing can be no more than voidable. It may, therefore, be ratified by the infant on coming of age, like any other voidable promise: *Kennedy v. Doyle*, 10 Allen, 161. "The agreement stood on the same ground as any other contract by an infant for anything but necessities. It was voidable, and not void, and if affirmed by her after coming of age, was binding upon her." The contract may, of course, be disaffirmed. And, certainly, one who has paid off a mortgage on the land of infants, at the request of their guardian, cannot maintain an action against them for money had and received or money lent; for the payment was voluntary, and not upon any contract with the defendants, and their guardian had no authority to subject them to the payment of the claim: *Bicknell v. Bicknell*, 111 Mass. 265. It may also be here noticed that infancy is a good defense to an action for money, generally, paid over to the defendant for the plaintiff: *Root v. Stevenson's Adm'rs*, 24 Ind. 115. As to an infant's liability on notes and bills, see *post*, next head, "Bills and Notes."

A number of cases have arisen concerning an infant's liability for money loaned to or advanced for him to pay for necessities. It seems to be the rule that an infant is not liable at law for money borrowed by him for necessities, although actually expended by him for that purpose; but, on the other hand, he is liable for money directly applied by the lender in procuring necessities for him: *Rearshy and Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, 10 Mod. 67; 1 Salk. 386; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197; 1 Ld. Raym. 344; *Probart v. Knouth*, 2 Esp. 472, note; *Clarke v. Leslie*, 5 Esp. 28; *Hedgeley v. Holt*, 4 Car. & P. 104, 105; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sand. 306; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb, 519. The infant is, however, liable in equity for money borrowed and actually applied by him for the payment of necessities: *Marlow v. Pitfield*, 1 P. Wms. 558; *Hickman v. Hall's Adm'rs*, 5 Litt. 338, 342; *Watson v. Cross*, 2 Duvall, 147, 149; *Price v. Sanders*, 60 Ind. 310. Several cases have determined, under different conditions of fact, that the particular purposes for which money was lent to or expended for an infant did not fall under the head of necessities: See *Smith v. Gibson*, Peake Add. Cas. 52; *Hedgeley v. Holt*, 4 Car. & P. 104; *West v. Gregg's Adm'r*, 1 Grant Cas. 53; *Magee v. Welsh*, 18 Cal. 155; *Dorrell v. Hastings*, 28 Ind. 478, 479; *McKanna v. Merry*, 61 Ill. 177; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *State v. Howzrd*, 88 N. C. 650, 651. See this question were fully considered *post*, under the head "Liability for Money Borrowed or Advanced for Necessaries."

BILLS AND NOTES.—Some early cases entertained the view that the bills of exchange and promissory notes of infants were absolutely void. Thus it was held by Sir James Mansfield that if a firm of partners accepted a bill of exchange, and one of the partners was an infant, the contract being void as to the infant, the holder of the bill might declare on it as accepted by the adult partner only, and if the defendant pleaded in abatement that the other partner ought also to be sued, the plaintiff might reply his infancy: *Burgess v. Merrill*, 4 Taunt. 468; and see *Gibbs v. Merrill*, 3 Taunt. 307, 313. The same judge had previously held at *nisi prius* that infancy was a good defense to an action on a bill of exchange accepted by the defendant for necessities, remarking: "Did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication [of necessities to the plea of infancy] is nonsense, and ought to have been demurred to": *Williamson v. Watts*, 1 Camp. 552. It has also been said, in actions on promissory notes to which

the plea of infancy has been interposed, that a negotiable note given by an infant, even for necessities, is absolutely void, and not merely voidable: *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9; for the reason, in the language of *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33, "if the note be valid in the first instance, as a negotiable note, the consideration cannot be inquired into when it is in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration." But this is no reason; for, on the contrary, a party to the negotiable instrument may plead his infancy as a defense to an action brought thereon by even a *bona fide* holder for value without notice, and before maturity: See Tiedeman on Commercial Paper, sec. 280. It will be further noticed that the facts of these cases did not call for an expression of opinion that the paper was void.

Other cases, for a similar reason, have denied the right of the holder of a promissory note given for necessities to maintain an action thereon against the defense of infancy. In other words, infancy is a complete defense to an action on a promissory note given for necessities, but without any particular regard to the question whether the note is void or voidable: *Fenton v. White*, 4 N. J. L. 100; *McCrillis v. How*, 3 N. H. 348. In *Morton v. Steward*, 5 Ill. App. 533, it was held that the promissory note of an infant given for necessities was invalid unless ratified; and although, perhaps, the payee might maintain an action thereon, a transferee of the note could not recover upon it. It should be observed that while, according to these views, no action can be maintained on the negotiable instrument, yet the infant will be required to pay the reasonable value of the necessities: *McMinn v. Richmonds*, 6 Yerg. 9; *McCrillis v. How*, 3 N. H. 348.

According to what we understand to be the better authority, however, an infant may be held liable on his express contract for necessities, when the contract is of such a form that the consideration may be inquired into, and the amount agreed to be paid is simply the reasonable value of the necessities; and should the stipulated amount exceed the reasonable value, the recovery on the contract is simply reduced to a just compensation. Therefore an action may be maintained against an infant on a promissory note, whether in the hands of the original payee or not, given for necessities; but the infant may show that the agreed sum is in excess of the reasonable value of the necessities, and thus reduce the recovery to their reasonable value: *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26; *Askey v. Williams*, 74 Tex. 294; and see *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; compare *Howard v. Simpkins*, 70 Ga. 322. And this so ruled by an early case concerning a single bill: *Russel v. Lee*, 1 Lev. 86; compare *Beeler v. Young*, 1 Bibb, 519. If a surety signs the note, and afterwards pays it, he may recover the amount so paid from the infant: *Conn v. Coburn*, 7 N. H. 365; 26 Am. Dec. 746; *Haine's Adm'r v. Tarrant*, 2 Hill (S. C.) 400; but see *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759. Several cases have decided that under the facts presented in them the notes were not executed for necessities at all, and consequently the defense of infancy was good: *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574; see also *Bouchell v. Clary*, 3 Brev. 194; *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Howard v. Simpkins*, 70 Ga. 322. See these questions concerning necessities more fully discussed *post*, under the head "Necessaries."

If a note be executed by an infant pursuant to some statute, it will be binding. Thus if a statute authorizes an infant father of a bastard child

to settle with the mother, and secure to her compensation for keeping the child, it impliedly gives him the power to execute instruments necessary in making such settlement, and, therefore, to a promissory note executed under such circumstances, infancy will be no defense: *Garin v. Burton*, 8 Ind. 69. See *post*, "Contracts Entered into Pursuant to Statutes."

With regard to general bills and notes to which an infant becomes a party, there is no doubt that his infancy is a good defense to an action against them thereon: *Williams v. Harrison*, Carth. 160; *Holt*, 359; *Hussey v. Jewett*, 9 Mass. 100. But his contract is voidable only, and not void. Therefore an infant's acceptance of a bill of exchange is merely voidable, and is subject to confirmation after his arrival at full age: *Hyer v. Hyatt*, 3 Cranch C. C. 276; and the acceptance of a bill drawn while the acceptor was an infant, but accepted by him after he came of age, is not even voidable: *Sterens v. Jackson*, 4 Camp. 164; and see *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124. The infant's note, whether negotiable or not, which he signs as a maker, is likewise simply voidable: *Young v. Bell*, 1 Cranch. C. C. 342; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544, 548; *Fant v. Cathcart*, 8 Ala. 725; *Strain v. Wright*, 7 Ga. 568; *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 24; *Best v. Givens*, 3 B. Mon. 72; *Reed v. Batchelder*, 1 Met. 559; *Minock v. Shortridge*, 21 Mich. 304; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Wright v. Steele*, 2 N. H. 51; *Aldrich v. Grimes*, 10 N. H. 191; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349; *Houston v. Cooper*, 3 N. J. L. 866; *Goodsell v. Myers*, 3 Wend. 479; *Everson v. Carpenter*, 17 Wend. 419; *Taft v. Sergeant*, 18 Barb. 320, 321; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 755; *Wamsley v. Lindenberger*, 2 Rand. 478. It is therefore subject to his ratification or disaffirmance. If he ratifies the paper on coming of age, he thereby makes it a good negotiable note from the time it was made, and consequently, if he makes a new promise to pay the note to the payee, who afterwards transfers the note, the transferee takes the paper as a valid negotiable instrument: *Reed v. Batchelder*, 1 Met. 559; see also *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; and on the other hand, if he disaffirms the note, no action can be maintained against him either by the payee or a subsequent transferee: *Hoyt v. Wilkinson*, 57 Vt. 404. The same objection has been urged against the validity of an infant's general negotiable note as against the validity of his negotiable note given for necessities; namely, that the defense of infancy would not avail against a *bona fide* holder for value without notice, and before maturity, and the note might necessarily operate to his prejudice. This, however, as has been said, is a mistaken notion; for infancy may be set up as a defense to an action on the note by such a holder. There is, then, no more reason why the negotiable note of an infant should be void than his non-negotiable note; and no more reason why his non-negotiable note should be void than any other contract which he may make. The same remarks apply to an infant's bill of exchange, or other negotiable instrument.

If the criterion of Lord Chief Justice Eyre, to the effect that if the court can pronounce the contract of an infant to be to his prejudice, it is void, while if it be uncertain whether the contract be to his benefit or prejudice, it is voidable, be adopted, still, an infant's general commercial paper, whether it be negotiable or not, would be simply voidable. But as shown *supra*, under the head "Void and Voidable," this is no longer a test. As early as 1827, Cranch, J., said in *Hyer v. Hyatt*, 3 Cranch C. C. 276, 277, in holding an infant's acceptance of a bill of exchange to be voidable only, and not void: "I am inclined to think that no contract entered into by an infant is abso-

lutely void, although all contracts by infants, except for necessities, are voidable. There are some *dicta* that contracts made by an infant to his prejudice are void, not voidable; but I doubt whether in law there be any difference as to validity between those which are beneficial and those which are prejudicial to the infant; both are voidable, but neither is absolutely void. There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract."

It should be remembered, however, that a statute may make an infant's general bills and notes, as well as his other contracts, void: See *supra*, "Statutory Regulation"; and see, under a former statute of Connecticut noticed under that head, *Alsop v. Todd*, 2 Root, 105, 109; *Lawrence v. Gardner*, 1 Root, 477; *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149, — cases which apply the statute to promissory notes. A statute conferring capacity upon married women to contract generally does not thereby remove the disability of infancy, and therefore a married woman may plead her infancy to an action on a promissory note: *Cummings v. Everett*, 82 Me. 260.

The doctrine that the executed contracts of infants are binding until avoided, but their executory contracts are invalid until affirmed, also here deserves a passing notice, for, according to it, it is said that the promissory note of an infant is not void, because it may be confirmed, but that it is invalid until it is confirmed: *Edgerly v. Shaw*, 25 N. H. 514, 516; 57 Am. Dec. 349, 350; *Minock v. Shortridge*, 21 Mich. 304, 315; *Morton v. Steward*, 5 Ill. App. 533, 535; and see also *State v. Plaisted*, 43 N. H. 413. This notion, which seems to be founded on a misconception of what is meant by "voidable," is, happily, not widespread. See it criticised *supra*, "Void and Voidable."

The promissory note of an infant has been held to be equally voidable when given in settlement of his torts or criminal acts, as when given in the adjustment of an account against him; although if the note be avoided by the plea of infancy, the plaintiff may be remitted to his original cause of action: *Shaw v. Coffin*, 58 Me. 254, 256; 4 Am. Rep. 290; see also *Hanks v. Deal*, 3 McCord, 257; *contra*, *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519. In an action on a note executed by the defendant, it is sufficient, according to the code practice, for the defendant to allege in his answer that at the time of the execution of the note he was an infant. It is not necessary to allege that the note was voidable: *Stern v. Freeman*, 4 Met. (Ky.) 309. The burden of proof is upon the plaintiff, in an action on a note to which the plea of infancy is interposed, to show that the note was either given for necessities (or, we may add, was given pursuant to some statute), or that the defendant ratified it after attaining full age: *Callin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249, 254.

There have been numerous attempts by parties to bills of exchange and promissory notes to escape liability thereon because of the infancy of some other party, but these attempts have generally been failures. A guarantor or surety of the infant, whether he is or is not really a party to the paper, cannot set up the infancy of the principal party as a defense to his collateral obligation. Thus in an action on a promise to pay the promissory note of

another, the fact that the note was voidable in consequence of the infancy of the maker furnishes no defense to the action: *Hesser v. Steiner*, 5 Watts & S. 476; the note being voidable, and not void, was, with an agreement to forbear to sue it, a sufficient consideration for the promise to pay it by the third person, and, furthermore, infancy can only be taken advantage of by the infant himself, or some one who represents him. But while, as a general proposition, infancy will not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings, yet sureties on the promissory note of an infant, given for the price of land purchased by him, are not liable where the infant disaffirms the contract after attaining majority, and restores the land to the grantor, the consideration of the note being entirely extinguished: *Baker v. Kennett*, 54 Mo. 82. Though the maker of a promissory note be an infant, an indorser, very plainly, aside from the proposition that the objection of infancy is personal, will be bound by his indorsement, for he warrants the capacity of the maker: *Henderson v. Fox*, 5 Ind. 489; and for like reasons, it is no defense to an action by the indorsee of a bill of exchange against the acceptor that the drawers, who had drawn the bill payable to themselves, and indorsed it, were infants when the bill was drawn: See *Taylor v. Croker*, 4 Esp. 187. Furthermore, since the indorsement of a bill of exchange or promissory note by an infant transfers the title, and is simply voidable, and since the privilege of infancy is personal, the infancy of the payee of a bill or note is no defense to an action on the paper by an indorsee against the acceptor, drawer, or maker: *Grey v. Cooper*, 3 Doug. 65; *Jones v. Darch*, 4 Price, 300; *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *Dully v. Brownfield*, 1 Pa. St. 497; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 382; and the same rule applies where the paper is transferred without indorsement: See *Garner v. Cook*, 30 Ind. 331; and where a non-negotiable note is indorsed by an infant payee: *Hastings v. Dollarhide*, 24 Cal. 195. A further reason is suggested why the maker of a note or drawer of a bill cannot set up the defense of the infancy of the payee to an action by the transferee of the paper; namely, that the maker or drawer by making a negotiable instrument payable to a certain person asserts to the world the competency of the payee to negotiate the paper: See *Frazier v. Massey*, 14 Ind. 382.

There is no doubt that if an infant indorser were sued on his contract of indorsement, infancy would be, as to him, a complete defense: *Nightingale v. Withington*, 15 Mass. 272, 274; 8 Am. Dec. 101, 102; *Dully v. Brownfield*, 1 Pa. St. 497. As before remarked, the indorsement transfers the title, which, however, the infant may ratify or avoid. Undoubtedly, the infant may disaffirm the indorsement, and intercept payment to the holder of the paper, at any time before the maker or other party who is called upon for payment has paid it to the holder; and, of course, in that case, the party called upon to pay could set up the disaffirmance as a defense to an action against him by the holder: See *Hastings v. Dollarhide*, 24 Cal. 195. Whether he could disaffirm his transfer after payment made to the holder is another question. In *Welch v. Welch*, 103 Mass. 562, it was said by Colt, J., citing *Nightingale v. Withington*, 15 Mass. 272, 274, 8 Am. Dec. 101, 102, that the indorsement by an infant payee of a note could not be set aside by him as void, so as to give him a right to recover of the maker, who had paid the indorsee before notice that the order of payment had been countermanded, for the reason that the transaction had become executed in favor of the appointee, and could not be opened without restating the maker. We regard this *dictum* as entirely unsound, and see no reason on principle why the infant may not

repudiate his indorsement after as well as before payment made to the holder of the paper, and himself claim payment, leaving the equities between the parties to be otherwise adjusted. This was the view taken in *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503, 506, where there is an expression of opinion to the effect that the infant payee of a non-negotiable note may disaffirm his contract of assignment, and recover of the maker, notwithstanding the maker paid the paper to the assignee before the infant's disaffirmance of the assignment.

It may here be noticed that an infant is not liable at law or in equity on his promissory note from the fact that he traded as an adult, and his infancy was unknown to the party who took the note. He is not thereby estopped from pleading his infancy as a defense: *Van Winkle v. Ketcham*, 3 Caines, 323; *Houston v. Cooper*, 3 N. J. L. 866; *Baker v. Stone*, 136 Mass. 405. Nor would he even be liable thereon at law because he fraudulently represented himself to be of full age at the time he executed, and the payee relied upon such representations: *Bateman v. Kingston*, 6 L. R. Ir. 328; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146. See this question fully considered *infra*, "Infant's Concealment or Misrepresentation as to Age."

Finally, it may be observed that the execution or indorsement of a note, negotiable or non-negotiable, by means of an agent appointed by an infant, is not void, but voidable: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Hardy v. Waters*, 38 Me. 450; *Hastings v. Dollarhide*, 24 Cal. 195. *Contra*, *Semple v. Morrison*, 7 T. B. Mon. 298; and see *post*, "Delegation of Authority."

BONDS. — An infant's bond, by which we are to understand his obligation under seal, with a penalty, has sometimes been considered as void, as being a contract clearly to his prejudice. In *Fisher v. Mowbray*, 8 East, 330, Lord Ellenborough said that an infant could not bind himself in a bond with a penalty, conditioned for the payment of interest as well as principal; but the only question really involved was the right of the infant to avoid the bond by a plea of infancy. A few years later, in *Byrlis v. Dinely*, 3 Maule & S. 477, in debt on a bond with a penalty, conditioned for the payment of the principal sum with interest, a replication that after the making of the bond, and before the commencement of the action, the defendant attained full age, and ratified and confirmed the bond, was held by the same judge to be ill on demurrer; for, it was again said, an infant could not give a bond with a penalty, and for the payment of interest, and unless the infant was estopped by some act at full age of as high authority as the bond, the defense of infancy would be good. The case involves altogether a singular confusion of ideas; and perhaps is really only authority on the proposition that the bond of an infant cannot be confirmed by parol. This question will be noticed hereafter under the head of ratification. The case of *Hunter v. Agnew*, 1 Fox & S. 15, holds a bond with a penalty, given by an infant, to be void, and not merely voidable; and see also some remarks in *Waples v. Hastings*, 3 Harr. (Del.) 403.

An infant's bond with a penalty, given for money paid out for necessities, was also said to be void, in *Ayliff v. Archdale*, Cro. Eliz. 920; that is, no action could be maintained thereon against the defense of infancy; but it was remarked that if the plaintiff had taken an obligation for the very sum which he had laid out for the defendant, it would have been otherwise. According, also, to the case of *Bliss v. Perryman*, 1 Scam. 484, an infant cannot bind himself by bond, not even, it seems, for necessities; and it is held, when the plaintiff relies upon a new promise made after full age, he must declare upon the simple contract which the new promise was meant to

establish; and, therefore, in an action on a bond, to which infancy was pleaded, the plaintiff could give evidence of a new promise by the defendant after coming of age; and see *Hussey v. Jewett*, 9 Mass. 100, 101. But "where the instrument given for necessities is such as to admit of inquiring into its consideration, the infant is liable upon the instrument, and if the evidence be such as not to warrant a recovery for the amount, judgment may be rendered *pro tanto* for that part due on the instrument for which a minor would be legally liable": *Guthrie v. Morris*, 22 Ark. 411. Therefore if, by statute, the consideration of a bond may be inquired into, an action may be maintained on a bond given by an infant for necessities: *Guthrie v. Morris*, 22 Ark. 411. "Being liable for the value of the necessities upon a *quantum valebant*, what protection could there be in permitting him to defeat an action on the instrument for the same amount? Protection is the sole end of the infant's privilege, and the latter should never be extended further than is demanded by the former": *Guthrie v. Morris*, 22 Ark. 411. This opinion, in our judgment, is sound sense and sound law.

In *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105, the court, approving the rule of Perkins, to the effect that all deeds of an infant which take effect by delivery of his hand were voidable only, held the bond of an infant to be simply voidable. And, as has been seen, a number of cases have established that an infant's bond for title is voidable merely, and not void: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Weaver v. Jones*, 24 Ala. 420; *Bozeman v. Browning*, 31 Ark. 364; see *ante*, "Executory Contracts to Sell Real Property." These cases are strictly in accord with the modern rule that all general contracts of infants are voidable, and not void. It has also been held that an administration bond given by an infant is not void, but voidable, and may be affirmed, or not, after he attains full age: *Chambers v. Wherry*, 1 Bail. L. 28.

If the bond of an infant be executed by him pursuant to the requirements of a statute, it is then not even voidable, but so far as infancy is concerned, absolutely binding. Thus the bond or recognizance entered into by a minor for his personal appearance at court, to answer a charge against him, is valid and binding, under statutes which provide for the taking of such bonds or recognizances from defendants who may be infants: *McCall v. Parker*, 13 Met. 372; *State v. Weatherwar*, 12 Kan. 463; and infancy is no defense to an action on a bond, executed pursuant to statute, by the reputed father of a bastard child, conditioned to indemnify the town against liability for the support of the bastard: *People v. Moores*, 4 Denio, 518; 47 Am. Dec. 272; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. Bronson, C. J., saying in the first of these cases: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation." The greatest question of difficulty in this connection has been, Is the infant included within the provisions of the statute? See *post*, "Contracts Entered into Pursuant to Statutes."

It may here be noticed that although an infant, at the time of making a bond, fraudulently represented that he was of full age, yet the bond is nevertheless only voidable, at his election, at law, though it might be otherwise in equity: *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; and see *post*, "Infant's Concealment or Misrepresentation as to Age."

SEALED CONTRACTS, GENERALLY. — The general contracts of an infant are none the less voidable because they are under seal, even according to the old theory that contracts prejudicial to an infant are void: *Whitney v. Dutch*, 14 Mass. 457, 461; 7 Am. Dec. 229, 232, per Parker, C. J.; *West v. Penny*, 16

Ala. 187; *Stokes v. Brown*, 4 Chand. 39; 3 Pinn. 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760; *Vaughan v. Parr*, 20 Ark. 600. "From a careful review of the authorities," says Whitney, J., in *Little v. Duncan*, 9 Rich. L. 55, 64 Am. Dec. 760, "I do not perceive that the question in any way turns on the fact of whether the contract was under seal or not." Such a contract is, therefore, capable of ratification or disaffirmance by the infant; and it may be confirmed by the infant, after reaching full age, by parol: *Vaughan v. Parr*, 20 Ark. 600; and see *Stokes v. Brown*, 4 Chand. 39; 3 Pinn. 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760.

INTEREST. — In *Fisher v. Mowbray*, 8 East, 330, and *Baylis v. Dinely*, 3 Maule & S. 477, Lord Ellenborough expressed himself to the effect that an infant could not give a security for interest; at least, his bond, with a penalty, conditioned for the payment of a principal sum, with interest, was void, as being clearly prejudicial. In *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228, it was also held, citing *Fisher v. Mowbray*, 8 East, 330, that interest would not be allowed on an account against an infant for necessities; but this ruling was disapproved in *Bradley v. Pratt*, 23 Vt. 378, in which it was held that interest might be recovered on a promissory note given by an infant for the reasonable value of necessities, Redfield, J., saying: "It seems to us, upon principle, if the infant is not to be held liable for interest, the price should be proportionately increased, which is the same thing. It is incomprehensible how if one, for board, deserves to have \$2.50 per week in hand, if the payment be delayed for years, the same sum is to meet the obligation. One might as well hold that a merchant should furnish goods to infants at cost, without freight even. The rule has no force when carried to that absurd length." It is impossible to escape this reasoning with respect to necessities; and in regard to other contracts of infants, certainly no court at the present day, even conceding that contracts which are to the infant's detriment, are void, would feel justified in declaring them to be void because they included stipulations for interest.

ACCOUNTS STATED. — It was at one time commonly said that an infant could not state an account so as to bind himself: *Hedgeley v. Holt*, 4 Car. & P. 104; *Oliver v. Woodroffe*, 4 Mees. & W. 650; *Burghart v. Hall*, 4 Mees. & W. 727, 732; *Vent v. Osgood*, 19 Pick. 572, 575, per Putnam, J. "An infant cannot be liable on an account stated," says Lord Abinger in *Burghart v. Hall*, 4 Mees. & W. 727, 732, "and the reason given is, that he cannot calculate, and is therefore incapable of stating an account." This may mean nothing more than that infancy may be a good defense to an action on an account stated; but, nevertheless, these cases seem to have been regarded as holding the account stated of an infant to be absolutely void. It has also been very generally held that an infant is not liable on an account stated for necessities: *Wood v. Witherick*, Latch, 169; *Pickering v. Gunning*, Palmer, 528; W. Jones, 182; *Ingledeu v. Douglas*, 2 Stark. 36; *Trueman v. Hurst*, 1 Term Rep. 40; *Bartlett v. Emery*, 1 Term Rep. 42, note; *Oliver v. Woodroffe*, 4 Mees. & W. 650. It is difficult to understand upon what theory these latter cases proceed, except it be that the account stated is void; or, more probably, and it seems to us correctly, as suggested by Baron Parke in *Williams v. Moor*, 11 Mees. & W. 256, 265, and Chief Justice Shaw in *Stone v. Dennison*, 13 Pick. 1, 6, 23 Am. Dec. 654, 657, that the items cannot be gone into; for if the items could be inquired into, and the balance, as struck and agreed to, represented simply the reasonable value of the necessities, a recovery, according to the weight of authority, might be had upon it: See *post*, "Express Contracts for Necessaries." However this may be, the English case last cited settled the question that

an account stated by an infant was not absolutely void, but voidable only, and therefore might be ratified by the infant after attaining full age. Baron Parke said: "We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or any other contract. The contract of an infant for goods sold and delivered (not being necessities) is as completely void as his contract on an account stated, if by the word 'void' is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract, as well as on the other. But if by the word 'void' is meant incapable of being ratified, then we can discover neither principle nor authority for the distinction relied on. . . . It was indeed argued for the defendant that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get anything valuable; that he has no *quid pro quo*. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of the transactions between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers."

SURETYSHIP. — *Dicta* are to be found in a number of cases to the effect that an infant's contract of suretyship is necessarily prejudicial to him, and is therefore absolutely void: *Wheaton v. East*, 5 Yerg. 41, 61; 26 Am. Dec. 251, 252; *West v. Penny*, 16 Ala. 187, 189; *Hastings v. Dollarhide*, 24 Cal. 195, 209; *Robinson v. Weeks*, 56 Me. 102, 106. In fact, the contract of suretyship of an infant is the usual example of a contract that is void because manifestly to his prejudice. In *Cronise v. Clark*, 4 Md. Ch. 403, it was also said that a mortgage of her reversionary interest in real and personal property, executed by an infant *feme covert* to secure a debt due by a firm of which her husband was a member, was absolutely void, as necessarily prejudicial, and incapable of confirmation; but the facts of the case simply involved the right of the infant to avoid the mortgage for her infancy; and in *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686, it was likewise said that a mortgage given by an infant *feme covert* to secure the debt of her husband was absolutely void, and not merely voidable, since it could not be beneficial to her; but here, also, the case simply involved the right of the infant to disregard the mortgage, and the proceedings had under it. And according to the early statute of Connecticut, quoted *ante*, under the head "Statutory Regulation," it was decided that a promissory note executed by an infant while under the government of a guardian, as surety of another, was a contract against his interest, and absolutely void, and incapable of confirmation: *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149. In *Curtin v. Patton*, 11 Serg. & R. 305, 310, 311, the court calls an infant's contract of suretyship "absolutely void," but yet it recognizes the possibility of a confirmation by the infant when of full age; and of course there could be no confirmation if the contract were absolutely void.

These views do not accord with principle or the weight of authority. It must now be regarded as settled that the contract of suretyship of an infant, like his other general contracts, is voidable only, and not void, and is consequently capable of ratification by him when he arrives at full age: *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496; *Williams v. Harrison*, 11 S. C. 412; *Reed v. Lane*, 61 Vt. 481; and see *Hinely v. Margaritz*, 3 Pa. St. 428. In *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496, McIlvaine, J., says: "The privilege of infancy is accorded for the protection of the infant from injury resulting from impos-

sition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult laboring under no disability may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance we think is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his sense of right and duty, he should, in law, as in morals, be bound to their performance." And in *Williams v. Harrison*, 11 S. C. 412, Willard, C. J., remarks: "Assuming that a person, being of full age, and, as such, chargeable with knowledge of his legal rights, deliberately determines that his interest or duty demands that he should recognize and discharge an obligation, imperfect through the fact of its assumption during minority, it would be difficult to find any sound reason why the courts should interfere to deny effect to such an act." Even in a state where the benefit and detriment theory seems to some extent to be still adhered to it is said: "It cannot be held as a matter of law that to sign a promissory note as surety is necessarily not beneficial to an infant": Gray, C. J., in *Owen v. Long*, 112 Mass. 403. Finally, in *Patchin v. Cromach*, 13 Vt. 330, it was held that the recognizance of an infant was not void, but voidable only; the court saying: "A recognizance, or debt of record, acknowledged by an infant in court, or before a magistrate, is, in no case, to be adjudged void, but voidable only."

INSURANCE. — An infant's contract of insurance by which he is insured against fire is not void, but voidable only, at the election of the infant; and the defense of infancy is personal, and is not open to the company, in an action against it to recover for the loss: *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238. Such a contract cannot be a contract for necessities, which will bind the infant absolutely: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

SHARE-HOLDER IN CORPORATIONS. — There is no doubt that if an infant purchase of a corporation shares of its capital stock, he may avoid the contract of purchase, and recover back the money paid: *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

Concerning the liability of an infant share-holder for calls, there have been a number of adjudications in England. In the first of these cases, that of *Cork etc. R'y v. Cazenove*, 10 Q. B. 935, to a declaration in debt for calls, charging the defendant as the holder of shares under a railway act incorporated with the Companies' Clauses Consolidation Act, 8 and 9 Victoria, chapter 16, it was held to be no answer that defendant, when he became the registered holder of the shares, and when he became indebted for the calls, was an infant, and that he had not, since he attained his age, been registered anew, or ratified the original registration; for (per Denman, C. J., and Patteson, J.) an infant was liable for calls by the express wording of the statute of Victoria; at all events (per Coleridge and Erle, JJ.), he was liable if he was sued after attaining his age, and still held the shares; for such holding would be a ratification. In the next case, *Newry etc. R'y v. Coombe*, 3 Ex. 565, the defendant pleaded to a similar action that he became the holder of the shares by having contracted and subscribed for them, and that at the time of his so contracting and subscribing, and also at the time of making the calls, he was an infant, and while an infant he repudiated the contract and subscription. It was held that the plea was a good *prima facie* bar, and that if the defendant, after he became of age, disaffirmed his repudiation, or if he became

liable by enjoyment of the profits, those facts should be replied. Baron Parke, in discussing the liability of an infant subscriber under the Companies' Clauses Consolidation Act, said, in opposition to the view held by Chief Justice Denman and Justice Patteson in *Cork etc. R'y v. Cazenove*, 10 Q. B. 935: "The law is never to be construed so as to affect with liability to a contract persons incapable of contracting; therefore, the liability imposed by this statute cannot apply to such of the subscribers as are lunatics, infants, or *feme covert*s. It is true that the statute contemplates the case of infants being share-holders, and no doubt they may acquire shares by descent or marriage; but the question here is, whether when an infant has become a share-holder by contract, he may not disaffirm it. I am of the opinion that this is the ordinary case of a contract with the company which the defendant may disaffirm." And see also *Northwestern R'y v. McMichael*, 5 Ex. 114, 124.

In the case next in order, *Leeds etc. R'y v. Fearnley*, 4 Ex. 26, the defendant pleaded that at the time of making the calls, and also at the time he became the holder of the shares, he was an infant. The pleas were held bad, it not appearing that the defendant had become a share-holder by original contract with the company, or that he had repudiated the shares. Baron Parke, in the course of the argument, remarked: "This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a property in the possible profits of the concern. Now, according to *Kelsey's Case*, Cro. Jac. 320, and what is more distinctly laid down by Dodderidge, J., in *Kirton v. Elliott*, 2 Bulst. 69, he would be liable, unless he repudiated; then ought not the plea to aver that fact?" and Baron Rolfe said: "There is no averment that the defendant was *originally* a contractor for the shares with the company, nor that he avoided the contract, as there was in that case [*Newry etc. R'y v. Coombe*, 3 Ex. 565]. The defendant may have received these shares by will, or devolution upon him by the operation of law, or purchase from the original contractor, and he cannot be assumed to have repudiated them. The case of *Cork etc. R'y v. Cazenove*, 10 Q. B. 935, decides that, under these circumstances, an infant is bound." In the case following of *Northwestern R'y v. McMichael*, 5 Ex. 114, the defendant pleaded that he became the original holder of the shares by contract with the company, and that at the time he became such holder, and also at the time the calls were made, he was an infant, and that he never ratified the contract, nor had he ever derived any profit, benefit, or advantage from the proprietorship of the shares. It was held that the plea was bad for want of an averment that the defendant had repudiated the contract, or, at least, that he continued a minor.

Baron Parke, in this latter case, thus explains the effect of an infant's becoming a share-holder: "If the effect of a person actually becoming a share-holder in a railway company by original agreement with the company ought to be treated as a mere contract with those to whom the proposal was made for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all; and the simple fact that the defendant at the time he made the contract was an infant would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants having become share-holders in railway companies have been held liable to pay calls made whilst they were infants. They have been treated,

therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: *Bac. Abr.*, tit. Infancy and Age, 1., 5; *Co. Lit.* 380. After commenting upon the previous cases, and again disapproving the view taken in *Cork etc. Ry v. Cazenove*, 10 Q. B. 935, that an infant was liable to pay calls under the Companies' Clauses Consolidation Act, Baron Parke continues: "Under the statute, therefore, our opinion is, that the infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest; he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the calls was due. . . . When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient." Finally, it was held in *Dublin etc. Ry v. Black*, 8 Ex. 181, that a plea of infancy to an action for railway calls which alleged that the defendant disaffirmed and repudiated his contract and subscription after he became of full age was bad for not alleging that he repudiated within a reasonable time after he became of age.

It seems to us that the courts in the foregoing cases might have delivered themselves of the results attained with much less labor, and certainly with greater clearness of thought. While we concur in the main with the views finally expressed in them, yet we do not agree with all that they say. We suggest the following rule, based partly upon them and partly on the general principles of disaffirmance and ratification discussed *post*: That if an infant enters into an original contract of subscription for or purchase of shares in a corporation with the company itself, the contract, in the absence of a statute to the contrary, is not absolutely binding upon him, but may be ratified or disaffirmed by him. If the contract is ratified, he is, of course, liable for future calls; and since the ratification makes the contract good *ab initio*, he will be liable for past calls as well, though made during his infancy. If the contract is disaffirmed, the shares revert to the corporation, and the infant, of course, is no longer a share-holder, nor liable for future calls; and since the disaffirmance avoids the contract from the beginning, he will not be liable for past calls. He may disaffirm the contract during infancy, and whether calls have been already made at the time or not; and he must disaffirm, either before he reaches full age or within a reasonable time thereafter, or he will be taken to have ratified the contract by retaining the shares. He can conclusively ratify the contract only after full age. If the infant has acquired the

shares by purchase, gift, or bequest from some original or intermediate holder, it seems to us that, on principle, the results are in general the same. He may either affirm his holding or repudiate the shares. If he does the former, he is, of course, liable for calls; if the latter, he is not liable, and the shares revert to the original holder, or his representatives, who are liable. He may repudiate the shares during his minority; but if he retains them, as an owner, after coming of age, he ratifies the holding, and must answer the calls. We are not quite sure that if a disaffirmance may be made by the infant at the time suit is brought against him for the calls, it is necessary, in either case of acquisition, to allege a repudiation of the shares, but that the repudiation may be sufficiently shown by a plea of infancy merely.

A number of cases have been decided under the English Companies' Acts involving the liability of an infant share-holder to be placed on the list of contributories on the winding-up of the company. Thus it has been determined that an infant share-holder who becomes adult before the winding-up order is made may become liable as a contributor, because of his failure to repudiate the shares within a reasonable time after his arrival at full age, or because of his failure to repudiate, coupled with some affirmative acts on his part: *Mitchell's Case*, L. R. 9 Eq. 363; *Lumsden's Case*, L. R. 4 Ch. 31; *Ebbett's Case*, L. R. 5 Ch. 302; and the same may be the result where he becomes adult after the commencement of the winding-up of the company: *Hart's Case*, L. R. 6 Eq. 512; but compare *Wilson's Case*, L. R. 8 Eq. 240; *Castello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. 298.

RELEASES AND COMPROMISES. — An infant's release of a claim on account of personal injuries sustained by him by reason of the tort of the releasee is not binding, nor is it void, but it is voidable by him, at his election, and constitutes no bar to an action to recover damages for the injuries: *Baker v. Lovett*, 6 Mass. 78; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; and the bringing of suit upon the claim is an unequivocal act of disaffirmance: *St. Louis etc. R'y v. Higgins*, 44 Ark. 293. But in the first of these cases, in which the release was given by the infant to one of two persons who had committed an assault and battery upon him, and the action was afterwards brought by the infant against the other wrong-doer, Parsons, C. J. said: "If the jury, on the trial, are convinced that the satisfaction received from Dennis [the releasee] was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation be found inadequate, the jury will give such further sum as, with the money received from Dennis, will amount to a reasonable satisfaction." The release by an infant of a claim arising from contract stands on the same footing as his release of a claim on account of a tort: See *Commonwealth ex rel. Strayer v. Hantz*, 2 Penn. & W. 333; but where, by statute, females of the age of eighteen are competent to enter into marriage contracts, a female of the age of eighteen may make a valid and binding release of a promise to marry: *Develin v. Riggsbee*, 4 Ind. 464. If, also, a party litigant who executes a release to a witness to extinguish the interest of the witness in the suit be an infant, he will not be bound by the release: *Walker v. Ferrin*, 4 Vt. 523; but in *Langford v. Frey*, 8 Humph. 443, it was said, rigidly applying the rule of *Keane v. Boycott*, 2 H. Black. 511, 515, discussed *supra*, that a release by an infant of his legacy or distributive share, in order to enable him to become a witness, was void, since the release could hardly be otherwise than injurious to him; and see *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. A release may, of course, be binding by statute. See, however, *Bowers's Adm'x v. State*, 7 Har. & J. 32; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463.

An infant's compromise of a claim is likewise not binding upon him, but is subject to his avoidance: *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489; but it is no defense to an action on an agreement of compromise of a suit that the plaintiff was an infant, and the agreement was made on his behalf by his attorneys: *Chicago etc. R. R. Co. v. Lammert*, 19 Ill. App. 135, 140.

ARBITRATION. — It was said in an old case that an infant's submission to arbitration was void: *Rudston and Yates's Case*, March, 111, 114. Of course the submission is not binding as against the objection of infancy: See *Jones v. Payne*, 41 Ga. 23. But there is no reason why the submission should be anything more than voidable, and why it may not be ratified by the infant after attaining full age. This view was taken in *Jones v. Phoenix Bank*, 8 N. Y. 228, in which it was held that if an infant submits a claim to arbitration, and on coming of age receives the proceeds of the award from his guardian, he thereby ratifies the submission and the award, and cannot recover on his original claim; and in *Barnaby v. Barnaby*, 1 Pick. 221, in which it was decided that an infant, after coming of age, ratifies an award made upon a submission by his guardian that the ward and infant heir shall pay an annuity to the widow in lieu of dower, where he pays part of the money then due, promises to pay the rest of that installment, and says that he had lodged property in his brother's hands to meet an annual payment.

SERVICE. — It has not been so much the question whether an infant's contracts of service, both when he is the employer and when the employed, are voidable, rather than void, but whether they are not binding, at least to some extent, upon him. There should be no doubt, however, that an infant employer is not liable for wages which he has agreed to pay: *Hughes v. Gallans*, 10 Phila. 518; but see *Delarue v. Clare*, Latch, 156. But, plainly, infancy is no answer to a claim for wages accruing due after majority has been attained, although on a contract of hiring originally made under age: *Thomas v. Waldo*, 1 Post. & F. 173. And, of course, the infant, on coming of age, may ratify the contract of hiring.

There is more difficulty where an infant enters into a contract by which he agrees to serve another. In *Rex v. Inhabitants of Chillesford*, 4 Barn. & C. 94, 161, Bayley, J., said: "An infant may make a contract for his own benefit; he may, therefore, make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does not perform his contract, although no action will lie against him, he will be liable to the statutory regulations applicable to masters and servants." And in a proceeding under 4 George IV., chapter 34, against a servant for absentsent himself from the service, it was said in *Wood v. Fenwick*, 10 Mees. & W. 195, that a contract of hiring and service for wages was a contract beneficial to an infant, and therefore binding upon him [so far as the statute was concerned], though the contract contained clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages. But in *Regina v. Lord*, 12 Q. B. 757, which was an information against an infant servant, under the same statute, Lord Denman held that an agreement to serve for wages might be for an infant's benefit; but an agreement which compelled an infant to serve at all times during a certain term, but left the master free to stop his work and wages whenever he chose to do so, could not be considered as beneficial to the servant, and was wholly void [for the purposes of the prosecution]. On the other hand, under the Employees and Workmen Act, 1875, 38 and 39 Victoria, chapter 90, which enables a dispute between employer and workmen to be

heard and determined by a court of summary jurisdiction, an agreement by which an infant undertakes to serve iron ship-builders and boiler-makers as plater and riveter for a term of five years, at weekly wages, with a proviso that should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control, they should have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, was held not to be void on the face of it, so as to prevent it from being enforced against him according to the act: *Leslie v. Fitzpatrick*, L. R. 3 Q. B. Div. 229, the court saying: "The agreement in question is not open to the objections which were held fatal in *Regina v. Lord*, 12 Q. B. 757. According to the construction put upon the contract in that case, it bound the infant not to engage in any other service or business during the whole term, while it reserved to the master the right to stop the work and the wages whenever he pleased. Moreover, it rendered the infant liable to be dismissed for any misconduct or disobedience, and upon dismissal, to forfeit all his wages which should then be due and unpaid. That contract was manifestly void on the face of it. Either stipulation was of itself sufficient to invalidate it. The first was inequitable; the second violated a settled rule of law, by which an infant is incapable of contracting himself out of his acquired rights, or subjecting himself to a penalty." See also *Birkin v. Forth*, 33 L. T. 532.

In this country, an infant's contract of work and labor, or service, for wages, is not binding upon him, but is subject to his avoidance, at least before the contract has been fully executed by the parties, by the performance of the service and the payment of the wages: See the cases referred to in the following paragraphs of this head. "Even a contract of apprenticeship," says Parker, C. J., in *Moses v. Stevens*, 2 Pick. 332, 335, "by means of which he is to acquire a knowledge of some mechanical or other business, is not by the common law obligatory; certainly a contract by which he disposes of his personal labor without any stipulation for instruction is less deserving of legal protection." Infancy, therefore, is a good defense to an action against him for a breach of the contract: *Francis v. Felmit*, 4 Dev. & B. 498. And when an infant has disaffirmed the contract, a person who afterwards employs him is not guilty of the violation of a statute which makes it a penal offense to entice away or employ a laborer or servant who has contracted in writing to serve another for a specified time, "such contract being in force, and binding on the parties thereto": *Langham v. State*, 55 Ala. 114; overruling *Murrell v. State*, 44 Ala. 367. The contract, of course, is binding until avoided by the infant: *Nashville etc. R. R. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506. In *Nickerson v. Euston*, 12 Pick. 110, a contract in writing, signed by a minor, his mother and step-father, of the one part, and by the defendant of the other part, which recited that the minor had been living with the defendant as an apprentice, but that no indenture had been executed, and which stipulated that the minor should go on a whaling voyage, and that the defendant should furnish him outfits, and should receive all his earnings on the voyage, and that should the ship return before the minor reached the age of twenty-one, he should be free from his apprenticeship, was held to be a contract for an independent service and purpose, and was not binding upon the minor, and therefore he was entitled to recover his earnings on the voyage, which had been received by the defendant.

It follows that if an infant makes a special contract to labor for a certain time at certain wages, he may, nevertheless, avoid the contract at his pleasure, and recover on a *quantum meruit* for the services performed, as though no special contract had been made: *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Pick. 572; *Gaffney v. Hayden*, 110 Mass. 137; 14 Am. Rep. 580; *Thomas v. Dike*, 11 Vt. 273; 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206; *Medbury v. Watrous*; 7 Hill, 110; *Whitmarsh v. Hall*, 3 Denio, 375; *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229; *Vehue v. Pinkham*, 60 Me. 142; *Lowe v. Sinklear*, 27 Mo. 308; *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Van Pelt v. Corwine*, 6 Ind. 363; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133. The cases of *McCoy v. Huffman*, 8 Cow. 84, and *Weeks v. Leighton*, 5 N. H. 343, to the contrary, have been overruled by *Medbury v. Watrous*, 7 Hill, 110, and *Lufkin v. Mayall*, 25 N. H. 82, respectively. So where an infant agreed to accept in part payment for his services an order upon a third person for cloth, he is not bound by the receipt of the order, but may avoid the contract, and recover on a *quantum meruit* for the value of his services: *Abell v. Warren*, 4 Vt. 149. And where an infant agrees to work at a certain rate of wages, it being understood that she could leave the employment at any time, she may likewise avoid the express contract, and recover the value of her services rendered upon a *quantum meruit*: *Lufkin v. Mayall*, 25 N. H. 82. "The general principle undoubtedly is," says Bell, J., in this last case, "that when there is an express contract between parties, the law will not raise any implied contract; but we doubt if this has any application to the case, where the law itself gives to one of the parties the right to avoid the contract by reason of an original and intrinsic defect." There can be no doubt of the right of an infant to recover on a *quantum meruit* what her services rendered are reasonably worth, if her employer has violated his part of the contract, and she leaves the service at his request, and in conformity with her own wishes: *Meeker v. Hurd*, 31 Vt. 639. And, on the other hand, where an infant contracted to work for a year, but left before the expiration of that time, but about a month after he had become of age, it was held that he had ratified the contract by continuing in the service after he became of age, and that if he then left without sufficient cause, he could not recover for the services rendered: *Forsyth v. Hastings*, 27 Vt. 646. In *Aldrick v. Abrahams*, Hill & D. 423, it was held that an infant who had agreed to lease and purchase from the defendants certain premises, and to pay therefor a gross sum and an annual rent, and to erect buildings on the premises of sufficient value to secure the payments, could not, on avoiding the agreement, without having paid or done anything for the defendants, maintain an action against them to recover for the value of the labor done and materials furnished by him in the erection of a building upon the premises, pursuant to the agreement, since he had erected the building for himself.

There has, however, been considerable dispute as to whether the amount of the injury occasioned to the employer by the infant's abandoning the special contract can be deducted from the value of the services rendered by the infant, so that the latter can only recover the difference, if any, in his favor. A *dictum* by Chief Justice Parker, in *Moses v. Stevens*, 2 Pick. 332, to the effect that such a deduction might be made, has been approved, and sometimes actually applied, in several cases: *Thomas v. Dike*, 11 Vt. 273; 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206; *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229; *Lowe v. Sinklear*, 27 Mo. 308. In *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690, Williams, C. J., says. "The court are inclined to adopt this rule [of *Moses v. Stevens*]; and although I have great doubt

whether it is not infringing the general rule of law on the subject of contracts with infants, yet I more readily yield my assent to this course, on principles of policy, when I reflect that so many minors are emancipated by their parents by giving them their time, as it is called, — a practice which, though sanctioned by judicial decisions, I regret has prevailed, — and become adults for the purpose of making contracts, and remain infants to avoid them. It would be unsafe for the community, unless some such principle were adopted. The case under consideration must be decided on this ground."

This view has been condemned, and, we think, properly so; and the correct rule, in our opinion, is, that the damages sustained by the employer by reason of the infant's abandoning the service under the special contract, or otherwise failing to comply with the terms of the contract, cannot be taken into consideration in an action by the infant on *quantum meruit* to recover for the services rendered by him: *Whitmarsh v. Hall*, 3 Denio, 375; *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133. In *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286, Walton, J., uses the following language: "To compel the minor thus to make good the loss occasioned by the non-performance of his contract is virtually to enforce the contract; and thus to enforce the contract is, in effect, to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him." The court criticises a number of cases, among them *Moses v. Stevens*, 2 Pick. 332; but does not refer to its previous case of *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229. It should be carefully noticed that the foregoing rule only excludes damages sustained by the employer by reason of the infant's simple violation of the terms of his contract. If he has been guilty of negligence in the performance of his services, the negligence should plainly be taken into consideration in estimating the value of the services: See *Vehue v. Pinkham*, 60 Me. 142. "It was what his services were reasonably worth, under all the circumstances of the case, that he was entitled to recover. If by his negligence or disobedience of orders he broke his employer's tools or damaged his property, his services were manifestly worth just so much less": *Vehue v. Pinkham*, 60 Me. 142. And plainly, also, if the contract was broken and the service terminated through the fault of the employer, no deduction for the damage he may have sustained in consequence of the infant leaving his employment should be made: *Meeker v. Hurd*, 31 Vt. 639.

If an infant has been fully and fairly compensated for his services, he should certainly not be entitled to claim compensation a second time, and a part payment should also be a discharge to the employer to that extent: See *Holbs v. Godlove*, 17 Ind. 359; *Waugh v. Emerson*, 79 Ala. 295; *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576; *Breed v. Judd*, 1 Gray, 455, 459; compare *Nickerson v. Easton*, 12 Pick. 110. In *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, where an infant agreed to work at a certain rate of wages, and to have his board, it was held he could not repudiate the contract, if it was fair and reasonable, and recover on a *quantum meruit* for the services rendered, he having had his board for the period for which he worked, and some payments of money. Cooley, J., said: "If a contract for service is apparently fair and reasonable under

the circumstances, the infant who has performed it should be held to its terms, and if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmance. So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further." In *Breed v. Judd*, 1 Gray, 455, 459, an infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and other money expended for him by the other party in pursuance of the agreement. The court, after discussing the partnership feature of the case (see *ante*, title "Partnership"), said that, viewing the contract as an agreement for the services of the plaintiff for a limited time, to be repaid by the advancement and by retaining also two thirds of the fruits of his labor, it would, if fairly made and fully executed, be within the principles, if not within the direct authority, of *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654. The court, per Thomas, J., continues: "Indeed, to say that an infant could make no contract for his labor, however reasonable and beneficial to himself, by which he should be bound, even when fully executed on both sides, instead of serving as a protection to the infant, would have the effect only to prevent his being employed. Men of business want to know beforehand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed, and the price paid, there is an end of the matter."

While we agree with the results attained by these latter cases, we do not concur in the reasoning by which those results were reached. We do not believe that the cases can be supported on the mere theory that the contracts, being fully executed, could not be avoided by the infants. If this were so, an infant could not avoid any executed contract, yet it must be conceded that his executed conveyances of realty and sales of personalty may be disaffirmed by him, and the land or the chattels recovered back again. A payment once made to an infant employee should be good so far as it goes. But we would suggest as the reason why there cannot be a second recovery by the infant, that the infant, to disaffirm the previous payment and recover anew, should restore to the employer what he has received; and although he may have parted with the consideration, and would not be obliged to restore an equivalent, or even if he retained the consideration, might perhaps not be compelled to restore it as a condition to maintaining the action, yet what he would now recover, the employer would be entitled to recover back again, and to avoid circuity of action, a second recovery will not be allowed. Furthermore, it seems to us that if the infant were able to show, in any case, that his services were worth more than what he had received according to the terms of his contract, he could, nevertheless, in the exercise of his right of disaffirmance, recover the excess in value. Of course, it is assumed in the foregoing discussion that if the infant has parents, he is permitted by them or by the law to

receive his wages. This question is settled in Iowa by section 2240 of the code, which enacts that "where a contract for the personal service of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor, in accordance with the terms of the contract, is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time"; under which it is held that the payment is a full satisfaction to the minor as well, who cannot recover a second time for the services: *Murphy v. Johnson*, 45 Iowa, 57.

There is still another line of cases, which has an intimate connection with the one last mentioned, differing from it only in that the services were rendered in consideration of board, clothing, education, and other necessities furnished by the employer. In other words, an infant agrees to render services in consideration of his support and education. While the infant might decline to perform the agreement, and would incur no liability by so doing, yet when the agreement is fairly made and fully executed on both sides, the infant cannot avoid the agreement and recover the value of the services on a *quantum meruit*. The contract may be supported on the ground that it is one for necessities, or it may be upheld on the theory just considered, that the services have been fully paid for: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Squier v. Hydliff*, 9 Mich. 274; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. The case of *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, might have been decided according to this theory; and perhaps, also, the case of *Breed v. Judd*, 1 Gray, 455, 459, in which, indeed, the question of necessities is somewhat discussed. The contract having been fairly made, the infant cannot recover merely by showing that it turned out that his services were worth more than the agreed compensation: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. Thus in *Wilhelm v. Hardman*, 13 Md. 140, Tuck, J., says: "It was urged in argument that the services might be worth more than the support furnished, and that the employer would thereby obtain an advantage over the infant. This may occur in some cases; but we must remember that the infant may leave the employment of his own caprice, or whenever he can procure better returns for his labor. The employer is subject to his will. If this reason did not apply, we think it more in accordance with the policy of the law, in reference to infants, that they should be held bound by their contracts of this kind, as far as performed, than to offer inducements to them to obtain employment with persons acting in good faith, and afterwards suffer compensation, not contemplated by the other party at the time of the agreement." In this case of *Wilhelm v. Hardman*, 13 Md. 140, the infant agreed with the defendant to work and labor for the latter on his farm, for seven years, in consideration that the defendant should provide him necessary food, lodging, and clothing, and give him schooling when there was a school convenient, and that if he remained and worked for the seven years, the defendant would give him a horse, saddle, and bridle in addition. It was held that the item in regard to the horse and equipments was something over and above the support, and the infant could not aver it to avoid the contract *in toto*. See also *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152.

The case of *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, is said to have been overruled by *Dallas v. Hollingsworth*, 3 Ind. 537, and by subsequent cases: See *Wheatly v. Miscal*, 5 Ind. 143; *Van Pelt v. Corvine*, 6 Ind. 364; *Garner's Adm'r v. Board*, 27 Ind. 326; but while some of the reasoning in *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, respecting executed con-

tracts of minors is to be condemned, the decision, in our opinion, is correct, and in accordance with the weight of authority. We think that the case was not overruled by *Dallas v. Hollingsworth*, 3 Ind. 537, but that the latter case has been entirely misconstrued by the Indiana court. *Dallas v. Hollingsworth*, 3 Ind. 537, simply involved the right of an infant to abandon his special contract, and recover on a *quantum meruit* for the services performed, and *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, which was a different case entirely, was not even referred to. In accordance with this misconception of the effect of *Dallas v. Hollingsworth*, 3 Ind. 537, it was erroneously held in *Wheatly v. Miscal*, 5 Ind. 143, that where an infant agreed to work for a certain time, in consideration of which his employer was to furnish him with board and clothing, and send him to school, and at the end of the time was to pay him a certain sum of money, if the infant quit before the expiration of the agreed time, he could recover for the value of the services up to the time he quit. The question of a portion of the consideration for the services being necessities was not even noticed. It will be seen that the case bears a very close resemblance to *Wilhelm v. Hardman*, 13 Md. 140, and *Squier v. Hytloff*, 9 Mich. 274, which were decided to the contrary. A similar view, in part, was taken in *Locke v. Smith*, 41 N. H. 346, in which it was held that where an infant renders services in return for support and education given him, he could not, after coming of age, repudiate the contract, so as to recover pay for his labor, without allowing anything for his support and education.

In *Mountain v. Fisher*, 22 Wis. 93, the court held that an infant who lives with and works for another person upon a mutual understanding that his services were rendered in consideration of receiving a home, food, clothing, care, and attention, such as a child of such other person would reasonably be entitled to, and who was in fact so treated, could not recover for his services, but placed its decision upon the ground that the services were not rendered in expectation that they would be paid for. But, on the other hand, it is held, in Indiana, that the rule that where a person resides with another as a member of his family, being supported as such, and rendering services in return, there is no implied contract to pay for such services, does not apply where the person is an infant; for, since an infant can avoid his special contract, and recover the reasonable value of his labor, his conduct and acts could not create an implied contract which would operate against him to bar his right of action; but, it is held, the reasonable value of necessities furnished the infant during the period of such service may be allowed the defendant: *Garner's Adm'r v. Board*, 27 Ind. 323; *Meredith v. Cranford*, 34 Ind. 399; the last case, however, giving as the reason that "the plaintiff, having been an infant at the time, was not bound by any special contract as to the time that she was to work, or the amount to be paid her therefor." It may be said of these cases that there is absolutely no difference in principle, whether the parties have expressly agreed that the services were to be compensated for in support, or whether such is their understanding, implied from their acts and conduct. In neither case should the infant be permitted, on the mere ground of infancy, to disregard the agreement so far as it has been executed, and recover for his services. These Indiana cases are nearly as erroneous as *Wheatly v. Miscal*, 5 Ind. 143, which they really follow.

Finally, if an infant has been furnished with necessities, while working with a mechanic, to learn his trade, upon an action of *assumpsit* brought against the infant for the value of the necessities, it is a good defense under

the plea of *non assumpsit* that the defendant's services were equal to or exceeded in value the necessities furnished: *Francis v. Felmit*, 4 Dev. & B. 498.

APPRENTICESHIP. — It has been said that an infant may bind himself an apprentice, because such a contract was for his benefit: See note to *Brotzman v. Bunnell*, 34 Am. Dec. 538; *Rex v. Inhabitants of Arundel*, 5 Maule & S. 257; *Rex v. Inhabitants of Great Wigston*, 3 Barn. & C. 484, 486; 5 Dowl. & R. 339. Yet it should be observed that whatever binding force a contract of apprenticeship may have is due to statute. The contract, at common law, is voidable by the infant, like his other contracts: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. An indenture by which an infant, with the consent of his father, bound himself apprentice to a tradesman, "his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of Wolverhampton," for the term of seven years, and the master, in consideration of the service of the apprentice, covenanted to teach and instruct him, or cause him to be taught and instructed, during the term, was held, in England, binding upon the infant, upon the death of the master, since it was not for the infant's disadvantage to remain in the service of the personal representatives, and for unlawfully absenting himself from the service of the executrix, he might be punished under the act 4 George IV., chapter 34: *Cooper v. Simmons*, 7 Hurl. & N. 707; but where an infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit, it was held that this provision, not being for the benefit of the infant, the apprentice deed could not be enforced against the infant under the Employees and Workmen Act, 1875, 38 and 39 Victoria, chapter 90: *Meakin v. Morris*, L. R. 12 Q. B. D. 352.

While an infant's contract of apprenticeship executed according to statutory requirements may subject the infant to the control and discipline of the master, to the penalties prescribed by statute for the misconduct of apprentices, and may confer a settlement on the infant under the poor-laws, and the like, yet, unless perhaps the statute otherwise provides, no action can be maintained by the master, against the infant, for damages for breach of the covenants contained in the indenture, if the plea of infancy is interposed: *Gylbert v. Fletcher*, Cro. Car. 179; *Lylly's Case*, 7 Mod. 15; *McNight v. Hogg*, 1 Const. S. C. 117; and see *Moses v. Stevens*, 2 Pick. 332, 335. The contrary was held in *Woodruff v. Logan*, 6 Ark. 276; 42 Am. Dec. 695; and in *Horn v. Chandler*, 1 Mod. 271, it was decided that an infant, unmarried, and above the age of fourteen years, might bind himself apprentice to a freeman of London; and by the custom of that city, the master might have the same remedies against him on the covenants of the indenture as if he had been of full age; "though such a covenant shall not bind an infant, either by common law, or by 5 Elizabeth, chapter 4, yet by this custom it shall": *Horn v. Chandler*, 1 Mod. 271.

Infancy is certainly a good defense to an action on the agreement to serve the plaintiff as an apprentice, if the agreement is not made in pursuance to the statute relating to apprentices: *Frazier v. Rowan*, 2 Brev. 47. And, on the other hand, it is no defense to an action to recover the value of work and labor performed by the plaintiff while an infant, for the defendant to show that the services were rendered under articles of indenture purporting to bind the plaintiff to the defendant as an apprentice, if the articles are in-

valid because not executed in conformity with the statutory requirements: *Tague v. Hayward*, 25 Ind. 427; *Hunsucker v. Elmore*, 54 Ind. 209; *Kerwin v. Myers*, 71 Ind. 359; see also *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662; *Davies v. Turton*, 13 Wis. 185. And if there is no statute, since the contract of apprenticeship is not binding at common law, and since the statute of 5 Elizabeth, chapter 4, cannot be regarded as in force in this country, it being opposed to the genius and spirit of our institutions, the contract may be ended at the pleasure of the infant; and, therefore, to an action for falsely and maliciously representing to certain persons, with whom the plaintiff was employed, that the plaintiff was defendants' apprentice, by means whereof the plaintiff was discharged from an employment, a plea of justification by defendants setting up a contract of apprenticeship with the plaintiff, who was a minor, was held properly sustained: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777.

The contract of apprenticeship is not binding if the infant is not a party thereto, unless, perhaps, the statute should provide that it might be executed in his behalf by his parents or guardian: *Commonwealth ex rel. Murray v. Moore*, 1 Ashm. 123; *Pierce v. Massenburg*, 4 Leigh, 493; 26 Am. Dec. 333; *Stringfield v. Heiskell*, 2 Yerg. 546; *Ivins v. Norcross*, 3 N. J. L. 977; *Matter of McDowle*, 8 Johns. 328; *Balch v. Smith*, 12 N. H. 437; *Rex v. Inhabitants of Arnesby*, 3 Barn. & Akl. 584. No limitation of time may be prescribed by the statute within which an infant is incapable of binding himself by indenture of apprenticeship: See *Brotzman v. Bunnell*, 5 Whart. 128; 34 Am. Dec. 537.

An indenture of apprenticeship of an infant, it is held in England, may be put an end to when it is for the benefit of both parties, because of the master's running away and leaving the apprentice: *Rex v. Inhabitants of Mountsorrel*, 3 Maule & S. 497. In *Rex v. Inhabitants of Great Wigston*, 3 Barn. & C. 484, 486, Abbott, C. J., said: "It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract. If, then, it be for the benefit of the infant to bind himself an apprentice, it is impossible to say, generally, that it is for his benefit to dissolve such connection; such a position involves a contradiction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship." In this case it was held that no facts being stated from which it could be inferred that it was for the infant's benefit to put an end to the apprenticeship, it could not be considered dissolved, and therefore a second apprenticeship was invalid, and no settlement could be gained by service under it.

Finally, it may be observed that the provisions of the particular statute in question must be examined, in order to ascertain the extent of the binding force of a contract of apprenticeship upon an infant.

CONTRACTS TO MARRY. — While an infant of a certain age, at the common law, and under various state statutes, is capable of consenting to marriage, and the marriage of an infant of proper age actually contracted and solemnized is valid and binding, and cannot be disagreed to or avoided on the ground of infancy, yet the mere promise to marry of infant is not binding upon him, and hence infancy is a good defense to an action against him for the breach of the promise to marry: *Hale v. Ruthven*, 20 L. T. 404; *Pool v. Pratt*, 1 Chip. 252; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Warwick v. Cooper*, 5 Sneed, 659; *Rush v. Wick*, 31 Ohio St. 521; 27 Am. Rep. 523;

Hamilton v. Lomax, 26 Barb. 615; and in an action for breach of promise of marriage, infancy, it is held, is admissible in evidence under the general issue: *Morris v. Graves*, 2 Ind. 354. In *Pool v. Pratt*, 1 Chip. 252, the court says: "A contract of marriage by an infant and his contract for necessities are perfectly analogous; in both cases the contract when consummated is binding, but while executory, is not binding." The contract is not void, but is simply voidable by the infant, at his election. Therefore, the adult party to the contract is bound, and the infancy of the plaintiff is no defense to an action for breach of promise against the adult: *Holt v. Ward Clarendieux*, 2 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; and see also *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475. This would be true under any view of the nature of an infant's general contracts.

It is held that the second section of the Infants' Relief Act, passed by the English Parliament in 1874, noticed *ante*, under the head "Statutory Regulation," concerning the ratification of infants' contracts, applies to promises of marriage. And therefore, where the defendant, during his infancy, promised to marry the plaintiff, and after coming of age, recognized, without expressly repeating, the promise, and eventually broke it, it was held that the plaintiff was properly nonsuited in an action for breach of promise; for assuming that there was a ratification of the promise subsequent to his majority, the right of action was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age: *Coxhead v. Mallis*, L. R. 3 C. P. D. 439. But in *Northcote v. Doughty*, L. R. 4 C. P. D. 385, the defendant, during his infancy, made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engagement ring, which she wore, and two days before he attained his majority, he went into the country to visit his father, and on his return, the day after he came of age, he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement, the defendant adding that now he might and would marry the plaintiff as soon as he could. It was held that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the second section of the above act. It was also held, in *Ditcham v. Worrall*, L. R. 5 C. P. D. 410, that a fresh promise of marriage, made after the defendant came of age, was binding; but that a mere ratification of the original promise, made after coming of age, was not binding under section 2 of the act.

In *Develin v. Riggsbee*, 4 Ind. 464, it was held that where, by statute, females of the age of eighteen were competent to contract marriage, a female of the age of eighteen might, as incident to such capacity, make a valid and binding release of a party from a contract to marry her.

GIFTS. — A transfer of his property by an infant by way of gift is, of course, not a contract, but its validity may properly be noticed in connection with this subject of contracts of infants. If an infant may avoid his contract whereby his property, real or personal, has been transferred, he, or his personal representatives in case of his death, should plainly have the right to avoid his gift of such property on the ground of his infancy: *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630; *Holt v. Holt*, 59 Me. 464. And in *Swafford v. Ferguson*, 3 Lea, 292, 31 Am. Rep. 639, it was held, approving the criterion of Lord Chief Justice Eyre, that a deed executed by infants without consideration, being necessarily to their prejudice, was void, and being void, and

not voidable, they could consequently maintain a bill during their infancy, by their next friend, to set the deed aside. But it was held, with better reason, that a deed of gift of a slave, executed by an infant in trust for his children, was not void, but voidable only: *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463. An infant who executes, without consideration, and as a gift, a deed, in which, by mistake, the land was incorrectly described, cannot, very plainly, be compelled, after attaining his majority, to execute a deed for the land intended to be conveyed, although after arriving at age he promised to do so, the promise being without consideration: *Oxley v. Tryon*, 25 Iowa, 95.

DELEGATION OF AUTHORITY. — In a number of early cases, both in England and in this country, it has been said that an infant's warrant of attorney to confess a judgment was absolutely void: *Sanderson v. Murr*, 1 H. Black. 75; *Wood v. Heath*, 1 Chit. 708, note; *Ashlin v. Langton*, 4 Moore & S. 719; *Bennett v. Davis*, 6 Cow. 393; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Carnahan v. Allderdice*, 4 Harr. (Del.) 99; *Knox v. Flack*, 22 Pa. St. 337; but it seems, at least so far as these cases show anything at all, that this statement means nothing more than that the court would set the judgment aside at the instance of the infant. In other words, the infant might avoid the warrant of attorney and the judgment founded thereon; but we do not understand these cases as holding that the judgment is good for no purpose and at no time at all, which, of course, would be the condition of affairs if it were absolutely void. In *Oliver v. Woodroffe*, 4 Mees. & W. 650, a cognovit given by an infant, authorizing an attorney to appear for him, and confess an action brought against him for the precise sum for necessities provided him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution," was held by Lord Abinger to be void, for three reasons: "1. It is bad because it falls within the principle which prevents an infant from appointing and appearing in court by attorney; he can appear by guardian only. 2. By this means the minor is made to state an account, which the law will not allow him to do, so as to bind himself; if an action be brought against him, the jury are to determine the reasonableness of the demand made. 3. The general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights"; but here, again, the question was simply as to the right of the infant to have the proceedings taken under the cognovit set aside. The reason why an infant cannot be absolutely held on an account stated for necessities has already been noticed: See *supra*, "Account Stated."

With respect to an infant's formal power of attorney, or any mere and less technical appointment of an agent, for other purposes, it has been actually decided in some cases, but more frequently asserted by way of *dictum*, that the delegation of authority is not simply voidable, but absolutely void: *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Dexter v. Hall*, 15 Wall. 9, 25; *Philpot v. Bingham*, 55 Ala. 435; *Flexner v. Dickerson*, 72 Ala. 318, 322; *Cole v. Pennoyer*, 14 Ill. 158; *Hiestand v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 481; *Tupley v. McGee*, 6 Ind. 56; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; *Pickler v. State*, 18 Ind. 266; *Fetrow v. Wiseman*, 40 Ind. 148, 155; *Pyle v. Crarens*, 4 Litt. 17; *Semple v. Morrison*, 7 T. B. Mon. 298; *Dana v. Coombs*, 6 Me. 89, 90; 19 Am. Dec. 194, 195; *Wainwright v. Wilkinson*, 62 Md. 146; *Armitage v. Widoe*, 36 Mich. 124, 129; *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Robbins v. Mount*,

entered into by means of an agent: See *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155; also *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285. In *Fetrow v. Wiseman*, 40 Ind. 148, 155, the court contents itself with saying that the proposition "may not be founded in solid reason, but is so held by all the authorities."

Whenever the question has been at all examined, the courts have usually reached the conclusion that an infant's appointment of an agent, and a contract made under it, are not void, but that the contract stands on exactly the same footing as a contract entered into by the infant personally. Thus Chief Justice Parker held at an early day, in *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, that an infant may authorize a person to execute a promissory note on his behalf, the delegation of authority not being void, and therefore the note might be ratified by the infant after coming of age. Furthermore, this authorization need not be express, but might result from a partnership relation existing between the infant and another person, who executed the note in the name of the firm for a firm debt. We cannot do better than to quote from the able opinion of the learned chief justice. He says: "Upon principle, what difference can there be between the ratification of a contract made by the infant himself, and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it? It may be said that minors may be exposed if they may delegate power over their property or credit to another; but they will be as much exposed by the power to make such contracts themselves, and more for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced; for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them." The learned justice, however, with more care than necessary, avoids the question whether an infant can confer an authorization to do an act under seal, saying: "Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void, although no satisfactory reason can be assigned for such a position." We might here observe that several cases noticed *supra*, under the head "Partnership Agreements and Transactions," which hold that an infant may ratify a partnership contract so as to be liable thereon, must necessarily assume, even if they do not decide, that an infant's appointment of an agent is not void: See particularly *Miller v. Sims*, 2 Hill (S. C.) 479.

In conformity with this case of *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, it has been held that if an infant payee of a promissory note authorizes a person to indorse and transfer the note for him, the transfer so made is not void, but is valid until avoided, the authorization not being void, but voidable only: *Hardy v. Waters*, 38 Me. 450; and that the same rule applies to a non-negotiable note: *Hastings v. Dollarhide*, 24 Cal. 195. Again, it is held that the fact that an infant notified his vendee of personal property of his election to rescind the contract of sale, offered to return the consideration, and demanded a restoration of the property, through an agent, was no defense to an action of trover by the infant against the vendee to recover back the property, the acts of the agent not being void, but, at most, voidable, at the election of the infant: *Towle v.*

right to disaffirm the contract and recover back the money which his father had paid under it, on the ground that he had assented to the contract, on being informed of it. It was held that he could not adopt the contract and recover; for, says Cooley, C. J., "had the infant, in the first place, undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities, no rule is clearer than that an infant cannot empower an agent or attorney to act for him. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize." It seems to us that this language, as applied to the facts of the case, was wholly unnecessary. It does not appear that the infant assented to the contract made in his name, so far as to return, or promise to return, to his father the money advanced by the latter; and as he did not, any rights asserted by him under the contract were really claimed by him as a gift from his father. If he had returned the money to his father, or even agreed to return it, and thus have fully adopted the contract, we do not see why he could not have afterwards repudiated the contract, and recovered the money paid to the defendant. The court went on to hold, with more correctness, that, treating the act of the father as a gift to the son, the son was not entitled to recover back the money paid; for the contract was valid in the father's hands, and could not be repudiated by him, and he could not empower another to do what he could not do himself.

In California and Dakota, as already seen, an infant's "delegation of power" is made by statute absolutely void: Cal. Civ. Code, sec. 33; Dak. Civ. Code, sec. 15; *ante*, "Statutory Regulation"; *Wambole v. Foote*, 2 Dak. 1, the court in this case saying: "This particular disability, after all, works no hardship, but rather a benefit; for the disposition of the infant's property is perhaps better secured through a guardian, under the control of a court," — a nonsensical apology for the rule, and the legislation which, the court says, "preserves" it; for the same remark would apply to contracts of an infant, rendering them equally void.

It is thus seen, from an analysis of the decisions, that, independently of statute, there is in truth but very little real authority in support of the proposition that an infant's delegation of authority, and contracts made in pursuance of it, are void; and among all the cases which exist in favor of the rule, not one is sustained by any reasoning whatever. The notion that an infant's appointment of an agent is void seems to have originated with Perkins's senseless criterion: "All such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable"; Perkins on Conveyancing, sec. 12; see *supra*, "Void and Voidable"; or perhaps we should say that the notion originated in the interpretation put upon this passage by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, 1804, who says that "the words 'which do take effect' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest." From "letters of attorney" the transition to all delegations of authority was an easy one; and we find case after case repeating the *dictum* that an infant's power of attorney or appointment of an agent is void, without stopping to inquire the reason why. Even cases which have otherwise correctly announced that none of an infant's general contracts were void by reason of his nonage have sometimes carelessly said that an infant's appointment of an agent was void, and have thus made an exception where the contract was

4 Rob. (N.Y.) 553; *Brown v. Town of Canton*, 4 Lans. 409; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Turner v. Boudalier*, 31 Mo. App. 582.

If, then, according to these authorities, an agent be appointed by an infant for the purpose of making a contract in his behalf, the appointment being void, the contract entered into pursuant to it must necessarily also be void. The result is, that the contract would be good for no purpose whatever, and would be incapable of ratification by the infant after coming of age. And this has been so decided. Thus in *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781, Baron Parke says: "An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So it is held that a bond for title, executed by the agent of an infant, cannot be ratified by him after attaining majority; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; see also *Wainwright v. Wilkinson*, 62 Md. 146. In *Philpot v. Bingham*, 55 Ala. 435, and *Lawrence's Lessee v. McArter*, 10 Ohio, 37, it was said that an infant's power of attorney to sell lands, under which the lands were sold and conveyed, was absolutely void, and consequently no title passed under the conveyance; but this was only a *dictum* in either case; for in *Philpot v. Bingham*, 55 Ala. 435, the infant had brought an action to recover possession of the land, and the question involved was simply his right to disaffirm the deed; and in *Lawrence's Lessee v. McArter*, 10 Ohio, 37, the action was ejectment, the defendant claiming title under the conveyance executed in pursuance of the power of attorney, and the plaintiff under a deed executed to him by the infant after coming of age, which, of course, had disaffirmed the prior deed. And in *Pyle v. Cravens*, 4 Litt. 17, it was also said that if an infant son executes a power of attorney to his father, authorizing the latter to dispose of the son's claim in certain land, the power of attorney was absolutely void, and could not be enforced against the son. Of course, it could not be enforced against the son's defense of infancy. In *Semple v. Morrison*, 7 T. B. Mon. 298, the assignment of a note belonging to an infant, by an agent, was held to be void, the court saying: "It is true, the assignment to Semple appears not to have been made under any written warrant [power] of attorney; but if, as the doctrine of the law seems to be, acts done under warrants of attorney are void because infants are disabled from appointing an attorney, the result must be the same, whether the attorney be appointed by warrant of attorney, strictly so called, or by parol." And in *Fonda v. Van Horne*, 15 Wend. 631, 30 Am. Dec. 77, a sale of chattels made by the agent of an infant was likewise held void; see also *Stafford v. Roof*, 9 Cow. 626, 627, per Jones, Chancellor.

In *Brown v. Town of Canton*, 4 Lans. 409, a direction by an infant to town authorities to deliver certain town-bounty certificates, to which he was entitled on enlisting as a soldier, to his father, and when due to pay them to the latter, was also asserted to be void; and although the town paid the amount of the certificates to the assignee of the father, it was held that the infant was to be regarded as still owning the certificates, and entitled to recover upon them from the town. It is plain that the case simply involved the right of the infant to disaffirm the transaction. For a case in which the opposite result was reached, on a somewhat similar state of facts, on the ground that the agency had been executed before a revocation was attempted by the infant, see *Welch v. Welch*, 103 Mass. 562. In *Armitage v. Widoe*, 36 Mich. 124, a father made a contract for the purchase of lands in the name of his infant son, without the knowledge of the latter. The son claimed the

Dresser, 73 Me. 252. In *Stiff v. Keith*, 143 Mass. 224, it was held that a contract of bailment made by the bailee with the agent of an undisclosed principal, who was a minor, could not be rescinded by the bailee on the ground of the principal's minority, which, of course, might have been done had the agency been void. And so far as real property is concerned, Hemphill, C. J., remarks, in *Cummings v. Powell*, 8 Tex. 80, 88, in commenting upon the opinion in *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229: "The justness of the views presented in this opinion is very striking, and they apply with special force to the condition of property in this state. The lands of individuals are frequently situate in counties remote from each other and from the residence of the owner. It is a matter of great convenience, if not absolute necessity, that sales should be effected by agents, and it seems quite preposterous that a sale by a minor, which must necessarily or may conveniently be made through the intervention of an attorney in fact, should be void, but if made by him-himself would be only voidable. His infancy, instead of operating beneficially, would, under such circumstances, be perverted to his injury. If the act be void, it is not binding on others; and if the property depreciate after the sale, it might be thrown back upon his hands, and his infancy would then be turned against him, and instead of shielding himself, would protect others." See also *Ferguson v. Houston etc. Ry Co.*, 73 Tex. 344, 347; but see *Voglesang v. Null*, 67 Tex. 465; *Askey v. Williams*, 74 Tex. 294.

It seems to us, furthermore, contrary to the opinion expressed by Cooley, C. J., in *Armitage v. Widoe*, 36 Mich. 124, that an infant may adopt a contract made in his name by one who acted without previous authority. There is no difference in principle whether the authority is previously expressly conferred or is subsequently ratified. In *Ward v. Steamboat Little Red*, 8 Mo. 358, it was said that "an infant can become a party to a contract made without authority from him, by his subsequent adoption of it, as well as by his previous express consent"; and in *Alexander v. Heriot*, Bail. Eq. 223, it was held that if one makes a purchase for an infant, avowedly as agent, if the infant affirm the contract after attaining full age, he will be directly liable to the vendor. It must be said, however, that the question under consideration does not seem to have been distinctly raised in either of these cases.

An infant, of course, may be an agent, and, as such, bind his principal: *Talbot v. Bowen*, 1 A. K. Marsh. 436; 10 Am. Dec. 747.

INFANT'S CONCEALMENT OR MISREPRESENTATION AS TO AGE, ETC. — The question next presents itself as to what effect, if any, is produced upon the general contracts of an infant by the fact that he has dealt as an adult, or made false representations as to his age or other matters, whereby the other party was induced to enter into the contract. In the first place, it is perfectly well settled at law that the general contract of an infant, otherwise voidable, cannot be enforced against him because he dealt or traded as an adult. He is not thereby estopped from pleading his infancy as a defense: *Miller v. Blankley*, 38 L. T. 527; *Van Winkle v. Ketcham*, 3 Caines, 323; *Houston v. Cooper*, 3 N. J. L. 866; *Curtin v. Patton*, 11 Serg. & R. 305, 309; *Oliver v. McClellan*, 21 Ala. 675; *Carpenter v. Pridgen*, 40 Tex. 32, 35; *Folds v. Allardt*, 35 Minn. 488, 489; nor is he estopped from disaffirming his deed, and maintaining an action to recover the land conveyed, by the fact that when the deed was executed he appeared and was believed by the grantee to be an adult: *Buchanan v. Hubbard*, 96 Ind. 1. Nor even is his contract rendered binding at law, so that a recovery can be had against him thereon, from the fact that he falsely represented himself to be of full age at the time the con-

tract was made, and the other party relied upon such representation in entering into the contract: *Bartlett v. Wells*, 1 Best & S. 838; *De Roo v. Foster*, 12 Conn. B., N. S., 272; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Brown v. McCune*, 5 Sand. 224; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412. "A contrary doctrine," says Sandford, J., in *Brown v. McCune*, 5 Sand. 224, "would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by a suppression of the fact that he was under age, when he was silent on that point, while he knew that the party with whom he was contracting supposed him to be of age. There is no difference between the direct and the inferential falsehood; the one is as fraudulent as the other."

For the same reason, a grantor is not estopped from disaffirming her deed on the ground of infancy, and maintaining an action to recover the land, by a false recital in the deed that she was "unmarried and of age": *Wieland v. Kobirk*, 110 Ill. 16; 51 Am. Rep. 676. So, also, an infant who fraudulently represented himself to be of age may nevertheless disaffirm his contract of sale of goods, and maintain trover against the purchaser for their conversion: *Norris v. Vance*, 3 Rich. L. 164. "An infant is liable for his torts," says the court; "but his tort neither makes valid his void contract, nor takes away his right of disaffirming a voidable one"; nor where an infant makes a purchase of personal property is his right to disaffirm the contract and recover back the purchase price affected by the fact that at the time he made the purchase he falsely represented to the vendor that he was of full age: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678. "To hold that he is estopped by such representations from avoiding the contract by asserting his infancy would be an exception to the law governing this class of cases. Such representations cannot be of any greater force to bind the plaintiff than the contract itself": *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678. And, likewise, a minor's fraudulent representation to a shipping commissioner for a vessel, that he was of age, will not estop him from avoiding his written contract for compensation, and recovering pay on a *quantum meruit*: *Burdett v. Williams*, 30 Fed. Rep. 697.

Again, for like reasons, an action to recover the purchase price of goods cannot be sustained against an infant on the ground of the infant's false representations as to his means of payment and prosperous condition of his business, made to induce the sale and to give him credit, on which the vendors relied: *Studwell v. Shapter*, 54 N. Y. 249; and infancy is a good defense to an action against a person as a secret partner, to recover the price of goods, purchased ostensibly by his co-defendant on the false representations of the infant as to the solvency of the co-defendant, in order that the two might both profit by obtaining the goods: *Vinsen v. Lockard*, 7 Bush, 458; and where an infant perpetrated a fraud, in representing that certain bonds, deposited by him as a margin upon a stock transaction, belonged to himself, it was said: "An infant is liable for his willful torts, and for damages for frauds committed by him; but no fraudulent representation made by an infant can give validity to any contract entered into by him which would otherwise be voidable for his infancy. The action must, in all cases, arise solely upon the tort or wrong committed by him": *Heath v. Mahoney*, 7 Hun, 100. It will be noticed that the actions in the foregoing cases were not brought to recover damages resulting from the fraudulent representations, or to reclaim the goods sold, but

sought to enforce the contracts which had been made. In *Stoolfoos v. Jenkins*, 12 Serg. & R. 399, a release of her interest in land executed by an infant in collusion with her guardian, having first chosen him guardian for the purpose of cheating the releasees, and then deceived them by persuading them that their title would be confirmed by the release, and thus prevailed upon them to pay her a certain sum of money as her share of the land, was held not to constitute such fraud as would prevent the infant from avoiding the release and recovering the land; for, it was said, the infant did not pretend to be of full age, and the probability was, that, acting under her guardian's influence, she was ignorant of the law, and really supposed that the release would confirm the title of the defendants. And, very plainly, neither the conduct of an infant's mother in inducing certain persons to enter into a contract of apprenticeship with the infant, nor the act of her agent in intentionally drawing, with her knowledge and acquiescence, the contract so as to be insufficient, can estop the infant from avoiding the contract: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777.

In equity, also, it is equally well settled as at law that an infant is not estopped from avoiding his contract from the mere fact that he did not disclose his minority at the time he entered into the contract, and the other party believed him to be adult, and dealt with him on that supposition: *Stikeman v. Dawson*, 1 De Gex & S. 90; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; and see *Davidson v. Young*, 38 Ill. 145; *Pyle v. Cravens*, 4 Litt. 17; *Price v. Jennings*, 62 Ind. 111; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. "We think these facts," says the court in *Baker v. Stone*, 136 Mass. 405, "would not estop her from avoiding the mortgage and the note. They do not present the question whether a minor who has induced a person to accept a conveyance of land by false and fraudulent representations that he is of full age may be estopped to disaffirm the conveyance when of age." "In one sense," says Chalmers, J., in *Brantley v. Wolf*, 60 Miss. 420, "it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits, and thereafter to repudiate it to the prejudice of the other party; but legal fraud cannot be predicated of such conduct by a minor, where it has been unmarked with any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability; and of this right all men are bound to take notice." Again, says Dargan, C., in *Rivers v. Gregg*, 5 Rich. Eq. 274, 279, "he who deals with an infant is presumed to know of his infancy. He is bound, at his peril, to make the inquiry. It makes no difference whether the inquiries result in correct information, or the reverse. It is no excuse if he honestly supposed, from his appearance or other circumstances, that the infant was an adult." See further, on the question that it is not a fraud, either at law or in equity, for an infant to disaffirm his contract, *Tucker v. Moreland*, 10 Pet. 59, 77; 1 Am. Lead. Cas. *224, *234, per Story, J.; *Clumorgan v. Lane*, 9 Mo. 442, 471; *Burns v. Hill*, 19 Ga. 22; *Seabrook v. Gregg*, 2 S. C. 68.

If, however, an infant is guilty of something more than a mere failure to disclose his infancy at the time the contract is entered into, and fraudulently represents that he is of full age, or actively conceals his minority, whereby the other party is induced to enter into the contract, then it is held the infant will be estopped in equity by his fraud from avoiding the contract on the ground of infancy, to the prejudice of the other contracting party: *Ferguson v. Bobo*, 54 Miss. 121; and see *Davidson v. Young*, 38 Ill. 145; *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; but see *Geer v. Hovy*, 1

Root, 179; *Sims v. Everhardt*, 102 U. S. 300. In *Ferguson v. Bobo*, 54 Miss. 121, Chalmers, J., says: "It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion, by direct participation, or by silence when he was called upon to speak, has entrapped a party, ignorant of his title or of his minority, into purchasing his property from another, he will be estopped, in a court of chancery, from setting up such title"; and therefore, where an infant nineteen years of age, knowing her rights, conveyed land to her father for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of her minority, and subsequently the father conveyed the land to the mortgagee to pay the debt, the mortgagee being still ignorant of the daughter's minority, it was held that a court of equity would restrain her from asserting a claim to the land in an action of ejectment after her arrival at full age. In *Lemprière v. Lange*, L. R. 12 Ch. D. 675, it was also held that where an infant obtained a lease of a furnished house on an implied representation that he was of full age, the lease would be declared void and canceled at the suit of the lessor, and possession of the house ordered to be given up, and the defendant restrained by injunction from parting with the furniture, but that the defendant would not be liable for use and occupation. If equity will thus aid a party with whom the infant has contracted, it certainly should not assist an infant *feme covert* to set aside a deed made by her of her lands, against an innocent purchaser, who was induced to part with his money on the faith of an oath made by herself and husband before a notary that, to the best of their knowledge and information, she was then more than twenty-one years of age: *Schmitzheimer v. Eiseman*, 7 Bush, 298.

The party contracting with the infant must, of course, be deceived by the fraud of the infant, in order that the rule may operate. Therefore a settlement executed by an infant in contemplation of marriage was held not binding upon him, because he had falsely represented to the solicitor, before executing the instrument, that he was of age, it appearing that the intended wife knew that he was not of age, and was consequently not deceived: *Nelson v. Stocker*, 4 De Gex & J. 458; and so where an infant *feme covert* relinquished her dower, she is not estopped from disaffirming her deed by the fact that she declared herself to be of age to the officer who took her acknowledgment, there being no proof that such declaration was communicated to the party to be affected, and formed the inducement to the contract, or misled him to enter freely upon it: *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1. And in determining whether a person was deceived, or was justified in relying upon the representations, the appearance of the infant is, of course, a very material matter. For, says Sir George Jessel, M. R., in *Ex parte Jones*, L. R. 18 Ch. Div. 109, 120, "if the representation were made by a boy of ten years old, it would be impossible that the person to whom it was made could have relied on it. But if a man who is apparently of full age represents that he is of full age, the person to whom he makes the representation may well be deceived by it. An infant is capable of committing a fraud in equity just as he is capable of committing a crime, and may be made liable for it. But the authorities show that there must be an express representation, and one which would naturally deceive the person to whom it is made." It is held, furthermore, that the fact that an infant induced a person to purchase his land on the faith of his representation that he was of full age could not avail such purchaser in a contest between him and an innocent purchaser to whom the infant conveyed the land after coming of age: *Vallandigham v. Johnson*, 85 Ky. 288.

It has also been shown, *supra*, "Trading Contracts," that an infant might be declared a bankrupt with respect to debts contracted on the faith of representations or a holding out that he was of full age, such debts being binding upon the infant in a court of bankruptcy, which acts upon equitable principles: *Ex parte Watson*, 16 Ves. 265; *Ex parte Bates*, 2 Mont. D. & D. 337; *In re Unity etc. Banking Ass'n*, 3 De Gex & J. 63; compare *In re Rainey*, 3 L. R. Ir. 459; but, on the other hand, a debtor who had simply traded during infancy could not, for that reason, be adjudicated a bankrupt: *Ex parte Moule*, 14 Ves. 602; *Ex parte Jones*, L. R. 18 Ch. Div. 109, overruling *Ex parte Lynch*, L. R. 2 Ch. Div. 227.

In Georgia, it is provided by section 2733 of the code (1882), that "if an infant, by permission of his parent or guardian, or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business": Code 1882, sec. 2733; *McKamy v. Cooper*, 81 Ga. 679; but it is held that a minor, who is a mere clerk, is not engaged in a business, within the meaning of this section, so as to make him responsible for his contracts; and even if this were not so, he would not be liable for the price of a buggy purchased by him, in the absence of evidence that he used the buggy or bought it to use in the business of clerking: *Howard v. Simpkins*, 70 Ga. 322. In Indiana, it is provided by a statute passed in 1881 (2 R. S. 1883, sec. 2945): "In all sales of real estate by an infant, he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age." In Iowa and Kansas, it is enacted that "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting": Iowa Code, sec. 2239; Kan. Comp. Laws 1885, sec. 3478; *Oswald v. Broderick*, 1 Iowa, 380; *Prouty v. Edgar*, 6 Iowa, 353; *Dillon v. Burnham*, 43 Kan. 77. This provision is not to be limited, in its effects, to the particular business in which the minor may be engaged, but applies to any contracts he may make: *Jaques v. Sax*, 39 Iowa, 367. To render the infant who engages in business as an adult liable, his infancy must have been unknown to the party contracting with him: *Beller v. Marchant*, 30 Iowa, 350; and the language "capable of contracting" means "legally capable of contracting," and not that the minor is mentally and physically capable of contracting: *Burgett v. Barrick*, 25 Kan. 526.

As to an infant's liability for his frauds and other torts connected with his contracts, see *post*, "Torts of Infants Connected with Contracts."

EMANCIPATION. — The fact that an infant is emancipated by his parent, or allowed to shift for himself, does not impart any additional validity to his general contracts; or in other words, render his contracts, otherwise voidable, absolutely binding upon him. He may still take advantage of his infancy, as before. The effect of the emancipation is simply to release him from the parent's control, and to give him the right to his own earnings: *Mason v. Wright*, 13 Met. 306; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; *Tandy v. Masterson's Adm'r*, 1 Bibb, 330. The same is true with reference to his gifts: *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630.

MARRIAGE. — The marriage of a male infant, while it may remove him from his parents' control, and give him the right to his earnings, does not remove the disability of infancy, and render his general contracts any the more binding; nor is the condition of infancy removed from a female infant by her marriage, by reason of statutes which confer capacity upon married women either to contract generally or to convey their real estate or relinquish their claims to dower in the lands of their husbands: *Inhabitants of Taunton v. Inhabitants of Plymouth*, 15 Mass. 203, 204; *Davis v. Caldwell*, 12 Cush. 512, 513; *Walsh v. Young*, 110 Mass. 396; *Hartman v. Kendall*, 4 Ind. 403, 404; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Cummings v. Everett*, 82 Me. 260; *supra*, "Deeds of Infant Females Covert." The capacity of an infant to contract for necessities is, however, enlarged by his marriage; for he is bound for the reasonable value of necessities furnished his family as well as himself: *Chapman v. Hughes*, 61 Miss. 339; and see *infra*, "Necessaries." And an infant husband is liable at common law for his wife's debts contracted by her before marriage: *Roach v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 768; *Cole v. Seeley*, 25 Vt. 220; *Nicholson v. Wilborn*, 13 Ga. 467; *Anderson v. Smith*, 33 Md. 465; see *post*, "Liability of Infant Husband for Wife's Antenuptial Debts."

CONTRACTS ENTERED INTO PURSUANT TO STATUTES. — If a contract of a minor be entered into under the authority or direction of a statute, it is binding upon him, so far as the question of infancy is concerned, and cannot be disaffirmed. This is so expressly enacted in California and Dakota: Cal. Civ. Code, sec. 37; Dak. Comp. Laws 1887, sec. 2518; Civ. Code, sec. 19. Whether infants are contemplated, when not expressly mentioned, by statutes which provide for the execution of contracts under peculiar circumstances, is, of course, entirely a question of legislative intent. Where the statute is general in its terms, and such that it may apply to infants as well as adults, infants will be included, unless a contrary intent appears. "Where the words of law, in their common and ordinary signification, are sufficient to include infants," says Chief Justice Wilnot, "the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject-matter of it": *Earl of Buckinghamshire v. Drury*, Wilm. Op. 194. If, then, an infant is imprisoned on execution in a civil suit for an assault and battery, he is entitled to a discharge from imprisonment on assigning his property as provided for by a statute general in its terms, and the assignment is valid, notwithstanding his infancy: *People ex rel. Smith v. Mullin*, 25 Wend. 698. Again, a recognizance entered into by a minor for his personal appearance at court, to answer a charge of committing a criminal offense, is binding upon him under statutes authorizing recognizances to be taken, and defendants to be discharged thereon, and making no distinction between minor defendants who may commit crimes and be arrested and imprisoned, and other persons: *State v. Weatherwax*, 12 Kan. 463; and see *Dial v. Wood*, 9 Baxt. 296. And where, by statute, a person who is accused of being the father of a bastard child may be required to give bond to answer to a complaint made by the mother to a justice, and to abide the order of the court thereon, his infancy is no defense to an action on the bond, either for him or his sureties: *McCall v. Parker*, 13 Met. 372. Infancy, furthermore, is no defense to an action on a bond, executed pursuant to statute, by the reputed father of a bastard child, conditioned to indemnify the town against liability for the support of the bastard: *People v. Moores*, 4 Denio, 518; 47 Am. Dec.

272; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. So if a statute authorizes the infant father of a bastard child to settle with the mother, and secure to her compensation for keeping the child, it impliedly gives him the power to execute instruments necessary in making such settlement, and hence to a promissory note executed under such circumstances, infancy will be no defense: *Gavin v. Burton*, 8 Ind. 69; and a statute which imposes upon the father of a bastard child the obligation of supporting it, and provides a means of compelling him to do so, is applicable to infants, although it does not speak of them; and an infant accused by the mother of a bastard child of being its father may admit his liability and bind himself by a contract to support the child: *Stowers v. Hollis*, 83 Ky. 544.

ENLISTMENT. — The subject of an infant's contracts of enlistment in the military service is a branch of the one just considered. It has been said that, "by the general policy of the law of England, the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended, but not destroyed. When the reason for its suspension ceases, the parental authority returns": Best, J., in *Rex v. Inhabitants of Rotherfield Greys*, 1 Barn. & C. 345, 349. In this country, there is no doubt, under the provision of the constitution of the United States giving Congress the power "to raise and support armies," and "to provide and maintain a navy," that Congress has the constitutional power to enlist minors into the army and navy of the United States; this it may do without the consent of the parents, guardians, or masters; for the right of a parent, guardian, or master to the service and control of the person of a minor child, ward, or apprentice is held in subordination to the sovereign right and power of the state to call upon its citizens to maintain and protect its existence. If the state recruits its army and navy by means of contracts of enlistment, such contracts may be made binding upon minors as well as adults: *United States v. Bainbridge*, 1 Mason, 71; *Commonwealth v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; *Commonwealth v. Barker*, 5 Binn. 423, 428, 429; *Commonwealth v. Downes*, 24 Pick. 227, 229; *United States v. Blakeney*, 3 Gratt. 405; *Phelan's Case*, 9 Abb. Pr. 286, 287; *In re Gregg*, 15 Wis. 479.

In *United States v. Bainbridge*, 1 Mason, 71, Story, J., says: "Whenever any disability, enacted by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit and for the public benefit, so that when *bona fide* made, it is neither void nor voidable, but is strictly obligatory upon them." It may be remarked that the learned justice attempts, in this passage, to uphold contracts of infants made valid and binding by statute on Lord Chief Justice Eyre's rule in *Keane v. Boycott*, 2 H. Black. 511, as to void, voidable, and binding contracts of infants at common law. There is no necessity for the effort; it is enough that the statute makes the contract binding. In *United States v. Blakeney*, 3 Gratt. 405, it is said by Baldwin, J.: "It seems to me to be obvious that the enlistment of a minor capable of bearing arms does not fall within the general rule of the municipal law in regard to the capacity of infants under

the age of twenty-one years to bind themselves by contract. Nor am I disposed to regard the enlistment as an exception to that rule. The rule, I think, has no application to the subject. The capacity of all citizens or subjects able to bear arms to bind themselves to do so by voluntary enlistment is in itself a high rule of the public law, to which the artificial and arbitrary rule of the municipal law forms no exception. The rule of the public law is subject to but two conditions: the ability of the party to carry arms, and his consent to do so; and these conditions may exist in as full force at the age of eighteen as at the age of twenty-one. The party is subject to no incapacity by any arbitrary rule in regard to discretion; and there is but little room for discretion when he is in the line of his allegiance and public duty." Again, it is said in *Lanahan v. Birge*, 30 Conn. 438, 443: "It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the state may require, is an incident to state sovereignty, and the subject of state constitutional and statutory regulation. . . . Enlistment is but another and less objectionable method of securing the military service required by the state and due from the citizen; and the same essential principles of public policy and necessity which impose the obligation to serve, and confer the power to enforce that obligation, require that the minor who is subject to military draft should be at liberty to enlist when called upon in that form to render the military service which the state requires. It may indeed be for his interest to do so, rather than be subject to draft, as it certainly is sound policy in the government that he should. But however that may be, the obligation to serve, and the right to require the service, exist, and are paramount. What a minor can be compelled to do he may contract to do, or do voluntarily; and if he is lawfully subject to military duty, and is lawfully called upon to enlist, his contract of enlistment is as valid and binding as that of an adult. . . . Although it is the policy of the law to give to a parent a right to the service and control of the person of a minor child until he has attained the age which the law has fixed for his emancipation, yet that right and authority are holden in subordination to those paramount rights and powers of the state which are essential to the maintenance of civil society and civil government."

The chief question of difficulty is, whether Congress, under the statutes which have been passed from time to time, has authorized the enlistment of minors; or, more particularly, whether the enlistment of minors below certain ages is binding upon them, especially when made without the consent of the minor's parents, guardian, or master. This question has been discussed in a number of cases, but with some little conflict as to results, caused principally from a careless overlooking of some of the statutes: See *United States v. Bainbridge*, 1 Mason, 71; *United States v. Anderson*, Cooke, 143; *Brunner's Col. Cas.* 202; *Matter of Keeler*, Hemp. 306; *In re McDonald*, 1 Low. 100; *Commonwealth v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; *Commonwealth v. Barker*, 5 Binn. 423; *Commonwealth v. Callan*, 6 Binn. 255; *Commonwealth v. Gamble*, 11 Serg. & R. 93; *Commonwealth v. Fox*, 7 Pa. St. 336; *United States v. Wright*, 5 Phila. 296, 297; *Commonwealth v. Cushing*, 11 Mass. 67; 6 Am. Dec. 156; *Commonwealth v. Downes*, 24 Pick. 227; *State v. Breatly*, 5 N. J. L. 555, 563; *Matter of Carlton*, 7 Cow. 471; *Phelan's Case*, 9 Abb. Pr. 286;

Matter of Dobbs, 21 How. Pr. 68; *State v. Dimick*, 12 N. H. 194; 37 Am. Dec. 197; *United States v. Blakeney*, 3 Gratt. 405; *United States v. Lipscomb*, 4 Gratt. 41; *In re Gregg*, 15 Wis. 479; *In re Higgins*, 16 Wis. 351; *In re Tarble*, 25 Wis. 390; and see, under state statutes, *Grace v. Wilber*, 10 Johns. 453, reversed in *Wilbur v. Grace*, 12 Johns. 68; *Lanahan v. Birge*, 30 Conn. 438; and under confederate laws, *Dies v. Hurtel*, 34 Ga. 109. It would serve no useful purpose to examine these cases, and the statutes upon which they are based, in detail. The reader will find a careful and exhaustive review of the question by Lowell, J., in the case of *In re McDonald*, 1 Low. 100; and by Brewer, J., in *In re Morrissey*, 137 U. S. 157.

ACT WHICH INFANT WOULD HAVE BEEN COMPELLED BY LAW TO DO.—The rule that if an infant does an act which the law would have compelled him to do, he will be bound thereby, has a connection with the subject of his contracts, and may therefore be here noticed and illustrated. The rule finds a somewhat frequent illustration in the case of his conveyances executed under such circumstances that the law would have compelled their execution, although it need not be confined in its application to such a case. The rule was thus announced by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, 1801, as follows: "If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him; as if he makes equal partition; if he pays rent; if he admits a copyholder, upon a surrender. But there is no occasion to enumerate instances; the authorities are express, and the reason decisive. 'Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law';" citing Co. Litt. 172 a. In fact, the point really decided in *Zouch v. Parsons*, 3 Burr. 1794, 1801, was, that a deed of lease and release executed by the infant heir of a mortgagee, upon payment to him of the mortgage debt, was binding, and could not be avoided by him, for on payment of the debt the infant was compellable by law to execute the conveyance. "There can be but little doubt," says Story, J., in *Tucker v. Moreland*, 10 Pet. 59, 67, 1 Am. Lead. Cas. *224, *226, "that the decision in *Zouch v. Parsons*, was perfectly correct; for it was the case of an infant mortgagee, releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do, and could have been compelled to do by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would by a suit have compelled him to do." In *Irvine v. Irvine*, 9 Wall. 617, 626, there is a *dictum*, based on *Zouch v. Parsons*, to the effect that there were some cases in which the deed of an infant was not even voidable. "They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do." And in *Burlington v. Clarke*, 2 Penr. & W. 115, 21 Am. Dec. 432, it was held, citing *Zouch v. Parsons*, that "where any person, even an infant, does that which by law he is compellable to do, that is, makes equal partition, he is bound."

The rule is well illustrated by the following cases. In *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488, a father, upon purchasing land, took the title in the name of his infant son for the purpose of defrauding his creditors, and afterwards sold the land, the son executing the deed to the purchaser, at his father's direction, during his infancy. It was held that as the infant's conveyance of the naked legal title was only that which a court of equity would have compelled him to make, he could not disaffirm it on attaining majority. In *Starr v. Wright*, 20 Ohio St. 97, which was a similar case, a father made a voluntary conveyance of his land to his minor son, to defraud his creditors.

The son, during his infancy, reconveyed the land to his father, to sell for the purpose of paying the father's debts, charged on the land, and the father sold the land to a third person, who paid full value therefor, and out of the purchase-money paid the liens on the land. It was decided that as the son held the land in trust for the father and holders of the liens thereon, and as he might have been compelled by law to submit to a sale thereof for their benefit, and having voluntarily conveyed the land during his minority to discharge the trust, he could not, as against a *bona fide* purchaser, for that purpose, be permitted to disaffirm the conveyance after attaining his majority. So in *Bridges v. Bidwell*, 20 Neb. 185, where a father, on purchasing certain real estate, had the conveyance made to his son, and took a note secured by mortgage of the land from the son, and assigned the note and mortgage as collateral security for a debt, the son, it was held, could not plead his minority to defeat the mortgage in the hands of the assignees; the court saying: "Otto Bidwell, being a mere trustee of the legal title to the property in question, could convey the same in execution of the trust, and having done so, neither he nor his father can plead his infancy to invalidate the deed." In *Trader v. Jarvis*, 23 W. Va. 100, also, a father made an assignment of a title bond to his sons to indemnify them against any loss they might sustain by reason of their being sureties on the father's note. Afterwards the father and sons assigned the title bond to a third person, who agreed to pay, and did pay, the note, thereby releasing the sons from liability thereon as sureties. It was held that the conditions upon which the bond had been assigned to the sons having been upon performed, they had no further interest in it, and one of the sons could not avoid his assignment to the third person on the ground of his minority.

Again, in *Prouty v. Edgar*, 6 Iowa, 353, it was decided that where a son held the legal title to real estate in trust for his father, who executed a bond for the conveyance of the same, and received the purchase-money, the son, who conveyed the land in accordance with the requirements of the bond, could not set aside the deed on the ground that he was a minor when it was executed. "Holding the title, as he did, for the benefit of his father, who had sold the land to the defendant, and received the purchase-money, we do not see how, even if his infancy was conclusively established, he could have resisted the claim of defendant for the conveyance of the legal title. He would have been required in equity to convey." So where an infant purchases land at an administrator's sale for the administrator, and immediately conveys to him, he cannot disaffirm such conveyance on arriving at full age as though the lands belonged to him: *Sheldon's Lessee v. Newton*, 3 Ohio St. 494.

In *Watson v. Cross*, 2 Duvall, 147, 148, the court expressed the opinion that an innkeeper could recover for entertainment furnished an infant, on the theory that he was legally bound to receive and entertain all guests apparently responsible and of good conduct who might come to his house, and the contract was therefore compulsory on his part, and hence the law would not permit it to be avoided on the other side for infancy. This reasoning is simply absurd. An innkeeper may demand his reasonable compensation in advance. If he suspects a person who applies to him for entertainment to be an infant, he should exercise this privilege; and if he fails to do so from the fact that he believed the proffered guest to be an adult, or from any other cause, and the plea of infancy is set up as a defense to his charges, he is in no worse a position than any one else who happens to trust an infant, and there is no more reason why he should be protected.

LIABILITY OF INFANT HUSBAND FOR WIFE'S ANTENUPTIAL DEBTS. — An infant husband is liable at common law for such debts of his wife contracted before marriage as she would have been legally liable to pay had she remained sole. Therefore the infant husband is liable for all the antenuptial debts of the wife if she were adult when she contracted them, and for her debts for necessities if she were an infant. The liability of the husband is, of course, not due to any idea of contract on his part, but is a common-law incident to the marriage; and the fact that the husband is an infant furnishes no excuse: *Roach v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 768; *Cole v. Seeley*, 25 Vt. 220; *Nicholson v. Wilborn*, 13 Ga. 467; *Anderson v. Smith*, 33 Md. 465. This rule, it will be observed, has a connection with the one just considered.

NECESSARIES — THE GENERAL RULE. — It has already been seen that an infant is liable for the reasonable value of necessities which may have been furnished him. To the general rule that an infant is incapable of binding himself by his contracts, this constitutes an exception. The exception is not introduced for the benefit of those who may deal with the infant, but for the benefit of the infant himself. It is to protect the infant that the law enables him to avoid his general contracts; and for the same reason the law compels him to answer for the reasonable value of necessities. Were the rule otherwise, the infant might not be able to procure suitable food, clothing, shelter, and education, though certain to possess means for payment in the future: See *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38, per Willes, J. Lord Coke thus expresses the rule: "An infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards": Co. Lit. 172 a. The obligation to pay for necessities is a legal one, for which the law gives an adequate remedy, and therefore a resort cannot be had to equity: *Oliver v. McDuffie*, 28 Ga. 522.

The rule is expressly preserved in some states by statute. Thus in California and Dakota, it is provided that "a minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them": Cal. Civ. Code, sec. 36; Dak. Comp. Laws 1887, sec. 2517; Civ. Code, sec. 18; and in Georgia it is enacted that "the contracts of an infant under twenty-one years of age are void [voidable], except for necessities; and for necessities they are not valid, unless the party furnishing them proves that the parent or guardian fails or refuses to supply sufficient necessities for the infant."

EXPRESS CONTRACTS FOR NECESSARIES. — Whether an infant is ever bound by his express contract with reference to the price or value of necessities furnished him has been disputed. It is agreed, however, that he cannot be held for more than their reasonable value. Or, as said in *Locke v. Smith*, 41 N. H. 346, an infant may bind himself to pay for necessities he obtains, so much as they are reasonably worth, but not what he may foolishly have agreed to pay for them; and in *Trainer v. Trumbull*, 141 Mass. 527, 530, it was observed that the question whether or not an infant made an express promise to pay for necessities was not important. "He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay from the necessity of his situation, just as in the case of a lunatic. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them."

It has been held that no action could be maintained against an infant on his express contract for necessities, and even that his express contract was void; yet we doubt that an action would be dismissed by any court at the present day because brought upon the express contract, if the contract were of such a form that its consideration could be inquired into, so that it might be ascertained whether the amount agreed to be paid was what the necessities were reasonably worth. If the agreed amount exceeded the reasonable value of the necessities, we do not see why the action upon the express contract should not still be maintained, and a recovery had for the difference; and if the amount stipulated to be paid was no more than the necessities were justly worth, we do not see why the express contract should not be said to be binding upon him to the fullest extent. We think these views are sustained by the weight of authority. For instance, it has been seen, *supra*, under the title "Service," that if services are rendered by an infant, pursuant to an agreement, in consideration of board, clothing, education, and other necessities, and the agreement is fairly made and fully executed on both sides, the infant cannot avoid the agreement and recover the value of the services on a *quantum meruit* merely because the services eventually proved to be worth somewhat more than the necessities furnished. In other words, such an executed agreement for necessities is completely binding, so far as it is executed: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Squier v. Hydliff*, 9 Mich. 274; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662; and see *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; *Breed v. Judd*, 1 Gray, 455, 458; but see *Wheatly v. Miscal*, 5 Ind. 142; and compare *Locke v. Smith*, 41 N. H. 346; *Mountain v. Fisher*, 22 Wis. 93. We do not see why this rule cannot be generalized; and we should accordingly say that an infant's contract for necessities, when fairly made and fully executed on both sides, by the furnishing of the necessities on the one side and the payment on the other, is binding; and that he cannot disaffirm the contract on afterwards discovering that he has paid more for the necessities than what they might have been obtained for, and recover back at least such excess.

Again, it has also been seen, *supra*, title "Bills and Notes," that a plea of infancy has sometimes been sustained to an action on a bill of exchange accepted or a promissory note made for necessities, and that the expression has sometimes been used that an infant's negotiable paper was always void, for the reason that the infant would be precluded from questioning the consideration if the paper came into the hands of a *bona fide* holder for value without notice, and before maturity: *Williamson v. Watts*, 1 Camp. 552; *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33; *Bouchell v. Clury*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9; *Fenton v. White*, 4 N. J. L. 100; *McCrillis v. How*, 3 N. H. 348; *Morton v. Steward*, 5 Ill. App. 533; yet even under this view the payee of the note might recover on a count for necessities: *McCrillis v. How*, 3 N. H. 348; and if the infant went into a court of equity to have the note canceled, he would be required to do equity by paying the reasonable value of the necessities: *McMinn v. Richmonds*, 6 Yerg. 9. These cases, founded, as they are, upon the mistaken notion that infancy is not a defense to an action on negotiable paper by a *bona fide* holder, are obviously entitled to very little respect. Furthermore, even conceding the basis of their ruling to be correct, it would furnish no reason why the payee of the paper given for necessities should not be entitled to maintain an action upon it, unless the most extreme view of Lord Chief Justice Eyre's rule be taken, that the paper should be declared absolutely void because the infant might

possibly be prejudiced by the paper coming into the hands of a *bona fide* holder: See *Morton v. Steward*, 5 Ill. App. 533; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26. Again, attention should be called to the fact that the cases simply involved the right of the infant to set up his disability in an action against him, and that it was really unnecessary for the court to assert that the paper was void. It might be held that infancy would be a good defense; but we do not understand the cases as going to the length of holding that the paper could not be ratified by the infant after reaching majority.

We consider it by all means the sounder and better doctrine that an action can be maintained against an infant upon his negotiable paper given for necessities, either by the original payee or by any subsequent holder, and that the plaintiff may recover the full face of the paper, or so much thereof as represents the reasonable value of the necessities; for infancy can be shown, and the consideration, therefore, of the paper be inquired into, no matter who may be plaintiff: *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26; *Askey v. Williams*, 74 Tex. 294; and see *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637. In *Bradley v. Pratt*, 23 Vt. 378, Redfield, J., said: "I do not well comprehend why, upon principle, any express contract may not be said to be binding upon him, when it is shown to have been given for necessities, and the price to have been reasonable, if it be one where the consideration may be inquired into. . . . And as confessedly the infant may *prima facie* avoid his note or bill by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all such cases by showing the consideration to be for necessities?" And in *Askey v. Williams*, 74 Tex. 294, it was well remarked: "We apprehend the better doctrine to be that an infant may make an express written contract for necessities upon which he may be sued, but that by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessities received by him. It is to his benefit to hold the express contract not void, but voidable; for if it be voidable merely, he can secure the advantage of a good bargain, and may relieve himself of it if it be a bad one, while, on the other hand, to hold it void would deprive him of the benefit of an advantageous contract."

The much-discussed case of *Russel v. Lee*, 1 Lev. 86, over which judges and writers have become considerably exercised in their attempts to reconcile it with other decisions, to the effect that an infant's single bill for necessities was good, we think is capable of an easy and satisfactory explanation on the foregoing grounds, it being possible to inquire into the consideration of the instrument. Compare *Beeler v. Young*, 1 Bibb, 519.

If the form of the instrument given for necessities be such as to preclude an inquiry into the consideration, it could very well be held that no action could be maintained thereon against the defense of infancy. Therefore it would seem that no action could be maintained at common law against an infant on a bond or other sealed instrument executed by him for necessities. And in case of a bond there would be a further objection on account of the penalty: See *Ayliff v. Archdale*, Cro. Eliz. 920; *Bliss v. Perryman*, 1 Seam. 484; *Hussey v. Jewett*, 9 Mass. 100, 101. These cases, however, are not very satisfactory. In *Ayliff v. Archdale*, Cro. Eliz. 920, it was held that an obligation in double the sum for money paid by the plaintiff for the necessary meat and drink of the defendant was void, but it was said that had the plaintiff taken an obligation for the very sum which he had laid out, it would have

been otherwise. The case is open to criticism in saying that the bond with the penalty was void, for that would mean that it could not be ratified; and we do not think that the court, as we understand its meaning, is correct in its *dictum* that an obligation under seal for even the very sum expended for necessities could be sustained against a plea of infancy. In *Bliss v. Perryman*, 1 Scam. 484, the court expressed itself to the effect that all bonds of infants, even for necessities, were void, and incapable of ratification so that actions could be maintained upon them; and see *Hussey v. Jewett*, 9 Mass. 100, 101. We think that *Guthrie v. Morris*, 22 Ark. 411, gives the true rule in holding that where, by statute, the consideration of a bond may be inquired into, an action may be maintained on a bond given by an infant for necessities. See quotations from this case *ante*, title "Bonds."

It is for the reason last given that the cases which hold that an infant is not liable on an account stated for necessities can be sustained, although the cases themselves give no reason. The items, or in other words, the consideration of an account stated, cannot be inquired into: *Wood v. Witherick*, Latch, 169; *Pickering v. Gunning*, Palmer, 528; *W. Jones*, 182; *Ingledeu v. Douglas*, 2 Stark. 36; *Trueman v. Hurst*, 1 Term Rep. 40; *Bartlett v. Elnery*, 1 Term Rep. 42, note; *Oliver v. Woodroffe*, 4 Mees. & W. 650; and see *Williams v. Moor*, 11 Mees. & W. 256, 265, per Baron Parke; and *supra*, title "Accounts Stated."

So far as the question of an infant's liability on his agreement to pay interest contained in his express contract for necessities is concerned, it was held in *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228, that interest would not be allowed; but this case was overruled, and we think correctly so, in *Bradley v. Pratt*, 23 Vt. 378. See the quotation from the opinion of Redfield, J., in this latter case, *supra*, title "Interest."

The deed of an infant to secure an indebtedness for necessities was held to be voidable in *Martin v. Gale*, L. R. 4 Ch. Div. 428, and to be valid and binding, to the extent of the value of the necessities, in *Cooper v. State*, 37 Ark. 421. In our opinion, the first of these rulings is correct. The note, or other instrument of indebtedness, may be valid, but we cannot see why the security should be equally binding. In *Askey v. Williams*, 74 Tex. 294, it was held that a power of sale given to the mortgagee, in a mortgage executed by an infant to secure the price of necessities, was not void, but voidable only, and a conveyance thereunder was ratified by the failure of the infant to tender the reasonable value of the necessities within a reasonable time after reaching majority.

Finally, it should be carefully remembered that an infant is liable for necessities only when they have been actually furnished to him. He is not liable for breach of his contract to take and pay for them. Thus, says Chipman, C. J., in *Pool v. Pratt*, 1 Chip. 252, 254: "An infant is bound by his contract for necessities, but it must be a contract executed by an actual delivery and receipt of the necessities to his use; and if he contract to purchase articles ever so necessary, he is not holden by his contract to receive and pay for the articles."

IMPLIED CONTRACTS FOR NECESSARIES. — An infant need not have expressly promised to pay for necessities, in order to render him liable therefor. It is sufficient if they be furnished him under such circumstances that a promise to pay for them can be implied: *Duncomb v. Tickridge*, Aleyn, 94; *Gay v. Ballou*, 4 Wend. 403; 21 Am. Dec. 158; *Hyman v. Cain*, 3 Jones, 111. Indeed, it has been seen under the last head that there is a theory that even if he makes an express contract, he cannot be held liable thereon, but only on a

promise implied by the law to pay what the necessities are reasonably worth. The necessities must be furnished under such circumstances that the law will imply a promise to pay for them on the part of the infant. Hence if the infant lives with a stranger as a member of his family, rendering such services as might be expected of him, and receiving in return a home, clothing, and care, such as a child of the stranger would receive, it seems evident to us that the law will allow him nothing for his services over and above what he has received. But see *Garner's Adm'r v. Board*, 27 Ind. 323; *Meredith v. Crawford*, 34 Ind. 399; compare *Mountain v. Fisher*, 22 Wis. 93; and see *ante*, title "Service," where this question is considered more at length. For this reason, there is no implied obligation on the part of an infant to pay for his support, as necessities, furnished by his step-father, with whom he lived as one of the family: *Hussey v. Roundtree*, Busb. L. 110.

NECESSARIES MUST HAVE BEEN PROCURED AT INSTANCE OF INFANT, AND CREDIT GIVEN TO HIM. — As said in the old case of *Duncomb v. Tickridge*, Aley, 94: "If an infant comes to a stranger and boards with him, there is a contract, in law, implied that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract," and there can be no recovery against the infant. It is plain that an infant is not liable for necessities supplied solely on the credit of her guardian, and charged to him, although the credit given to the guardian was induced by the fact that the ward had an estate of her own from which the payment was expected to come: *Simms v. Norris*, 5 Ala. 42. And a guardian, as such, has no right to enter into contracts for necessities which shall bind the infant ward: *Phelps v. Worcester*, 11 N. H. 51; *Wallis v. Bardwell*, 126 Mass. 366.

CIRCUMSTANCE OF INFANT'S BEING ALREADY SUPPLIED WITH NECESSARIES — PRESUMPTION. — If an infant is already properly supplied with necessities, whether by his parents, guardian, friends, tradesmen, or, in short, from any source whatever, it is well settled that his contracts for additional articles, or in reference to other matters which would otherwise be necessities, are not binding upon him as contracts for necessities: *Bainbridge v. Pickering*, 2 W. Black. 1325; *Ford v. Fothergill*, Peake N. P., 229; 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Story v. Pery*, 4 Car. & P. 526; *Burghart v. Angerstein*, 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465, 466; *Brayshaw v. Eaton*, 7 Scott, 183; 5 Bing. N. C. 231; *Steedman v. Rose*, Car. & M. 422; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; *Wailing v. Toll*, 9 Johns. 141; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652; *Angel v. McLellan*, 16 Mass. 28, 31; 8 Am. Dec. 118, 120; *Swift v. Bennett*, 10 Cush. 436, 437; *Davis Caldwell*, 12 Cush. 512, 513; *Hoyt v. Cusey*, 114 Mass. 397; 19 Am. Rep. 371; *Trainer v. Trumbull*, 141 Mass. 527, 530; *Assignees of Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Edwards v. Higgins*, 2 McCord Ch. 16; *Kraker v. Byrum*, 13 Rich. L. 163; *Guthrie v. Murphy*, 4 Watts, 80; 28 Am. Dec. 681; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Smith v. Young*, 2 Dev. & B. 26; *Hussey v. Roundtree*, Busb. L. 110; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Elrod v. Myers*, 2 Head, 33; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; *McKanna v. Merry*, 61 Ill. 177, 180; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449. An oversupply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against the infant only for so much as was actually needed: *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542. But a minor, it is held, although he have an income suffi-

cient to provide him with necessities suitable to his condition, may, nevertheless, contract for necessities on credit: *Burghart v. Hall*, 4 Mees. & W. 727; but see *Rivers v. Gregg*, 5 Rich. Eq. 274; *Nicholson v. Wilborn*, 13 Ga. 467.

A tradesman, therefore, who trusts an infant does so at his peril, and cannot recover for the price of articles furnished the infant on credit, as necessities, if he was already sufficiently supplied: *Story v. Pery*, 4 Car. & P. 526; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607. It is consequently incumbent upon the tradesman, before he gives credit to the infant, to make inquiries as to whether the infant was not at the time suitably provided with the articles: *Ford v. Fothergill*, Peake N. P. 229; 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Burghart v. Angerstein*, 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465, 466; *Steedman v. Rose*, Car. & M. 422; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542. "But," says Tindal, C. J., in *Dalton v. Gib*, 7 Scott, 117, also reported in 5 Bing. N. C. 198, "a party may, by his conduct and appearance, render inquiry unnecessary"; and hence where an infant lived with her mother at a fashionable hotel, and drove to the tradesman's shop in a carriage with her mother, who waited in the carriage while the daughter purchased the goods, some of which were taken away in the carriage, and others sent to the hotel, it was held that the jury might fairly assume that the goods were subjected to the mother's inspection, and that there was no necessity of making inquiry as to whether they were necessary or not; and where the friends of a minor, who was an orphan, had twice previously taken him to a dentist for like services, and the bills had been made out against the minor, and paid, the guardian furnishing the money, without notice, to the dentist, of any objection, it was held that "these acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services, as a prerequisite for a recovery in this suit, the work being necessary to meet an unsupplied want": *Strong v. Foote*, 42 Conn. 203. Compare, however, the cases in the next paragraph.

But the duty of the tradesman to inquire as to whether or not the infant is already supplied with similar articles before he trusts him is not a rule of law which will protect the tradesman, if, notwithstanding a diligent inquiry without ascertaining that the infant has been supplied, it turns out after he furnishes the articles applied for that the infant was sufficiently provided. If the infant was already supplied as a fact, the tradesman cannot recover for other goods supplied as necessities, whether the latter knew of the fact or not, at the time he gave credit to the infant: *Brayshaw v. Eaton*, 7 Scott, 183; 5 Bing. N. C. 231; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Trainer v. Trumbull*, 141 Mass. 527, 530; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; and see *Ryder v. Wombwell*, L. R. 4 Ex. 32. There is no inflexible rule of law, according to the case of *Brayshaw v. Eaton*, 7 Scott, 183, 5 Bing. N. C. 231, making it incumbent on a tradesman to institute inquiries as to the situation and resources of an infant before he gives him credit for necessities. "No doubt," says Tindal, C. J., in the report of the case in 7 Scott, "a prudent tradesman would make such inquiry; and the total absence of inquiry would afford matter of strong observation to the jury. But whether inquiry were made or not, the question for the jury would still be the same; and their verdict must depend, not upon the degree of knowledge acquired by the tradesman as to the infant's circumstances, but upon whether the goods were necessities or not." "In

my view," says Lopes, J., in *Barnes v. Toye*, L. R. 13 Q. B. D. 410, "it is immaterial whether the plaintiffs did or did not know of the existing supply, just at it is immaterial whether they did or did not know that the defendant was a minor."

It is sometimes stated as the reason for the rule that an infant is not liable as for necessities, when he is already sufficiently supplied, applicable to the condition of circumstances, where he resides with and is supported by his parents, or is under the care of a guardian, that it is a matter for the parents or guardian to decide what shall be suitable and proper for the maintenance of the child or ward, and third persons have no right to interfere with the exercise of that discretion. Thus in *Bainbridge v. Pickering*, 2 W. Black. 1325, it is said that "no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother." And in *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371, this notion was carried to the extent of holding that a case could not be excepted from the operation of the principle because the father was a poor man, and unable to pay for the necessities, — in this case medical attendance, — there being no refusal or neglect on his part to perform the duty of supporting and caring for his son. It may be very true that when a child is under the care and control of his parents or guardian, they have the right to determine the character of his support; but we do not think that this affords a reason for the rule under consideration even under that state of facts, and certainly it is no reason when the infant either has no parents or guardian, or is not under their control. We think the liability of the *parent* for necessities furnished his child under certain circumstances has been confused by these cases with the liability of the *child* himself. We think that the reason of the rule is simply that when the infant is amply supplied with necessities, nothing else is *necessary*, and hence he cannot be further bound as for necessities.

We should say it is certainly true that the mere fact that an infant had a father, mother, and guardian, neither of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished; *Trainer v. Trumbull*, 141 Mass. 527; and hence a person who takes from an almshouse a minor whose father was an inmate of a soldier's home, and whose mother was committed to a reformatory institution, who has a guardian, and who will inherit property on the death of his father, may maintain an action against the minor, after his father's death, for support and education furnished to him on the credit of his expectations of property; *Trainer v. Trumbull*, 141 Mass. 527. Furthermore, it is held that the mere fact that an infant lived with her mother did not necessarily render her incapable of binding herself for necessities; *Atchison v. Bruff*, 50 Barb. 381.

But when it appears that an infant lives with his father, or even his mother, who may not be under the same obligation to support him as the father, or is under the care of a guardian, it is a very natural and reasonable presumption that he is properly supplied with necessities, and he is therefore not liable for anything further, in the absence of evidence to the contrary; *Assignees of Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Jones v. Colvin*, 1 McMull. L. 14; *Perrin v. Wilson*, 10 Mo. 451; *State v. Cook*, 12 Ired. L. 67; *Freeman v. Bridger*, 4 Jones L. 1; 67 Am. Dec. 258; compare *Parsons v. Keys*, 43 Tex. 557. And if it appears that a parent or guardian has furnished the infant with such articles as he regarded ample for the support of the infant, according to his age and condition, or even that the

infant has been furnished with money by his parent or guardian, or by an allowance from the court, sufficient to supply him with necessaries, the presumption is, that he has been adequately and properly supplied, and a tradesman who seeks to charge the infant as for necessaries in addition has the burden of proving that such is not the fact: *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Rivers v. Gregg*, 5 Rich. Eq. 274. In *Rivers v. Gregg*, Dargan, C., says: "When it is shown that an infant is supplied with necessaries by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and reason must be that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was in a state of destitution, must take upon himself the burden of proving the allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then it should be limited to bare necessaries, and should not be allowed to embrace articles of luxury which would otherwise be suitable to the infant's fortune and condition in life." Again, he says: "It is a fallacy to suppose that a distinction can be drawn between the case where an infant is actually supplied with the necessaries themselves, and that where he receives an allowance under an order of the court, which he is to disburse himself in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution that would require his necessary wants to be otherwise supplied, it is obvious that the argument applies with equal force to the case where the infant is supplied with the necessary articles for his use and consumption. These he may sell, give away, or waste, so that it may become necessary that he should have more, to save him from nakedness and starvation." If these special circumstances do not appear, however, and the infant relies as a defense to an action for necessaries on the fact that he was at the time properly supplied with necessaries, it would seem that the burden of proving the fact rests upon him: See *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; also *Parsons v. Keys*, 43 Tex. 557, in which case, however, it appeared that the defendant had a guardian.

It has been determined that a stranger cannot recover the price of goods sold to an infant, as for necessaries, against the injunctions of his guardian: *Bredin v. Deen*, 2 Watts, 95; but, in our opinion, this ruling is altogether too broad. No doubt, if the guardian forbade the furnishing of the articles to the infant, this would be a circumstance to show that the infant was already properly supplied with necessaries; but we think the infant's liability depends, after all, upon the question whether he *was* so supplied. And in other cases it has been held that an infant may bind himself for necessaries purchased with the consent of his guardian: *Rundel v. Keeler*, 7 Watts, 237; *Watson v. Hensel*, 7 Watts, 344; but it was more correctly held in *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542, that the permission of a guardian to tradesmen to deal with his infant ward might, in a doubtful case, justify a *bona fide* supply to the infant beyond the limits of strict necessity, for which the infant would be liable; but the connivance of the guardian at an improper supply would not subject the ward to pay for it. Again, we should say that the infant's liability depends, except in a doubtful case, not on the fact that the guardian assented to the furnishing of the articles, but upon the question whether the infant was really properly supplied at the time.

TEST AS TO WHAT ARE NECESSARIES — STATION AND CIRCUMSTANCES OF INFANT — ARTICLES FOR MERE ORNAMENT OR PLEASURE. — It is obvious

that the question what are necessities depends upon the infant's station and condition in life. The term is entirely a relative one. What would be necessities in one case might not be in another: *Ford v. Fothergill*, v. 1 Esp. 211; *Peake N. P.* 229; *Hands v. Slaney*, 8 Term Rep. 578; *Burghart Angerstein*, 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465, 467; *Lowe v. Griffiths*, 1 Scott, 458, 460; 1 Hodges, 30, 31; *Brayshaw v. Eaton*, 7 Scott, 183, 187; 5 Bing. N. C. 231, 234; *Steedman v. Rose*, Car. & M. 422; *Smithpeters v. Griffin's Adm'r*, 10 B. Mon. 259, 260; *Breed v. Judd*, 1 Gray, 455, 458; *Price v. Sanders*, 60 Ind. 310, 314. "What are necessities," says Campbell, J., in *Epperson v. Nugent*, 57 Miss. 45, 47, 34 Am. Rep. 434, "cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own." And, says Dargan, Chancellor, in *Rivers v. Gregg*, 5 Rich. Eq. 274, 278, "necessaries, when the term is applied to an infant, are those things that are conducive and fairly proper for his comfortable support and education, according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation."

It is not to be understood that the term "necessaries" is to be confined to those things required merely to sustain life; but it includes what may be suitable and proper for the particular person according to his station and circumstances: *Peters v. Fleming*, 6 Mees. & W. 42; *Davis v. Caldwell*, 12 Cush. 512, 513; *Nicholson v. Spencer*, 11 Ga. 607, 610; *Jordan v. Coffield*, 70 N. C. 110; *Strong v. Foote*, 42 Conn. 203. Articles of mere luxury or of pure ornament would be excluded, unless, perhaps, in very extraordinary cases; but "luxurious articles of utility" might be included. Thus in *Peters v. Fleming*, 6 Mees. & W. 42, Baron Parke said: "It is perfectly clear that from the earliest time down to the present the word 'necessaries' was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out." Again, he says: "The true rule I take to be this: that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were for such articles, the infant may be responsible." Baron Alderson, who also gave his views to the same effect, again remarked, several years afterward: "Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed": *Chapple v. Cooper*, 13 Mees. & W. 252. Perhaps the same thing was intended when it was said in *Wharton v. Mackenzie*, 5 Q. B. 606, that articles of comfort and convenience merely, in a particular case, can never be included under the term "necessaries." See also *McKanna v. Merry*, 61 Ill. 177, 179. But in *Ryder v. Wombwell*, L. R. 4 Ex. 32, 41, Willes, J., observes: "Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century, it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair-powder; but, as a general rule, and in the absence of some

evidence to show that the usages of society required the use of such things, we think the rule laid down in *Peters v. Fleming*, 6 Mees. & W. 42, is correct."

On the other hand, the mere fact that articles furnished or services rendered were beneficial or desirable to the infant does not make him liable therefor as necessaries: *Tupper v. Cadwell*, 12 Met. 559, 563; 46 Am. Dec. 704; 705; *Phelps v. Worcester*, 11 N. H. 51; *Middlebury College v. Chandler*, 16 Vt. 683, 686; 42 Am. Dec. 537, 538; *Turner v. Gaither*, 83 N. C. 357, 362; 35 Am. Rep. 574, 576; and see other cases cited as to materials or money supplied and services performed for the benefit of his estate, *post*, title "Illustrations of What may be Necessaries." And we may here observe, also, that it is laid down as a general principle that necessaries concern the person and not the estate of the infant: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; but see *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434.

QUESTION OF NECESSARIES, WHETHER OF FACT OR LAW. — The province of the court and of the jury in solving the question of necessaries involves a proposition of considerable nicety, and one which is not always as clearly and definitely stated as it might be. The rule, having regard particularly to the latest cases, seems to be this: It is for the court to determine, as a matter of law, in the first place, whether the things supplied may fall within the general classes of necessaries, and if so, whether there is sufficient evidence to warrant the jury in finding that they were necessary. If either of these preliminary inquiries be decided in the negative, it is the duty of the court to nonsuit the plaintiff who seeks to recover from the infant. If they be decided in the affirmative, it is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the infant, as well as their reasonable value, and whether the infant was already sufficiently supplied: *Ruinsford v. Fenwick*, Cart. 216; *Harrison v. Fane*, 1 Scott N. R. 287, 289; 1 Man. & G. 550, 553; *Peters v. Fleming*, 6 Mees. & W. 42; *Brooker v. Scott*, 11 Mees. & W. 67; *Wharton v. Mackenzie*, 5 Q. B. 606; *Bryant v. Richardson*, L. R. 3 Ex. 93, note; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479; *Hill v. Arbon*, 34 L. T. 125; *Beeler v. Young*, 1 Bibb, 519; *Saunders v. Ott*, 1 McCord, 572; *Smith v. Young*, 2 Dev. & B. 26; *Tupper v. Cadwell*, 12 Met. 559, 563; 46 Am. Dec. 704, 705; *Merriam v. Cunningham*, 11 Cush. 40; *Davis v. Caldwell*, 12 Cush. 512, 513; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Jordan v. Coffield*, 70 N. C. 110, 113; *Henderson v. Fox*, 5 Ind. 489, 491; *Garr v. Haskett*, 86 Ind. 373; *McKanna v. Merry*, 61 Ill. 177; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; compare the following cases: *Maddox v. Miller*, 1 Maule & S. 738; *Brayshaw v. Euton*, 7 Scott, 183, 185; 5 Bing. N. C. 231, 235; *Hart v. Prater*, 1 Jur. 623; *Jenner v. Walker*, 19 L. T. 398; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Mohney v. Evans*, 51 Pa. St. 80; *Swift v. Bennett*, 10 Cush. 436, 437.

BURDEN OF PROOF AS TO NECESSARIES. — It has been seen, *supra*, title "Circumstance of Infant's being Already Supplied with Necessaries," that where it appears that an infant lives with his parents, or is under the care of a guardian, a presumption exists that he is properly supplied with necessaries. Therefore one who seeks to charge the infant further for articles otherwise conceded to be necessaries has the burden of showing that he was not so supplied. But it seems that if the infant does not live with his parents, nor is under the care of a guardian, but defends on the ground that he was already sufficiently provided, the burden is upon him to show the fact.

Aside from these cases, one claiming to recover from an infant on the ground of necessities is obliged to plead and prove the fact that having regard to the condition and circumstances of the infant, the things supplied the infant were such: *Ive v. Chester*, Cro. Jac. 560; *Mortara v. Hall*, 6 Sim. 465, 467; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Thrall v. Wright*, 38 Vt. 494; *Wood v. Losey*, 50 Mich. 475; and where the defendant pleaded infancy to an action on a promissory note, it was held that a reply that the note was given for necessities furnished the defendant at her request, without specifying in what the necessities consisted, was demurrable on account of its vagueness: *Burr v. Wilson*, 18 Tex. 367.

ILLUSTRATIONS OF WHAT MAY BE NECESSARIES. — According to the language of Lord Coke, heretofore quoted, "An infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards": Co. Lit. 172 a. Subject to the foregoing general rules, there, of course, can be no doubt that food is included in the term "necessaries" for which an infant may bind himself: See *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314; *Barnes v. Barnes*, 50 Conn. 572. Entertainment furnished by an innkeeper may be classed under the head of necessities, for which an infant is liable, and for which, it is held, the innkeeper has a lien on the infant's property brought within the inn: *Watson v. Cross*, 2 Duvall, 147. We think it doubtful that the innkeeper can claim a lien for the necessary entertainment. Besides, this case seems to us to be altogether incorrectly decided on the facts, which showed that the infant was placed by his guardian at school, but left there and came to the inn.

Suitable clothing may likewise undoubtedly be a necessary for which an infant may be held liable: See *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314. Regimentals furnished in perilous times, to an infant who was a member of a volunteer corps, were held by Lord Ellenborough to be necessities: *Coates v. Wilson*, 5 Esp. 152; and an infant, a captain in the army, was held liable to pay for a livery ordered for his servant, but not for cockades ordered for the soldiers of his company, in *Hands v. Slaney*, 8 Term Rep. 578; Lord Kenyon saying: "I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery." Clothing supplied an infant for his or her marriage, although not suitable for ordinary occasions, may be recovered for as necessities: *Sams v. Stockton*, 14 B. Mon. 232; *Garr v. Huskett*, 86 Ind. 373; *Jordan v. Cofield*, 70 N. C. 110, 113. But apparel consisting in part of velvet and satin suits laced with gold lace, supplied an infant who was one of the gentlemen of the chamber to the Earl of Essex, was held not to be necessary, in *Mackarell v. Bachelor*, Cro. Eliz. 583; compare *Nicholson v. Spencer*, 11 Ga. 607, 610, per Warner, J.; nor are racing-jackets necessities, unless for a jockey: *Buryhart v. Angerstein*, 6 Car. & P. 690, 698; and suitable clothing when supplied in an unreasonable quantity may not be recovered for: *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542.

Medical attendance, and articles furnished for the purpose of health, may also unquestionably be recovered for as necessities: See *Saunders v. Ott*, 1 McCord, 572; *Price v. Sanders*, 60 Ind. 310, 314. Services rendered by a dentist to a minor, in filling his teeth, which were decayed and gave him pain, the work being essential for their preservation, were held to be neces-

saries, in *Strong v. Foote*, 42 Conn. 203. So a horse may be a necessary for an infant who has medical advice to take exercise on horseback: *Hart v. Prater*, 1 Jur. 623; and see *Clowes v. Brooke*, 2 Strange, 1101; And. 277; *Aaron v. Harley*, 6 Rich. L. 26; but not if the horse is purchased by the infant for purposes of pleasure or business: *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479; *Beeler v. Young*, 1 Bibb, 519; *Smithpeters v. Griffin's Adm'r*, 10 B. Mon. 259, 260; *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Grave v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Wood v. Losey*, 50 Mich. 475; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; but see *Mohney v. Evans*, 51 Pa. St. 80.

A common-school education is a necessary: See *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; but not a collegiate education, at least not for an infant whose wealth, station in society, genius, or talent did not suggest its special fitness and expediency: *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; certainly a professional education is not a necessary: *Bouchell v. Clary*, 3 Brev. 194; *Turner v. Guither*, 83 N. C. 357; 35 Am. Rep. 574; and in *Smith v. Gibson*, Peake Ad. Cas. 52, Lord Kenyon was of the opinion that a sum of money advanced by the plaintiff to place out the infant wife of the defendant as an apprentice to learn millinery could not be considered a necessary.

Proper lodgings may also be included in necessities for an infant: See *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314; *Crisp v. Churchill*, cited 1 Bos. & P. 340; and where an infant rented a house, in which he lived and exercised his calling as a barber, it was held that it was properly left to the jury to determine whether the house was a necessary or not: *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30.

Purchases made by an infant for the purpose of trading, although he thereby gain his living, on the other hand, do not bind him: *Whittingham v. Hill*, Cro. Jac. 494; and see *Dilk v. Keighley*, 2 Esp. 480; but he is liable for so much of goods supplied him to trade with as were consumed as necessities in his own family: *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693; and as just seen, he may be chargeable for the use and occupation of a house in which he carries on his business, if he also uses it as a dwelling: *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30. He is not liable as for necessities for advances and supplies furnished him to enable him to carry on a plantation or farm: *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *State v. Howard*, 88 N. C. 650, 651. Nor is he liable for a horse purchased by him to be used in farming, although he thereby supports himself and family: *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Wood v. Losey*, 50 Mich. 475; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; but in *Mohney v. Evans*, 51 Pa. St. 80, where a lad seventeen years of age, carrying on a farm for his mother, who was a widow, and his guardian, purchased a pair of oxen, which were received by him and his mother, and afterwards exchanged for a horse, which was used to work the farm, it was held that the question whether the purchase of the oxen was necessary should have been submitted to the jury, — a decision at variance with the weight of authority. The board of four horses for six months, the principal use of which was in the business of a hackman, is likewise not within the class of necessities for which an infant is liable, although the horses were occasionally used to carry his family out for a drive: *Merriam v. Cunningham*, 11 Cush. 40.

An infant is not liable, furthermore, as for necessities, for repairs upon his dwelling-house, although required for the prevention of immediate and seri-

ous injury to the house: *Tupper v. Cadwell*, 12 Met. 559; 46 Am. Dec. 704; *Wallis v. Burdwell*, 126 Mass. 366; *West v. Gregg's Adm'r*, 1 Grant Cas. 53. Nor is he liable for labor and materials furnished for the erection of a dwelling or other building upon his land: *Freeman v. Bridger*, 4 Jones L. 1; 67 Am. Dec. 258; *Price v. Sanders*, 60 Ind. 310, 314; *Price v. Jennings*, 62 Ind. 111; *Wornock v. Loar*, 88 Ky. 000; Dewey, J., saying in *Tupper v. Cadwell*, 12 Met. 559, 46 Am. Dec. 704: "No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes the proper occasion for the appointment of a guardian, through whose agency such repairs can be made, and as the law assumes, more judiciously made, than through the agency of the minor." Nor is a contract for the insurance of his property against loss or damage by fire a contract for necessities which will bind the infant absolutely: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345. Nor is an infant liable, as for necessities, for money lent him for the purpose of removing encumbrances upon his estate: *West v. Gregg's Adm'r*, 1 Grant Cas. 53; *Mugee v. Welsh*, 18 Cal. 155.

Services and expenditures of counsel in an action to recover an infant's lands are likewise not necessities: *Phelps v. Worcester*, 11 N. H. 51. "An infant's rights to his estate are not prejudiced by his infancy, and any services to sustain such rights may be ratified by the infant when he comes of age, but cannot be enforced against him as necessities": *Phelps v. Worcester*, 11 N. H. 51. But in *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434, it was held that where there is no guardian, the infant's estate is liable for the fees of counsel whose services contributed to secure it; the court saying: "It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a lawsuit are generally excluded. This is, no doubt, the general rule, and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it. When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant, and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained." And see *Thrall v. Wright*, 38 Vt. 494. This is simply begging the question. The fact that the infant has no guardian is no reason why he should be able to contract concerning his estate. A guardian can easily be appointed. Nor does the fact that the services rendered have resulted in great benefit to the estate of the infant furnish a reason why he should be charged for them as for necessities. If this were so, the infant should be liable upon every contract by which he secured a benefit.

It is entirely a different matter, however, where the suit is strictly personal to the infant. Thus an infant is liable, as for necessities, for reasonable attorney's fees for defending him in a criminal action: *Askey v. Williams*, 74 Tex. 294. "We are of the opinion," says the court, "that the services of an attorney should be held necessary to an infant, where he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suit-

able to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare." So an infant is liable, as for necessities, for the reasonable services of an attorney, rendered in defending him in a bastardy proceeding, the proceeding affecting his liberty and good name: *Barker v. Hibbard*, 54 N. H. 539; 20 Am. Rep. 160. And in *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, it was held that while the ordinary fees and advances of an attorney in the prosecution of an infant's rights to property could not generally be said to be necessities, yet where such services and expenses were requisite for the personal relief, protection, and support of the infant, they may lawfully be contracted for by the infant, and he will be bound in law to pay for them. Therefore an attorney might recover of husband and wife fees for his services, and moneys expended by him in commencing and prosecuting in favor of the wife, while she was a *feme sole* and a minor, an action for breach of promise of marriage against her present husband, with whom the suit was settled by the marriage, it appearing that the services and expenses were absolutely requisite for the minor's personal relief, protection, and support, since she had been seduced and was pregnant, and was left by her relations and friends in a state of destitution and suffering. "A civil suit may, under extraordinary circumstances," says Hinman, C. J., "be the only means by which an infant can procure the absolute necessities which he requires; and where such is the case, it would be a reproach to the law to deny him the power of making the necessary contracts for its commencement and prosecution."

A number of cases of a very miscellaneous character have been decided, and remain to be noticed. Money paid at the request of an infant to relieve him from a military draft, to which he was subjected by law, was held not to come within the term "necessaries": *Dorrell v. Hastings*, 28 Ind. 478, 479. But a recognizance entered into by a minor for his personal appearance at court to answer to a criminal charge may, it was held, be classed among necessities, since the infant thereby secured his personal freedom: *State v. Weatherwax*, 12 Kan. 463, 464; and see also *Clarke v. Leslie*, 5 Esp. 28. A settlement which affords a provision to an infant who on her marriage has no other certain provision was decided in England to be a necessary, for the costs of preparing which she was accordingly liable to solicitors whom she engaged: *Helps v. Clayton*, 17 Com. B., N. S., 553. And an infant widow was held bound by her contract, as for necessities, for the funeral expenses of her husband, who left no property to be administered: *Chapple v. Cooper*, 13 Mees. & W. 252. A bridal outfit, including a chamber set, furnished an infant before her marriage, may be classed as necessities: *Jordan v. Coffield*, 70 N. C. 110, 113; and see also *Garr v. Haskett*, 86 Ind. 373; *Sams v. Stockton*, 14 B. Mon. 232. In *Hill v. Arbon*, 34 L. T. 123, where an infant, who was sole manager of a farm belonging to his father, and who had some expectations, bought on credit a pair of spurs, a suit of kersey horse-clothing, a hunting breastplate, a set of harness, a saddle, and other articles of like nature, it was held that there was reasonable evidence to go to the jury, considering the position of the infant, that the goods supplied were necessities, or, as Blackburn, J., well put it, "proprieties." But in *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542, the court drew the line at an account against an infant, which footed up to more than one thousand dollars, "comprising charges for many articles which might be ranked with necessities when supplied in reason, but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons in the space of fifteen months and twenty-one days;

to say nothing of three bowie-knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag to match; and in *Saunders v. Ott*, 1 McCord, 572, the court refused to allow for "liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings, etc., amounting to \$111.53½." And also in *Jenner v. Walker*, 19 L. T. 398, Cockburn, C. J., thought that betting-books, especially rich and costly ones, could not be necessities. Balls and serenades cannot be accounted necessities, even in case of a nobleman: *North and Thompson's Case*, cited Cart. 216.

An infant lieutenant in the English royal navy was held not answerable for the price of a chronometer, as a necessary, in *Berolles v. Ramsay*, Holt N. P. 77. But Baron Parke thought that breastpins and a watch-chain, furnished the eldest son of a gentleman of fortune and member of Parliament, who was an undergraduate of the University of Cambridge, might be necessities; "the former [the breastpins] might be either of necessity or of ornament; the usefulness of the other might depend on this: whether the watch was necessary. If it was, then the chain might become necessary itself." In *Ryder v. Wombwell*, L. R. 4 Ex. 32, an infant, the son of a baronet, and having an income of five hundred pounds a year, with the prospect of twenty thousand pounds on attaining his majority, bought on credit a pair of jeweled solitaire shirt-sleeve buttons worth twenty-five pounds, and a silver goblet worth fifteen pounds fifteen shillings, the latter for presentation to a friend at whose house he was staying. No evidence was given of anything peculiar in his station rendering it exceptionally necessary for him to have such articles. The jury, in answer to the question put to them, found that the articles were necessities, and suitable to the infant's station and degree. It was held that as the *onus* was on the plaintiff seeking to recover, and as he gave no evidence to show that the articles were necessities, the question ought not to have been left to the jury. But in *Jenner v. Walker*, 19 L. T. 398, Chief Justice Cockburn thought that a present of amethyst and diamond ear-rings, by a young gentleman who had an income of from seven hundred to one thousand pounds per annum, to a young lady to whom he was engaged to be married, and who eventually became his wife, were necessities.

Dinners, confectionery, and fruit supplied to an infant, an undergraduate of Cambridge, having lodgings in town, are *prima facie* not necessities, according to *Brooker v. Scott*, 11 Mees. & W. 67; and in an action brought against him for such supplies, no special circumstances being shown, the court directed a nonsuit; and in another case, on a very similar state of facts, it was held that in default of explanation, the court should decide the articles not to be necessities, as a matter of law; but that in case of explanation, as if fruit or other articles were supplied in illness, the question whether they were necessities or not should be left to the jury, with proper directions: *Wharton v. Mackenzie*, 5 Q. B. 606. So if there is no evidence to show that cigars and tobacco are necessary, medicinally or otherwise, in a particular case, the question should not be left to the jury: *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

In an action to recover £150, the purchase price of a hunter sold by the plaintiff to the defendant, in which there was a plea of infancy, and a replication of necessities, it appeared that the defendant was an English youth on a visit to a country hunting gentleman in Ireland. At the time of the bargain, he stated that he was a member of the Surrey Stag Hunt, and was accustomed to hunt his step-father's horses, and talked of being allowed six hundred pounds a year by his step-father. It was held that there was no evi-

dence which could be properly left to the jury that the hunter was a necessary: *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479. In *Beeler v. Young*, 1 Bibb, 519, a horse saddle and bridle were held not to be necessities, for which an infant would be liable; and see also *Smithpeters v. Griffin's Adm'r*, 10 B. Mon. 259, 260. But a horse, as said before, might be a necessary, if exercise on horseback be recommended by a physician: *Hart v. Prater*, 1 Jur. 623; and see *Clowes v. Brooke*, 2 Strange, 1101; And. 277; *Aaron v. Harley*, 6 Rich. L. 26.

Money advanced for the traveling expenses of an infant on a pleasure trip cannot be recovered as a necessary: *McKann v. Merry*, 61 Ill. 177; but, plainly, traveling expenses under different circumstances might be a necessary: See *Breed v. Judd*, 1 Gray, 455, 458. Money paid by a master for coach fares for the mother of his infant servant is not a necessary, and therefore cannot be deducted from the wages of the servant: *Hedgeley v. Holt*, 4 Car. & P. 104. In *Charters v. Bayntun*, 7 Car. & P. 52, it was left to the jury to say whether a stanhope was a necessary for an infant, under the circumstances, for the hire and repair of which he was liable; but in *Howard v. Simpkins*, 70 Ga. 322, a buggy was held not to be an article of necessity for an infant; and in *Pyne v. Wood*, 145 Mass. 558, a bicycle was held not to be a necessary for an infant seventeen years of age, who lived with his father, and worked in a shoe-shop a mile from his father's house, and who went home for his dinner, and was allowed to be absent an hour.

INFANT IS LIABLE FOR NECESSARIES FURNISHED HIS WIFE AND FAMILY, as well as those furnished himself, and for the same reason: *Hill and Blacton's Case*, 1 Sid. 112; *Turner v. Trisby*, 1 Strange, 168; *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Cantine v. Phillips's Adm'r*, 5 Harr. (Del.) 423; *Price v. Sanders*, 60 Ind. 310, 315; *Chapman v. Hughes*, 61 Miss. 339.

LIABILITY FOR MONEY BORROWED OR ADVANCED FOR NECESSARIES.—As before observed, under the head "Lending and Borrowing of Money," it seems to be the rule that an infant is not liable at law for money borrowed by him to pay for necessities, although actually expended by him for that purpose, but that he is liable for money directly applied by the lender in procuring necessities for him: *Rearsby and Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Eurle v. Peale*, 10 Mod. 67; 1 Salk. 386; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197; 1 Ld. Raym. 344; *Probart v. Knouth*, 2 Esp. 472, note; *Clarke v. Leslie*, 5 Esp. 28; *Hedgeley v. Holt*, 4 Car. & P. 104, 105; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sand. 306; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb, 519. But in equity the infant is liable for money borrowed and actually applied by him for the payment of necessities: *Marlow v. Pitfield*, 1 P. Wms. 558; *Hickman v. Hall's Adm'r*, 5 Litt. 338, 342; *Watson v. Cross*, 2 Duvall, 147, 149; *Price v. Sanders*, 60 Ind. 310. The reason why an infant is not liable at law for money borrowed by him to pay for necessities, although actually expended by him for that purpose, is usually stated to be that the lender, by intrusting the money to the infant, enables him to waste and misapply it, and his subsequent proper use of it could not confer an action when none existed, upon the contract of lending at the time of the loan. We think, however, that the true reason why the lender cannot recover at law is the want of privity between the lender and the one who supplies the necessities: See *Bradley v. Pratt*, 23 Vt. 378, 386, per Redfield, J.; and see, in this connection, the remarks of Dargan, C., in *Rivers v. Gregg*, 5 Rich. Eq. 274.

In conformity with these rules, if an infant gives a note for necessities, signed by a surety, the surety who afterwards pays the note is entitled to recover the amount so paid from the infant: *Conn v. Coburn*, 7 N. H. 368; 26 Am. Dec. 746; *Haine's Adm'r v. Tarrant*, 2 Hill (S. C.) 400; and see *Dial v. Wood*, 9 Baxt. 296; *contra*, *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759.

DISAFFIRMANCE. — The rules concerning the disaffirmance of their contracts by infants relate simply to those contracts which are voidable. Such contracts as are binding upon them, either by virtue of the common law or by statute, very plainly cannot be avoided on the ground of infancy. And should a statute make any or all of their contracts absolutely void, or should the notion be persisted in, contrary to principle and authority, that certain of their contracts are void at the common law, there can obviously be no disaffirmance in the proper sense of the word; for the contracts being mere nullities, there is nothing to disaffirm. In regard to their voidable contracts, it can be laid down as a general rule that they may be avoided by the infant contracting parties, whether the contracts be completely executory or executed, or whether executory on either side and executed on the other. The idea sometimes entertained that a contract entirely executed is not subject to disaffirmance by the infant because it is executed must necessarily be erroneous, unless it be true that certain contracts are no longer voidable when executed; for a contract cannot be voidable by him, and yet be binding upon him. It is certainly not true that the great mass of infants' contracts are binding when executed, and we do not believe it is ever true, either upon principle or authority, that any contract which an infant may make ceases to be voidable when and because it is executed. It may be that an infant is sometimes required to restore the consideration which he may have received on his disaffirmance, and, where this is a money payment, and he seeks to recover money, that the law, to avoid circuity of action, will leave the parties, so far as the infant has been compensated, in the condition in which it finds them; but this is merely an incident of the execution of the contract: See *supra*, "Service."

We may again observe, in this connection, that all voidable contracts of infants are binding until disaffirmed by them. It is not the rule that they are nugatory until ratified, but that they are good until avoided. If a contract has been ratified, it is then no longer subject to disaffirmance; but until it is ratified, it may be disaffirmed. These propositions are necessarily involved in the idea of a voidable contract. It makes no difference whether the contract be executory or executed, although it may be that a ratification will be held to result from slighter acts and circumstances in the latter case than in the former. See a distinction between executory and executed contracts, as to their binding force, noticed and criticised *supra*, title "Void and Voidable."

DISAFFIRMANCE OF PART OF TRANSACTION. — If an infant enters into several distinct and separate contracts he may evidently disaffirm one or more, and not the others. Thus he may, on arriving at full age, disaffirm one of several deeds made by him during his minority, and leave the others to have legal effect as if made when of full age: *Tunison v. Chamblin*, 88 Ill. 378, 387. But he cannot affirm a portion of a single transaction, and disaffirm the rest. He must abide by it, or disaffirm it *in toto*. If he ratifies a part of the agreement, he ratifies it all. Therefore if a contract be upon a condition, if he wishes to accept the contract he must accept it in its entirety, with the condition: *Biederman v. O'Conner*, 117 Ill. 493; *Lowry v. Drake's Heirs*, 1 Dana, 46. So infants cannot, on coming of age, adopt their agreement for the partition of

lands in part, but may be compelled in equity to elect either to confirm the agreement or to relinquish all rights and pretensions resulting from it: *Overbach v. Heermance*, 1 Hopk. Ch. 337; 14 Am. Dec. 546. And where an infant purchased a kettle and other articles of personal property, and gave his note for the price, under an agreement that he might return the kettle if it did not answer his purposes, and after he came of age the vendor requested him to return it if he did not intend to keep it, but he retained it and used it for several months afterwards, it was held that he thereby ratified the contract as to the kettle, and consequently the entire contract, and therefore an action was maintainable against him on the note: *Aldrich v. Grimes*, 10 N. H. 194. And where an infant sells a horse, and receives the vendee's notes for the price, he affirms the contract in all respects by bringing an action on the notes after coming of age; and hence he cannot, by pleading his infancy, preclude the defendant from offsetting damages for a breach of warranty on the sale of the horse: *Morrill v. Aden*, 19 Vt. 505.

Again, an infant who purchases land or chattels cannot, on coming of age, retain the property and repudiate his note given for the price, or other agreement upon which he obtained the property: *Kitchen v. Lee*, 11 Paige, 107; 42 Am. Dec. 101; *Henry v. Root*, 33 N. Y. 526; *Weed v. Beebe*, 21 Vt. 495; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Armfield v. Tate*, 7 Ired. L. 258; *Bennett v. McLaughlin*, 13 Ill. App. 349; not even by showing that a partial payment made by him was equal to the entire value of the property; *Bennett v. McLaughlin*, 13 Ill. App. 349. Thus in *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101, a retiring partner assigned his interest in the partnership property to his copartner, on condition that the latter would pay the debts of the firm. The assignee subsequently refused to pay the debts, on the ground of infancy. It was held that he could not retain the partnership effects, and at the same time refuse to perform the condition upon which they were assigned to him. Where, too, an infant purchases land or chattels, and gives back a mortgage thereon to secure the price, the conveyance or transfer and the mortgage constitute but one transaction, and the infant cannot avoid the mortgage without also avoiding the conveyance or transfer, or in other words, he cannot repudiate the one and affirm the other; and if, after coming of age, he ratifies the purchase, he thereby necessarily ratifies the mortgage: *Roberts v. Wiggins*, 1 N. H. 73; 8 Am. Dec. 38; *Heath v. West*, 28 N. H. 101; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Ottman v. Moak*, 3 Sand. Ch. 431; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368; *Young v. McKee*, 13 Mich. 552; *Curtiss v. McDougal*, 26 Ohio St. 66; *Calis v. Day*, 38 Wis. 643; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Betts v. Carroll*, 6 Mo. App. 518. "Nothing is clearer," says the court in *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589, "than that a party cannot affirm an entire contract in part and avoid it in part; and to allow the plaintiff to avail himself of the deed conveying the land to him, and to avoid the mortgage given by him to secure the purchase-money, would be no less repugnant to law than to the plainest dictates of justice." So in a suit to enforce a lien for the purchase-money reserved on the face of a deed, the infancy of the grantee is no defense, the land being still retained by him: *Smith v. Henkel*, 81 Va. 524. And where an infant purchases land, and assumes the payment of mortgages as a part of the purchase price, and afterwards, and during her minority, procures a loan, and mortgages the land to pay off the prior encumbrances, if she ratifies the purchase of the land by dealing with it as owner, after her majority, she thereby ratifies her agreement to pay the existing

mortgages, and also ratifies the manner in which she dealt with those mortgages, and consequently ratifies the subsequent mortgage given to secure the money borrowed by her to satisfy them: *Langdon v. Cluyson*, 75 Mich. 204. So, it is held, a surety on an infant's note for the purchase price of chattels who has satisfied a judgment recovered on the note, and received from the infant a note for the amount so paid secured by a mortgage of the same chattels, is entitled to be subrogated to the rights of the vendor, who, had he taken the mortgage for the price, would have been entitled to enforce it: *Knaggs v. Green*, 48 Wis. 601; 33 Am. Rep. 838.

DISAFFIRMANCE IS NOT A FRAUDULENT ACT which will avoid it, or render the infant liable at law as for fraud, or against which a court of equity will relieve on that ground: *Tucker v. Moreland*, 10 Pet. 59, 77; 1 Am. Lead. Cas. *224 *234; *Clumorgan v. Lane*, 9 Mo. 442, 471; *Huth v. Carondelet etc. Ry Co.*, 56 Mo. 202, 210; *Burns v. Hill*, 19 Ga. 22; *Seabrook v. Gregg*, 2 S. C. 68; *Brantley v. Wolf*, 60 Miss. 420, 430. In *Tucker v. Moreland*, 10 Pet. 59, 77, 1 Am. Lead. Cas. *224, *234, Story, J. says: "In many cases the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness, and misconduct"; and again, it is said in *Brantley v. Wolf*, 60 Miss. 420, 430, "in one sense it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits, and thereafter to repudiate it to the prejudice of the other party; but legal fraud cannot be predicated of such conduct by a minor where it has been unmarked with any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability, and of this right all men are bound to take notice." As to whether an infant will be estopped from availing himself of his infancy as against a contract entered into through his concealments or misrepresentations, see *supra*, "Infant's Concealment or Misrepresentation as to Age, etc."; and as to his liability in damages for his frauds, and other torts connected with his contracts, see *post*, "Torts of Infants Connected with Contracts."

DISAFFIRMANCE AS AGAINST SUBSEQUENT BONA FIDE PURCHASER. — The protection of *bona fide* purchaser for value, and without notice, does not avail as against an infant's right to disaffirm his contract. His right to avoid his contract is an absolute and paramount right, superior to all equities of other persons. Therefore a purchaser of personal property from the vendee of an infant, although a purchaser for value, and without notice, cannot hold the property as against the infant who chooses to rescind his contract of sale: *Hill v. Anderson*, 5 Smedes & M. 216. Nor is a *bona fide* holder of a negotiable instrument for value before maturity, and without notice, protected against the plea of infancy: *Howard v. Simpkins*, 70 Ga. 322; Tiedeman on Commercial Paper, sec. 250. And an infant may avoid his deed of conveyance, or executory contract to convey real property, as against a subsequent *bona fide* purchaser from his grantee or vendee for value, and without notice of the fact of infancy: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 213; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Jenkins v. Jenkins*, 12 Iowa, 195, 200; *Miles v. Lingerian*, 24 Ind. 385; *Sims v. Smith*, 86 Ind. 577; *Buchanan v. Hubbard*, 96 Ind. 1; *Brantley v. Wolf*, 60 Miss. 420; *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; "the right of the infant to avoid his contracts is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against *bona*

fide purchasers from the grantee": *Brantley v. Wolf*, 60 Miss. 420; and in *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629, in which dower was claimed by a widow who had renounced it during her infancy, it was said: "The plea of purchaser for valuable consideration without notice is equitable in its character, and has no proper application to a claim purely legal, like that for dower." The fact that an infant induced a person to purchase his land upon the faith of his representation that he was of full age, it has also been held, cannot avail such purchaser in a contest between him and an innocent purchaser to whom the grantor made a subsequent conveyance after he became of age: *Vallandingham v. Johnson*, 85 Ky. 288.

DISAFFIRMANCE OF PREVIOUS DEED, WHERE SUBSEQUENT GRANTEE HAS NOTICE THEREOF. — If an infant disaffirms his deed of conveyance by the execution, after he reaches majority, of another deed to a different person, the second deed is not rendered fraudulent and void from the fact that the grantee had notice of the prior deed made during infancy. The privilege of an infant to disaffirm his contracts might be of little value to him if he were permitted to dispose of the property previously conveyed to such persons only who had no notice of that conveyance: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Clamorgan v. Lane*, 9 Mo. 442, 471. "The transaction is not, however, favored by a court. If the party purchasing under such circumstances gets the legal advantage, he will not be deprived of it; but further than this, the court is under no obligation to go": *Clamorgan v. Lane*, 9 Mo. 442, 471. It has been held, also, that if an infant conveys his land, and on attaining his majority, ratifies the conveyance, and then conveys to another person for a valuable consideration, the second grantee, having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land: *Black v. Hills*, 36 Ill. 376; 87 Am. Dec. 224; the court saying: "The argument that the subsequent purchaser takes with knowledge that the grantor may have ratified, and therefore takes subject to that risk, would apply as well to all conveyances. For in every instance where a deed is made, the grantee knows that the grantor may have made a former conveyance, and it is precisely to protect the innocent purchaser against such chances that our registry laws are enacted." And again, the court says: "It can in no just sense be said that the grantee of a person who had conveyed during his infancy is not to be deemed an innocent purchaser, if he has notice of the first deed. He has as perfect a legal right to purchase land which his grantor had sold during minority as he would have to purchase land that had never been conveyed at all." We stop to remark that this latter language is a little strong. Finally, it was observed: "If the ratification is by means of a written instrument, it is within the policy of the registry laws. . . . If the ratification is by acts *in pais*, then a subsequent purchaser must be affected with notice of those acts."

DISAFFIRMANCE IS QUESTION OF INTENTION, TO BE INDICATED BY SOME POSITIVE ACT. — It is almost a self-evident proposition that there can be no disaffirmance of a contract unless there is an intention to disaffirm on the part of the infant, and that this intention must be indicated by some positive act inconsistent with the continued validity of the contract: *Illinois Land and Loan Co. v. Beem*, 2 Ill. App. 390; *Dixon v. Merritt*, 21 Minn. 196; *Roberts v. Wiggins*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40. And where a female infant conveyed her real estate to trustees, by way of marriage settlement, it is not sufficient to compel a purchaser of the land from her, after attaining her majority, to accept a conveyance, to allege that no act had been done or caused to be done by her after coming of age in confirmation of the deed of settle-

ment; but it must be alleged and proved that she has, since coming of age, by some positive act, disaffirmed such deed, the deed of an infant not being as a matter of course superseded and annulled by the mere execution, after he attains his age, of another deed to another person: *Dominick v. Michael*, 4 Sand. 374; and see also *Voorhies v. Voorhies*, 24 Barb. 150, 153. It is not necessary, however, that the infant should expressly disaffirm his contract. It may be enough if the act of disaffirmance be inconsistent with it: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 338; 76 Am. Dec. 209, 212. This proposition finds a frequent illustration in those cases where an infant's deed is held to be disaffirmed by the execution, on coming of age, of another deed of the same premises to another person: See *post*, "Execution of Second Deed, Mortgage, or Lease." A disaffirmance, involving, as it does, a mental condition, "necessarily implies the action of a free mind, exempt from all constraint or disability": *Sims v. Everhardt*, 102 U. S. 300, 312.

ACT OF DISAFFIRMANCE, WHETHER REQUIRED TO BE OF EQUAL SOLEMNITY AS ACT DISAFFIRMED. — It seems that a feoffment of an infant with livery of seisin could only be avoided by an entry when he came of age which was an act of equal notoriety, or by writ of *dum fuit infra ætatem*: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 255; *Dominick v. Michael*, 4 Sand. 374, 421; *Vallandigham v. Johnson*, 85 Ky. 288, 293. Some few early cases have taken the view that deeds operating under the statute of uses and statutory grants executed by infants must be disaffirmed by entry, or some other act of equal notoriety with the original conveyance; a re-entry, however, not being indispensable, as in case of feoffments: See *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Voorhies v. Voorhies*, 24 Barb. 150; and see *Dominick v. Michael*, 4 Sand. 374, 421. And there can certainly be no question that if the disaffirming act is of equal notoriety with the deed or other contract, it is all that the law requires: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 338; 76 Am. Dec. 209, 212; *Vallandigham v. Johnson*, 85 Ky. 288, 292; and see *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. The better opinion, however, is, that any act of the infant unequivocally manifesting an intention to disaffirm his deed or contract generally is sufficient: *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *White v. Flora*, 2 Over. 426, 431; *State v. Plaisted*, 43 N. H. 413; *Cogley v. Cushman*, 16 Minn. 397, 402; *Chapin v. Shafer*, 49 N. Y. 407; *Long v. Williams*, 74 Ind. 115; *Allen v. Poole*, 54 Miss. 323, 331; *McCarthy v. Nicrosi*, 72 Ala. 332, 335; 47 Am. Rep. 418, 420; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225; *Bagley v. Fletcher*, 44 Ark. 153; and see *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40. Thus in *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253, Mr. Justice Lane observes: "Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant. But I cannot find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary. We believe that an entry, suit, or action, a subsequent conveyance, an effort to restore parties to their original condition, or an act unequivocally manifesting the intention, would render the avoidance effectual." And in *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225, Martin, C., says: "The ancient doctrine, which required the disaffirming act to be of as high and solemn a character as the act disaffirmed, has no place in modern law. The disaffirming act need take no particular form or expression. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument."

It may be here stated that a distinction has been made between the nature

of the acts which are sufficient to ratify an infant's deed or other contract, and those which are required to disaffirm it. "There is," says Strong, J., in *Irvine v. Irvine*, 9 Wall. 617, 627, "a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. . . . There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to the grantee. Now, if the deed be avoided, the ownership of the land is retransferred. The seisin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is therefore itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner."

PARTICULAR ACTS WHICH WILL AMOUNT TO DISAFFIRMANCE. — The foregoing general propositions, that disaffirmance is a question of intention to be indicated by some positive act on the part of the infant, and that any act of his unequivocally manifesting an intention to disaffirm his contract will be sufficient for that purpose, will now be illustrated.

A distinct and unequivocal assertion of ownership over property sold during minority which results in obtaining its possession is such a disavowal of the contract by the infant as will relieve the purchaser from his obligation to pay for the same; but the acts of ownership must be distinct and unequivocal: *Harris v. Musgrove*, 59 Tex. 401. And where an infant purchased personal property, and gave his promissory note for the price, his tender of the property to the payee, with a demand of the surrender of the note, annuls the contract on both sides: *Hoyt v. Wilkinson*, 57 Vt. 404.

RE-ENTRY IN CASE OF CONVEYANCES. — It has been seen under the preceding title but one that a re-entry by the grantor, after coming of age, upon land conveyed during his infancy, for the purpose of avoiding the deed, will have that effect, although other acts besides re-entry may be sufficient, except, perhaps, in case of feoffments. *A fortiori* would this be true if coupled with other acts indicating a disaffirmance. Thus a re-entry, with notice of disaffirmance, will avoid the deed: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. Again, in *White v. Flora*, 2 Over. 426, 431, an infant, on coming of age, expressed himself to the effect that he would never agree to a deed executed by him during infancy, instituted a search for the land, entered upon it, and made an agreement to convey it. It was held that his deed was thereby disaffirmed. As to whether an entry is ever necessary before the execution of another deed of the lands to a different person, or before bringing ejectment for the lands, after the infant comes of age, see *post*, "Execution of a Second Deed," and "Disaffirmance by Suit."

NOTICE OF DISAFFIRMANCE. — A notice of disaffirmance of his deed executed during infancy, given by the grantor after coming of age, is a sufficient act of avoidance: *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115; *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; especially if coupled with a re-entry: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. If this is true of his deeds of conveyance, it is certainly true of his contracts in general.

SALE OF PERSONAL PROPERTY PREVIOUSLY MORTGAGED by the infant to another person very plainly indicates an intention to avoid the mortgage,

and hence will amount to a disaffirmance of it, if the sale be absolute and unconditional: *Chapin v. Shafer*, 49 N. Y. 407; *State v. Plaisted*, 43 N. H. 413; *State v. Howard*, 88 N. C. 650.

EXECUTION OF A SECOND DEED, MORTGAGE, OR LEASE. — An infant's deed operating under the statute of uses, or his statutory conveyance, it is well settled, is disaffirmed by his execution, after attaining majority, of a like absolute and inconsistent deed of conveyance to another person: *Frost v. Wolverston*, 1 Strange, 94; *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead Cas. *224; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Roberts v. Wiggins*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 326; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Harris v. Cannon*, 6 Ga. 382; *Pitcher v. Laycock*, 7 Ind. 398; *Riggs v. Fisk*, 64 Ind. 100; *Long v. Williams*, 74 Ind. 115; *Losey v. Bowl*, 94 Ind. 67, 70; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *McGan v. Marshall*, 7 Humph. 121; *Youse v. Norcoms*, 12 Mo. 549, 564; 51 Am. Dec. 175; *Norcum v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441; *Hastings v. Dollarhide*, 24 Cal. 195; *Dawson v. Helmes*, 30 Minn. 107; *Bagley v. Fletcher*, 44 Ark. 153; *Haynes v. Bennett*, 53 Mich. 15; *Corbett v. Spencer*, 63 Mich. 731; *Vallandigham v. Johnson*, 85 Ky. 288. This is so at the present time in Georgia, by statute: Code 1882, sec. 2694. The execution of the subsequent inconsistent deed by the grantor after attaining majority indicates an intention not to be bound by the previous conveyance, and the latter is consequently thereby avoided. There can be no doubt about the proposition where the subsequent deed is a grant, bargain, and sale or a warranty deed, or a deed in the form prescribed by statute; but it has also been held that a quitclaim deed may operate as a disaffirmance of a prior deed, executed during minority, to a different person, since a quitclaim deed is, in this country, a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim, and estate of the grantor as a deed with full covenants: *Bagley v. Fletcher*, 44 Ark. 153.

No entry by the grantor is ever necessary for the purpose of avoiding the previous deed executed during infancy, and for the purpose of making the subsequent deed effective, where the land is vacant and unoccupied at the time of the execution of the latter, or, of course, where the grantor remains in possession; but if the land is at that time in the adverse possession of the first grantee or other persons, then, in those states where land adversely held cannot be conveyed, at least to all intents and purposes, the grantor, before executing the subsequent deed, must make an entry: *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. *224; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Dominick v. Michael*, 4 Sand. 374; *Den ex dem. Murray v. Shanklin*, 4 Dev. & B. 289; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442, 445; compare *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320; *Pitcher v. Laycock*, 7 Ind. 398. It is sometimes said, under this view, that if the land is held adversely, the subsequent deed would be void, and could not operate as a disaffirmance of the prior deed executed during infancy; but, we take it, the correct rule is that announced by *Riggs v. Fisk*, 64 Ind. 100, namely, that if the land is held adversely by one claiming under the first deed or otherwise, the grantor, before he can make the second deed effectual for all purposes, must first obtain possession by entry or other proper proceedings; but while the second deed, made by the minor after he arrives at

full age, will not be fully operative against the third person in adverse possession, it is nevertheless good between the parties and as to the rest of the world, and operates as a disaffirmance of the first deed, and authorizes the second grantee to prosecute a suit in the name of the grantor for the recovery of the land. In many states, land in the adverse possession of another may be conveyed without any objection whatever; and where this is the case, a subsequent deed, executed by the grantor after attaining his majority, is as completely effective to disaffirm his prior deed made during minority, when the land is adversely held at the time, as when it is vacant and unoccupied, or when he is himself in possession, and no entry whatever is required: *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Norcum v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Haynes v. Bennett*, 53 Mich. 15; and see *Allen v. Poole*, 54 Miss. 323, 331; and this is now the rule in Georgia: Code 1882, secs. 2694, 2695.

If a minor executes a deed of conveyance, and after arriving at age, gives a mortgage on the land conveyed, this will amount to a disaffirmance of the deed, for it implies that he still considered himself the owner; but it would be otherwise if he joined with the grantee in executing the mortgage to secure a debt of the grantee: *Watkins v. Wassell*, 15 Ark. 73. And the execution by an infant, after attaining majority, of a warranty deed of land mortgaged during infancy is a disaffirmance of the mortgage: *Dixon v. Merritt*, 21 Minn. 196; compare *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, where the warranty deed was executed during infancy. The same is said to be true of an ordinary absolute deed making no allusion to the mortgage: *Allen v. Poole*, 54 Miss. 323; but we think the contrary opinion is the correct one, since the mortgage and the deed are not inconsistent, but may well stand together: *Palmer v. Miller*, 25 Barb. 399; especially where the deed is a quitclaim deed: *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. If, however, the deed recites that the conveyance is subject to a mortgage, the mortgage is thereby confirmed: *President etc. of Boston Bank v. Chamberlin*, 15 Mass. 220; *Losey v. Bond*, 94 Ind. 67.

Again, if an infant sells a tract of land, and executes a title bond, and on coming of age sells the land to another person, and executes to him a title bond, the first contract is thereby avoided: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

But, as said in *Dominick v. Michael*, 4 Sand. 374, 421, "the deed of an infant is not as a matter of course superseded and annulled by the mere execution, after he attains his age, of another conveyance, even to a purchaser for value." The instruments must be inconsistent. "If the minor, after reaching his majority," says Martin, C., in *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225, "has expressly repudiated his deed, there remains nothing for construction. But when the disaffirmance proceeds from the acts of the minor after reaching majority, they must in their nature imply a repudiation of the voidable instrument. If they are consistent with the continued existence of such instrument, there is no disaffirmance, and the deed remains unaffected." Therefore a deed which purports to convey the grantor's right and interest in any lands in a certain town, not theretofore conveyed by the grantor, does not embrace lands sold by the grantor during her infancy: *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; and where a minor conveyed her interest in a tract of land, and afterwards acquired another interest by inheritance, a deed subsequently executed by her, after majority, conveying simply her right, title, and interest in the tract, does not avoid the prior deed: *Leitensdorfer v. Hempstead*, 18 Mo. 269; and also where a

purchaser from the grantee of an infant took a quitclaim deed from the infant after he came of age, the latter deed only operates as a confirmation of the first, and does not take precedence over a mortgage given by the original grantee of the infant, subject to which the second grantee purchased the property: *Eagle Fire Co. v. Lent*, 6 Paige, 635, affirming 1 Edw. Ch. 301. Again, a conveyance by an infant of a tract of land, part of a larger tract in which he was interested as heir of his father, is not disaffirmed by the execution of a deed, after attaining majority, to another person, of all his "right, title, interest, and claim in and to the estate" of his father: *Stuart v. Baker*, 17 Tex. 417, 421; but, as already seen, if the quitclaim were exactly co-extensive with the previous deed, it is held to be a disaffirmance: *Bagley v. Fletcher*, 44 Ark. 153; and a quitclaim deed or any other deed, unless, perhaps, a warranty deed, will not operate to disaffirm a mortgage executed by the grantor to another person during infancy: *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Palmer v. Miller*, 25 Barb. 399; *Dixon v. Merritt*, 21 Minn. 196; but see *Allen v. Poole*, 54 Miss. 323. A subsequent deed of trust to secure debts, not being inconsistent with a prior mortgage executed during infancy, will not operate as a disaffirmance of the mortgage: *McGan v. Marshall*, 7 Humph. 121; compare *Inman v. Inman*, L. R. 15 Eq. 260. And a lease by an infant is not avoided by the mere execution of a second lease of the same lands, made to another person by the infant on his attaining full age, since both contracts might stand together, the one as a lease and the other as a grant of the reversion; and it is held an estate, though voidable, having passed under the first lease, and the lessee being in possession thereunder when the infant became of age, the estate could not be divested but by some act of notoriety, as ejectment, entry, demand of possession, or the like, or, at least, notice: *Slator v. Brady*, 14 Ir. C. L. 61.

Whether a deed executed by a grantor after attaining majority amounts to a disaffirmance of a previous deed of the same land made by him during infancy, is held to be a question of law for the determination of the court, and should not be submitted to the jury: *Peterson v. Luik*, 24 Mo. 541; 69 Am. Dec. 441.

DISAFFIRMANCE BY SUIT. — Under the common-law theory of the action of ejectment, which regards the defendant as a trespasser, it has been held that an infant could not, on arriving at full age, maintain the action to recover lands conveyed during his infancy, without a previous entry, notice, or other act in disaffirmance of the deed: *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; and in *Law v. Long*, 41 Ind. 586, this rule was extended to a statutory action to obtain an assignment of dower in lands conveyed. Thus in *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300, it is said: "The action of ejectment is an action of trespass, and the defendant is always regarded by the plaintiff as a trespasser. Hence, where an individual is in the possession of land with the permission or acquiescence of the owner, a suit cannot be sustained against him for the possession without a notice to quit, or until there be a demand of possession and a refusal, or until he be guilty of some other act which will make him a wrong-doer."

This may be very true; yet we think the courts have overlooked the fact that a disaffirmance of his deed by an infant makes it void *ab initio*, and therefore those in possession under it may very well be regarded as trespassers, at least so far as it may be necessary to maintain ejectment without any previous act on the part of the grantor. And it is in accordance with the

decided weight of authority that a deed executed by the grantor during infancy is disaffirmed by the mere institution of a suit by him, after coming of age, to recover possession of the land conveyed, without any previous act, whether the suit be ejectment, — especially ejectment as it at present exists in most of the states, — writ of entry, or summary or other statutory proceedings: See *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *Hughes v. Watson*, 10 Ohio, 127, 134; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 324; *Chadbourn v. Rackliff*, 30 Me. 354; *Webb v. Hall*, 35 Me. 336; *Walker v. Ellis*, 12 Ill. 470 (contract to sell); *Cole v. Pennoyer*, 14 Ill. 158, 162; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381, 383; *Harris v. Ross*, 86 Mo. 89; 56 Am. Rep. 411; *Clark v. Tate*, 7 Mont. 171; *Craig v. Van Bebbler*, 100 Mo. 584; and see *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Haynes v. Bennett*, 53 Mich. 15, 17. Certainly the deed would be avoided by an equitable suit to cancel or set it aside on the ground that it was executed during infancy: *Harrod v. Myers*, 21 Ark. 592, 600; 76 Am. Dec. 409, 416; *Schaffer v. Lavretta*, 57 Ala. 14; *Bedinger v. Wharton*, 27 Gratt. 857; *Gillespie v. Bailey*, 12 W. Va. 70, 89; 29 Am. Rep. 445, 447; *Tunison v. Chamblin*, 88 Ill. 378.

An infant's release of a claim on account of personal injuries sustained by reason of the negligence of the releasee may be disaffirmed by bringing suit upon the original claim: *St. Louis etc. R'y v. Higgins*, 44 Ark. 293. So an infant may disaffirm a contract for work and labor by leaving the service before the time expires, and bringing an action upon a *quantum meruit*: *Moses v. Stevens*, 2 Pick. 332, 335; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. But it is held that if an infant contributes certain property, under a partnership agreement, to the capital of the firm, his copartner acquires an interest therein which is subject to attachment, unless the agreement had been avoided, and that the infant, by claiming the property in replevin against the attaching officer, did not signify his election to avoid the partnership contract; there should have been some act of avoidance before the institution of the suit: *Betts v. Carroll*, 6 Mo. App. 518, — a questionable decision.

DISAFFIRMANCE BY PLEA OF INFANCY. — A plea of infancy to an action brought against an infant on his contract is obviously a sufficient disaffirmance, provided, of course, the contract has not already been ratified by him: *Strain v. Wright*, 7 Ga. 568; *Freeman v. Nichols*, 138 Mass. 313, 314; *Schrock v. Crowl*, 83 Ind. 243; *Sparr v. Florida Southern R'y*, 25 Fla. 185. In *Best v. Givens*, 3 B. Mon. 72, 74, it was, however, held that although a plea of infancy to an action on a note was a proper mode or step for avoiding the note, yet it was but an initiatory step, and did not *ipso facto* accomplish that end; for not only might the plea have been sufficiently answered by the replication and be defeated on the trial, but it might have been withdrawn at any time before judgment; and hence the defendant might, at any time before trial, confirm the note, notwithstanding the plea. The remedy by plea is, of course, only applicable in case of executory contracts, or where the question is presented in such a form that an opportunity to plead the infancy is presented: See *Bool v. Mix*, 17 Wend. 119, 132; 31 Am. Dec. 285, 291; *Inhabitants of Worcester v. Eaton*, 13 Mass. 371. 375; 7 Am. Dec. 155, 157.

DISAFFIRMANCE DURING MINORITY OF PERSONAL CONTRACTS, AND CONCERNING PERSONALTY. — An infant's personal contracts, and contracts relating to personal property, whether executory or executed, may be disaffirmed by him during his minority. It might seem, at first blush, that an infant has no more legal discretion to avoid a contract during his infancy than he has to enter into one, and that, therefore, he could not conclusively disaffirm

any contract until he reaches full age. But the protection of the infant is to be considered; and where this can the better be subserved by allowing him to avoid his contract during his infancy, he should be permitted to make the disaffirmance. And, as said in *Towle v. Dresser*, 73 Me. 252, "by reason of the transitory nature of personal property, to withhold this right from an infant until he became of age would, in many cases, be to make it utterly valueless." Accordingly he may avoid a sale or exchange of his chattels before reaching full age: *Stafford v. Roof*, 9 Cow. 626, reversing *Roof v. Stafford*, 7 Cow. 179; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Shipman v. Horton*, 17 Conn. 481; *Bailey v. Barnberger*, 11 B. Mon. 113 (land-warrant); *Carpenter v. Carpenter*, 45 Ind. 142; *Towle v. Dresser*, 73 Me. 252; *Bloomington v. Chittenden*, 74 Mich. 698. In some of the earlier decisions, the rule is stated as though it were confined to the case where the property had been delivered. Thus in *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345, it was said: "If the subject of the sale be personal property, and a delivery to and possession by the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone beyond recovery, and in many cases for a very inadequate consideration." See also *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285. We may inquire, What real difference does it make whether the property has been delivered or not? If he can rescind when there has been a delivery, why may he not rescind when there has been no delivery? Certainly the law would not require him to make a delivery, in order that he might be able to disaffirm. The more recent cases do not recognize the distinction. In *Stafford v. Roof*, 9 Cow. 626, it was held that where an infant sold a horse, but there was no evidence that he delivered it with his own hand, he might avoid the sale during infancy, and maintain trover against the vendee without demand, Jones, C., observing that there being no evidence of a manual delivery by the infant, the case stood at best "as the case of an infant contracting to sell, and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself." This decision is founded upon the erroneous notion that if an infant does not himself make a delivery of the property sold, the sale is void, because he could not appoint an agent to do it for him. We think that no demand was necessary in this case, nor in any other case of a sale which has been disaffirmed, in order that an action of trover can be maintained for the property; but, for the reason that when the sale is avoided, the contract is rendered void *ab initio*, and gives no protection against the action.

An infant's chattel mortgage may likewise be disaffirmed by him during minority: *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *Cagley v. Cushman*, 16 Minn. 397, 401; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407. So may his purchase of personal property: *Cagley v. Cushman*, 16 Minn. 397, 401; *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, 55; *Riley v. Mallory*, 33 Conn. 201. And these rules are not changed by section 2238 of the Iowa code, which provides that "a minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority," the statute only fixing a time within which contracts must be disaffirmed: *Childs v. Dobbins*, 55 Iowa, 205; *Leacock v. Griffith*, 76 Iowa, 89, 93. His contract of subscription for shares of stock in a corporation may also be repudiated during his nonage: *Newry etc.*

R'y v. Coombe, 3 Ex. 565; and see also *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

An infant may also avoid his contract of partnership before he reaches his majority: *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; *contra*, *Dunton v. Brown*, 31 Mich. 182; and see *Armitage v. Widoe*, 36 Mich. 124, 130; or his contract of service: *Clark v. Goddard*, 39 Ala. 164, 171; 84 Am. Dec. 777, 780.

DISAFFIRMANCE DURING MINORITY OF DEEDS, LEASES, AND MORTGAGES.—An infant's conveyance of realty cannot be conclusively avoided by him until he reaches full age, although, it seems, he may enter during his minority, and enjoy the profits: *Zouch v. Parsons*, 3 Burr. 1794, 1808; *Stafford v. Roof*, 9 Cow. 626, 628; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Matthewson v. Johnson*, 1 Hoff. Ch. 560; *Cummings v. Powell*, 8 Tex. 80; *Kilgore v. Jordan*, 17 Tex. 341; *Chapman v. Chapman*, 13 Ind. 396; *Welch v. Bunce*, 83 Ind. 382; *Irvine v. Irvine*, 5 Minn. 61, 65; *Harrod v. Myers*, 21 Ark. 592, 600; 76 Am. Dec. 409, 416; *Doe ex dem. McCormick v. Leggett*, 8 Jones L. 425; *Hastings v. Dollarhide*, 24 Cal. 195; *McCarthy v. Nicrosi*, 72 Ala. 332, 335; 47 Am. Rep. 418, 420; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; and see code of Georgia (1882), sec. 2694; *Nathans v. Arkwright*, 66 Ga. 179; compare Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17. The reason which permits the infant to disaffirm his contracts of a personal nature, and those relating to personal property, during his minority, does not apply, at least under ordinary circumstances, to his deeds of conveyance. He is amply protected, while his infancy lasts, by his right to enter and take the profits. And it seems, also, that he may apply to a court of chancery for the appointment of a receiver, as the equivalent to such an entry: *Matthewson v. Johnson*, 1 Hoff. Ch. 560. In *Cummings v. Powell*, 8 Tex. 80, 91, Chief Justice Hemphill says: "Upon principle, it would seem that if an act of an infant be only voidable, and be binding upon the other party until it is avoided, that the act of disaffirmance must be by the infant himself on attaining mature age. That it can be avoided at all is owing to the want of legal discretion in the infant at the time of its execution; and this continues during his nonage and renders his affirmance or disaffirmance before majority of no avail." We may remark that this would undoubtedly always be so, were it not for the fact that his protection requires that he should be permitted to avoid certain of his contracts during his infancy.

The rule which denies the right of an infant to disaffirm his conveyance during minority is held not to be changed by a statute which provides that "when an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age"; for an infant has no right of action as to lands conveyed by him, simply on the ground of infancy, until the conveyance has been disaffirmed, and it cannot be disaffirmed until the infant has arrived at majority: *Welch v. Bunce*, 83 Ind. 382. According to the rule, the deed of an infant will not be held to be disaffirmed by his subsequent deed of the same land to another person, where there is no evidence that he was of full age when the second deed was executed, and the presumption that he was still an infant is not overcome by a considerable lapse of time between the conveyances: *Kilgore v. Jordan*, 17 Tex. 341; and in an action to cancel a deed executed during the infancy of the plaintiff, he should show affirmatively that he has attained his majority before the commencement of the action; there can be no implication in his favor as to his age from the fact that he has commenced an action in his own name; and the nature of the

relief he seeks requires him to show that he was a minor at the time of executing the deed, and the presumption is, that such condition continues until he negatives it: *Irvine v. Irvine*, 5 Minn. 61. If the deed of an infant be held to be absolutely void, as where it is executed without consideration, and therefore necessarily prejudicial to him under the rule of Lord Chief Justice Eyre, there would then seem to be no objection to a suit during his infancy to have it declared void: *Swofford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639. It may be remarked that this case virtually stands alone among recent cases in its persistent adherence to a criterion long since exploded. In *Barker v. Wilson*, 4 Heisk. 268, it was held that where, by statute, a husband has an interest in the real estate of his wife, and it is necessary for the husband and wife to unite in a deed of her real estate, if the husband is an infant, he may, on coming of age, avoid the deed entirely; for "the husband having undertaken to do that to which he did not bind himself, and to defeat which he avails himself of his infancy, thereby destroying his consent to his own act, his exercise of the grant of his wife's permission to sell, wholly disengaging himself of the transaction, leaves the conveyance as if made by the wife alone."

In regard to leases made by infants, two of the judges in *Slator v. Trimble*, 14 Ir. C. L. 342, were of the opinion that the infant lessor could not, by any act of his during infancy, absolutely avoid the lease. We are of the belief, however, that the best interests and welfare of the infant should give him this right; and we may observe that he has, at all events, the right to enter and take the profits of the land while his infancy continues, and that such an act virtually ends a lease, which by its terms would expire at or before he attains his majority. If a lease be made to an infant, we have authority that it may be repudiated during infancy: *Blake v. Concannon*, 4 Ir. Rep. C. L. 323; see also *Ketsey's Case*, Cro. Jac. 320; *Flesner v. Dickerson*, 72 Ala. 318; and so far as these cases maintain this proposition, we think them unquestionably sound. It needs no argument to show that it may be highly advantageous for an infant lessee to avoid the lease during his minority, and escape liability for rent; and we think it ought not to be questioned that a plea of infancy is good in an action for rent or on any covenant contained in the lease: See *ante*, title "Leases." We do not see why the same observations should not apply where a deed of conveyance is made to an infant, so that he could, while still a minor, avoid the deed and recover back the purchase price paid, or defend an action for the price, if it has not been paid.

If an infant mortgages his real estate, we also think the ruling sound that he may avoid the mortgage during his minority, at least by pleading his infancy to a suit to foreclose: *Schneider v. Stair*, 20 Mo. 269. "As in this instance," says the court, "the effect of the omission of the wife to plead her infancy would be to subject her estate to be sold under execution, by which an innocent purchaser might be injured, and as the proceeding is in the nature of an action to subject her estate to the payment of a debt, from analogy to the course in a suit on a contract by which an infant is jointly bound with others, we see no impropriety in permitting her to set up her infancy, though under age, in avoidance of this claim against her."

DISAFFIRMANCE OF CONTRACTS IN GENERAL WITHIN REASONABLE TIME AFTER REACHING FULL AGE. — While it is thus seen that certain contracts of an infant may be avoided by him during his minority, there is very little difference of opinion upon the proposition that it is never imperative that he should do so. The right to disaffirm a contract while his infancy continues is simply a privilege or option which the law allows him to exercise

for his protection, at his pleasure. There is nothing compulsory about it. To hold otherwise would be to say that he might ratify his contracts during his infancy; and to say that he might so ratify his contracts would be to say that his contracts were binding upon him. We know of no authority to the contrary except the cases of *Kelly v. Coote*, 5 Ir. C. L. 469, and *Blake v. Concannon*, 4 Ir. Rep. C. L. 323, which hold that an infant lessee, or an infant who acquires an estate on which rent has been reserved, must repudiate before the rent day comes, although he is still an infant, or he will be liable for the installment of rent; and we think the cases are clearly unsound: See *supra*, "Leases."

After an infant arrives at majority, there is no doubt about his power to repudiate as well as confirm his contracts made during minority. But it is a question involved in considerable confusion whether any or all of an infant's contracts not previously avoided must be disaffirmed by him within a reasonable or any particular time after he reaches full age; or in other words, whether his contracts may become binding upon him by the lapse of time, and no longer subject to disaffirmance. Much of this confusion has resulted from the application, or rather misapplication, of a *dictum* by Dallas, J., in *Holmes v. Blogg*, 8 Taunt. 35, 39, to the following effect: "I agree that in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and if the case before the court [the case of a lease to an infant] were that simple case, I should be disposed to hold that as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time." There is certainly a distinction, which this quotation fails to make, between the different contracts which an infant may enter into with respect to his obligation to disaffirm within a reasonable time after he comes of age: See the classification made by Shepley, J., in *Boody v. McKenney*, 23 Me. 517, 523-526. And sometimes the distinction is said to be between his executory and his executed contracts. Thus, to illustrate the use of these terms, it is asserted that where the contract of an infant is executory, the infant must, to render him liable thereon, on arriving at full age, expressly ratify it; but where the act is executed, the infant must, on attaining full age, do some act to disaffirm the contract: *Law v. Long*, 41 Ind. 586, 596; *Scranton v. Stewart*, 52 Ind. 68, 92; and see *State ex rel. Petty v. Rousseau*, 94 N. C. 355, 361. "In other words," says Buskirk, J., in the first of these cases, "where the contract is executory, there must be an affirmance, to render the contract valid; and where it is executed, there must be a disaffirmance, to avoid the operation of the deed." What, we may stop to inquire, does the court mean by an "executory" contract? One that is promissory on both sides, or on the side of the infant, or of the other contracting party, or any or all of these? And what does it mean by an "executed" contract? It is very evident that such a rule is worse than useless because of its inaccurate use of legal language; and besides, it will be shown that giving the expressions any of the meanings suggested, the rule is not correct. Another good illustration of the careless use of words in this regard may be found in *Beardsley v. Hotchkiss*, 96 N. Y. 201, 211, where it is said: "As to contracts purely executory, it must be shown that the infant ratified them after he became of age, before they can be enforced against him. As to contracts executed, such as deeds of land or conveyances of personal property, they will generally be deemed ratified, and will thus become just as valid and effectual as the contracts of an adult, unless they be disaffirmed by the infant before he arrives

at age, or within a reasonable time thereafter." We will now consider the specific rules which have been established.

A purchase of personal property by an infant must be disaffirmed by him within a reasonable time after he reaches his majority, if he continues to hold the property, or the right of disaffirmance will be lost. Or to state the proposition in another form, the retention of personal property purchased during infancy by the infant, for an unreasonable time after coming of age, without any act of disaffirmance, amounts to a ratification of the contract. This is particularly true if the infant uses the property, or exercises other acts of ownership over it. The retention of the property for an unreasonable time after attaining full age is of itself inconsistent with any other idea than that of ownership, and hence of ratification: See *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Bail. Eq. 223; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; Georgia Code (1882), sec. 2731. And the evidence of ratification may be rendered still stronger by declarations, a sale of the property, and the like: See *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Eubanks v. Peak*, 2 Bail. L. 497; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Boody v. McKenney*, 23 Me. 517, 525; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 115; *Robinson v. Hoskins*, 14 Bush, 393; *Shropshire v. Burns*, 46 Ala. 108; *Minock v. Shortridge*, 21 Mich. 304; compare *Aldrich v. Grimes*, 10 N. H. 194, 198; *Counts v. Bates*, Harp. L. 464. An infant's contract of subscription for shares in a corporation must likewise be repudiated by him within a reasonable time after coming of age, or he will be bound by it: *Cork etc. R'y v. Cazenove*, 10 Q. B. 935; *Leeds etc. R'y v. Fearnley*, 4 Ex. 26; *Northwestern R'y v. McMichael*, 5 Ex. 114; *Dublin etc. R'y v. Black*, 8 Ex. 181.

If a minor purchases and takes a conveyance of real property, or makes an exchange of lands, or enters into an agreement to purchase lands, and goes into possession, he must, for like reasons, elect to disaffirm within a reasonable time after attaining full age, or he will be held to have ratified the transaction by his acquiescence. See *Cecil v. Comes Salisbury*, 2 Vern. 225; *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Boody v. McKenney*, 23 Me. 517, 524; *Baker v. Kennett*, 54 Mo. 82; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; and see *Evelyn v. Chichester*, 3 Burr. 1717; *Armfield v. Tate*, 7 Ired. L. 258; *Middleton v. Hoge*, 5 Bush, 478; Georgia Code (1882), sec. 2731; compare *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358. The same is true respecting a settlement of boundaries: See *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. And if an infant takes a lease, he must also disaffirm within a reasonable time after reaching majority; and we should say, at all events, before rent day came: See *Boody v. McKenney*, 23 Me. 517, 524; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429; *McClure v. McClure*, 74 Ind. 108; *Mahon v. O'Farrell*, 10 Ir. L. R. 527 (the case of an infant assignee); and see *Ketsey's Case*, Cro. Jac. 320; but compare *Kelly v. Coote*, 5 Ir. C. L. 469; *Blake v. Concannon*, 4 Ir. Rep. C. L. 323, discussed *ante*, "Leases." In addition to a retention of the property, and a failure to disaffirm within a reasonable time after coming of age, the case may show a ratification by the infant's use of the property, or otherwise treating it as his own, or a ratification by a sale and conveyance of the property: See *post*, "Ratification by Sale or Conveyance of Property Purchased."

But, on the other hand, the mere retention by a minor, after coming of age, of either real or personal property purchased by him during his infancy, may be under such circumstances as not to indicate an intention to ratify the contract, as where he endeavors to rescind, or holds the property by virtue of a contract with some third person: See *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189, 191; *Baker v. Kennett*, 54 Mo. 82; *Scott v. Scott*, 29 S. C. 414; *Thing v. Libbey*, 16 Me. 55; *Smith v. Kelley*, 13 Met. 309; *Todd v. Clapp*, 118 Mass. 495; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27; and see *Dana v. Stearns*, 3 Cush. 372, 375; *Flechner v. Dickerson*, 72 Ala. 318; *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. These cases will be found discussed, *post*, under the title "Ratification by Retention of Property Purchased."

The retention of the consideration by the infant, for an unreasonable time after coming of age, without any expression of dissent, it is thus seen, ratifies the contract. It may be that this is what some of the cases call an "executed" contract, which requires a disaffirmance. What is a reasonable time, we should say, depends upon the circumstances of each case, and is, perhaps, a mixed question of fact and of law. If the infant has never received any consideration from the other contracting party, that is, if the contract is executory on both sides, or on the side of the opposite party, or if he has received the consideration, but has spent, wasted, or in any disposed of it during his minority, so that it no longer remains in his hands on attaining full age, the reason which requires him to disaffirm the contract within a reasonable time after coming of age, in order to avoid being bound, does not exist. It has therefore been held that an infant need not disaffirm his note, or a note and mortgage of his property, or any contract to pay money, after coming of age, in order to escape a ratification by inaction, to which, however, must be added the qualification, provided he does not retain the specific consideration: *Buzzell v. Bennett*, 2 Cal. 101; *Magee v. Welsh*, 18 Cal. 155; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Baker v. Stone*, 136 Mass. 405; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; and see *Crabtree v. May*, 1 B. Mon. 289. The same is true where he has sold or assigned his personal property: *Boody v. McKenney*, 23 Me. 517, 525; *Vaughan v. Parr*, 20 Ark. 600; *contra*, *Hastings v. Dollarhide*, 24 Cal. 195; *Summers v. Wilson*, 2 Cold. 469; or where he executes a chattel mortgage thereon: *Hill v. Nelms*, 86 Ala. 442; although acquiescence in the sale, assignment, or mortgage of property which has been delivered, if continued sufficiently long, might prevent his regaining the property, by virtue of the statute of limitations: See *Hill v. Nelms*, 86 Ala. 442; and perhaps his laches in avoiding the contract might result in a denial of equitable relief against it; certainly if continued for such a length of time as would bar an action for the recovery of the property: See *Merriweather's Adm'r v. Herran*, 8 B. Mon. 162. The contrary decisions of *Hastings v. Dollarhide*, 24 Cal. 195, and *Summers v. Wilson*, 2 Cold. 469, cannot be supported either by principle or by authority.

In Iowa, it is provided by section 2238 of the code that "a minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority." Unless, therefore, any contract whatever is disaffirmed within such reasonable time, it becomes binding, under this statute, both at law and in equity: *Stucker v. Yoder*, 33 Iowa, 177. What is a reasonable time within which the minor must disaffirm depends upon the circumstances of each case: *Jenkins v. Jenkins*, 12 Iowa, 195; *Stout v. Merrill*, 35 Iowa, 47; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. A disaffirmance on the eighteenth day after

attaining majority was held to be within a reasonable time, in *Jenkins v. Jenkins*, 12 Iowa, 195; and the same was held where the disaffirmance was on the thirty-second day: *Leacox v. Griffith*, 76 Iowa, 89, 95; but, on the other hand, a delay of two years was held to be unreasonable, in *Wright v. Germain*, 21 Iowa, 585; so with a delay of four months: *Stout v. Merrill*, 35 Iowa, 47; and of thirteen years: *Weaver v. Carpenter*, 42 Iowa, 343; of six months: *Jones v. Jones*, 46 Iowa, 466; *Hoover v. Kinsey Plough Co.*, 55 Iowa, 668; and of three years and eight months: *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696.

DISAFFIRMANCE OF DEEDS WITHIN REASONABLE TIME AFTER REACHING FULL AGE.—There has been more dispute on the question whether an infant must disaffirm his deeds of conveyance of his lands within a reasonable time after reaching full age than concerning the disaffirmance of his other contracts. According to one line of cases, he is required to avoid a deed of his lands within a reasonable time after attaining his majority, or he will be bound by his acquiescence: *Hastings v. Dollarhide*, 24 Cal. 195; *Kline v. Beebe*, 6 Conn. 494, 506; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Nathans v. Arkwright*, 66 Ga. 179; *Cole v. Pennoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115; *Wiley v. Wilson*, 77 Ind. 596; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798; *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Laverty*, 19 Neb. 429; *Scott v. Buchanan*, 11 Humph. 468; *Matherson v. Davis*, 2 Cold. 443, 451; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; *Ferguson v. Houston etc. R'y*, 73 Tex. 344; *Askey v. Williams*, 74 Tex. 294; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368; and see *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442. This is the rule in Iowa, by virtue of statute: See section 2238 of the code, and the cases cited under the last preceding head, particularly *Jenkins v. Jenkins*, 12 Iowa, 195; *Wright v. Germain*, 21 Iowa, 585; *Stout v. Merrill*, 35 Iowa, 47; *Weaver v. Carpenter*, 42 Iowa, 343; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. Of course, under this view, lapse of time, taken in connection with other circumstances, as where the infant grantor, after reaching full age, retains the consideration, sees the land being improved by those who claim under his deed, and the like, will preclude him from thereafter disaffirming his deed, or in other words, will amount to a confirmation: *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Hartman v. Kendall*, 4 Ind. 403, 404; *Ihley v. Padgett*, 27 S. C. 300; *Ferguson v. Houston etc. R'y*, 73 Tex. 344; compare *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Richardson v. Pate*, 93 Ind. 423, 428; *Buchanan v. Hubbard*, 96 Ind. 1. In *Ihley v. Padgett*, 27 S. C. 300, it was held that where an infant joined in the execution of a deed of a tract of land in which he held an interest in remainder, and the proceeds of the sale were in part invested in another tract, the title to which was partly taken in his name, and where he, after attaining his majority, lived on the land so purchased, and mortgaged his interest therein, and made no complaint for over fourteen years, and until the death of the life tenant, his deed was thereby confirmed. The court said: "It was very properly conceded in the argument that acquiescence for such a period of time would have been amply sufficient to make out a case of implied confirmation if there had

been no insuperable obstacle in the way of his avoiding the deed during the life of his mother"; yet it was held that the infant might have instituted an action to avoid the deed of his interest in remainder as soon as he attained his majority, notwithstanding he had no right to the possession of such interest until the death of the life tenant, and hence there was no such obstacle.

What is a reasonable time, under this view, depends upon the circumstances of the case, and, at all events, cannot exceed the period prescribed by the statute of limitations within which an action must be brought to recover the land. "What constitutes the reasonable time," says Morris, C., in *Sims v. Bardoner*, 86 Ind. 87, 91, 44 Am. Rep. 263, 266, "within which a person who has executed a deed during his infancy shall disaffirm it depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period." Again, says Quinan, C., in *Bingham v. Barley*, 55 Tex. 281, 288, 40 Am. Rep. 801, 805, "What is a reasonable time is such a period as, in view of the attending facts, would rebut any presumption of an intended disaffirmance. The silence or non-claim of the minor for a considerable length of time, though less than the period of limitation for the recovery of lands, may as effectually prove his affirmance or ratification, in connection with the circumstances of the case, as his express acts or declarations to that effect."

In Illinois, a statute provides that a person who continues in the actual possession of lands or tenements under claim and color of title, made in good faith, for seven years, paying the taxes thereon, shall be the legal owner thereof, provided that when an adverse title shall be held by an infant, he shall commence an action to recover such lands or tenements within three years after the disability shall cease to exist. Under this statute it is held that the limit of reasonable time within which an infant must disaffirm his deed after reaching majority is three years: *Cole v. Pennoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Keil v. Henley*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; and it is held that the heirs of the infant grantor are to disaffirm within the same time that the infant might himself, if living: *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

It is sometimes held that the question as to what is a reasonable time is one of fact for the jury: *Wiley v. Wilson*, 77 Ind. 596; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Scott v. Buchanan*, 11 Humph. 468; but perhaps the better view is, that the question may be either for the court or for the jury: *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 472; 47 Am. Rep. 798, 801; compare *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Laverty*, 19 Neb. 429; and see the Iowa cases cited under the last preceding head. It is held in Iowa that an unreasonable delay is not excused by the fact that the infant was fraudulently induced to execute the deed under the belief that she was simply executing an instrument authorizing the sale of the land, and that she proceeded to disaffirm the deed as soon as she was informed of its existence, she being chargeable with negligence in making no effort to inform herself: *Weaver v. Carpenter*, 42 Iowa, 343; nor by the fact that the infant grantor was informed by persons, not qualified to give legal advice, that she could not disaffirm until her infant brother, who united with her in the deed, became of age: *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. And it is held in Illinois that mere forgetfulness of having made a deed, for twelve

years after attaining majority, furnished no excuse for the delay in disaffirming the deed made during minority: *Tunison v. Chamblin*, 88 Ill. 378; and that the marriage of an infant shortly after majority did not extend the time for avoiding her deed: *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434. And in *Long v. Williams*, 74 Ind. 115, it was held that the possession of real estate by a widow, under right of dower, was no excuse for the failure of a minor heir, to whom the fee belonged, to disaffirm a deed made thereof within a reasonable time after arriving at full age.

According to another line of cases, the mere silent acquiescence of an infant grantor, after coming of age, for any period of time less than that prescribed by the statute of limitations for a recovery of the land in the adverse possession of another, will not bar his right to avoid his deed, and consequently will not amount to a ratification: *Tucker v. Moreland*, 10 Pet. 59, 76; 1 Am. Lead. Cas. *224, *233; *Irvine v. Irvine*, 9 Wall. 617; *Sims v. Everhardt*, 102 U. S. 300; *Wells v. Seixas*, 24 Fed. Rep. 82; *Eureka Company v. Edwards*, 71 Ala. 248; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418, 420; *Kountz v. Davis*, 34 Ark. 590; *Stull v. Harris*, 51 Ark. 294; *Hoffert v. Miller*, 86 Ky. 572; *Boody v. McKenney*, 23 Me. 517, 523; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323, 330; *Peterson v. Laik*, 24 Mo. 541, 544; 69 Am. Dec. 441; *Huth v. Carondelet Marine R'y etc. Co.*, 56 Mo. 202; *Thomas v. Pullis*, 56 Mo. 211, 219; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Voorhies v. Voorhies*, 24 Barb. 150, 153; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 327; *Drake's Lessee v. Ramsay*, 5 Ohio. 251; *Hughes v. Watson*, 10 Ohio, 127, 134; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Urban v. Grimes*, 2 Grant Cas. 96; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; and see and compare *Schaffer v. Lavretta*, 57 Ala. 14; *Bozeman v. Browning*, 31 Ark. 364; *Bayley v. Fletcher*, 44 Ark. 153; *Petty v. Roberts*, 7 Bush, 410; *Brantley v. Wolf*, 60 Miss. 420; *Jones v. Butler*, 30 Barb. 641; *Wilson v. Branch*, 77 Va. 65, 71, 72; 46 Am. Rep. 709, 712, 713. Although it is conceded that lapse of time, taken in connection with other circumstances, as retention of the consideration by the grantor after coming of age, standing by and seeing improvements made upon the land, and the like, may amount to a ratification or estop the grantor from avoiding the deed: *Irvine v. Irvine*, 9 Wall. 617, 627; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323, 330; *Thomas v. Pullis*, 56 Mo. 211, 219; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 254; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; compare *Youse v. Norcoms*, 12 Mo. 549, 563; 51 Am. Dec. 175. Under this principal rule it will be observed that the mere lapse of time raises a question, not of ratification, but of the statute of limitations. It follows, then, that although a time exceeding the statutory period has expired since the infant grantor became of age, yet if possession be not held under the deed for a sufficient length of time to constitute a bar, no obstacle exists, in the absence of acts or conduct on the part of the grantor creating an affirmation or estoppel, to his disregarding his deed and asserting a claim to the land: *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

The reasons of these two opposing rules as to the effect of a lapse of time after the infant becomes of age remain to be examined. Concerning the first rule, which seems to be founded upon the *dictum* of Dallas, J., in *Holmes*

v. *Blogg*, 8 Taunt. 35, quoted under the preceding head, it is said by Chief Justice Prentiss, in *Bigelow v. Kinney*, 3 Vt. 353, 359, 21 Am. Dec. 589, 592: "A deed executed and delivered by an infant, conveying land, remains good and valid until it is avoided by him; and as he alone has the power of avoiding the deed and rescinding the contract, he is bound, in reason and justice, after he comes of age, and is competent to exercise a discretion upon the subject, to make his election, and give notice of his intention. He ought not to be allowed to leave the grantee, upon whom the contract is binding, in a state of suspense and uncertainty; and unless he makes known his determination in a reasonable time, it is just that the contract should become absolute against him"; and again, by Gilfillan, C. J., in *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 471, 47 Am. Rep. 798, 801: "The right of a minor to disaffirm, on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others, — with as much regard to those rights as is fairly consistent with due protection to the interests of the minor. In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection."

We may observe that this reasoning applies as well to any other contract which an infant may make as it does to his deed of conveyance; and therefore it would require, if logically followed out, that an infant, after coming of age, should repudiate, within a reasonable time, a sale or assignment of personal property, and even a promissory note, made by him during his infancy. This, however, is not the case. And the only sound reason why an infant is required to disaffirm his contract in any case within a reasonable time after arriving at full age is, that a ratification by the retention of the consideration may be inferred against him. No such inference can ordinarily be drawn where he sells and conveys his property, receiving, as he would usually do, a return in money. When it is said that the grantee should not be left in a state of suspense and uncertainty as to whether the grantor will avoid the deed or not, it may be replied that the grantee should not have dealt with an infant. We think that this line of cases does not give sufficient weight to the fact that although the infant's deed is good until avoided, it is nevertheless subject to an infirmity which, outside of the statute of limitations, only a ratification or an estoppel can cure; and it cannot be claimed that mere silence or acquiescence will amount to either. Furthermore, Chief Justice Gilfillan is not quite correct when he says that in every other case of a right to disaffirm, the party holding the right is required to disaffirm within a reasonable time. The case of a person *non compos* stands on the same footing as the case of an infant; and a personal disability of this sort is entirely different from an infirmity, such as fraud, in the contract merely. We think, therefore, that the second rule is supported by the better reason, as it certainly is by the weight of authority. It is not, however, to be sustained, as suggested in some of the cases, for example, *Boody v. McKenney*, 23 Me. 517, 523, because the grantor, by his silent acquiescence, "occasions no injury to other persons, and secures no benefits or new rights to himself"; for his failure to disaffirm may, and perhaps often will, operate as an injury, but because mere acquiescence does not amount to either an affirmance or an estoppel.

There is, of course, in any view, as already seen, a distinction, as to disaffirmance, between the case where an infant conveys his lands, and where lands are conveyed to him; and to say, as was said in *Hastings v. Dollarhide*, 24 Cal. 195, 216, that "on principle, we can see no distinction between the case of an infant grantor and the case of an infant grantee justifying a distinction between them. If the infant, on attaining majority, is bound by the rule of diligence in the one relation, then he must be in the other," — is to confess one's self as being unable to appreciate clear and sound legal differences: See *supra*, the preceding title.

DISAFFIRMANCE OF DEEDS OF INFANT FEMES COVERT AFTER REACHING FULL AGE. — The question just considered of the obligation of a grantor to disaffirm a deed of conveyance executed during infancy within a reasonable time after reaching full age, may be complicated by the fact that the grantor is laboring under the disability of coverture as well as that of infancy. It is the settled rule, wherever coverture at the time a cause of action accrues is a disability, so that the *feme covert* is not required to sue, although she may be permitted to sue, and so that the statute of limitations will not run against her, that an infant *feme covert* who executes a deed of her lands according to the statutory requirements will not be precluded from disaffirming the deed by her mere omission for any length of time to disaffirm it, after she attains her majority, while her coverture continues. *A fortiori* would she not be barred of her right to disaffirm the deed by any mere lapse of time during the existence of the coverture, if the husband, who united in the deed, acquired by virtue of the marriage an estate by the curtesy in the wife's lands, or at all events, a right to take their rents and profits during his lifetime; for the deed would convey the husband's interest, and hence the grantee would have a right to the possession and profits of the lands while that interest continued, or in other words, during the coverture, and the wife would consequently be powerless to disaffirm the deed during that time, or, at least, any disaffirmance would be a vain act: See *Sims v. Everhardt*, 102 U. S. 300; *Miles v. Lingerman*, 24 Ind. 385; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100, 108; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Temple v. Hawley*, 1 Sand. Ch. 153; *McIlvaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Scott v. Buchanan*, 11 Humph. 468; *Matherson v. Davis*, 2 Cold. 443, 451; *Youse v. Norcoms*, 12 Mo. 549, 563; 51 Am. Dec. 175; *Bedinger v. Wharton*, 27 Gratt. 857; *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709; *Darraugh v. Blackford*, 84 Va. 509; *Stull v. Harris*, 51 Ark. 294; *Epps v. Flowers*, 101 N. C. 158; and see *Vaughan v. Parr*, 20 Ark. 600 (sale of an interest in remainder in a slave); *Magee v. Welsh*, 18 Cal. 155 (execution of a note and mortgage); compare *Craig v. Van Bebber*, 100 Mo. 584, — the principal case.

It was, however, asserted in *Scranton v. Stewart*, 52 Ind. 68, 92, that an infant *feme covert* is required to disaffirm a deed of her lands by some such act as notice within a reasonable time after coming of age, notwithstanding her coverture, and notwithstanding coverture at the time a cause of action accrues prevents the running of the statute of limitations, so that while she continued married she would not be required to bring an action concerning the property; the court saying that there was a "well-defined distinction between laying the foundation to bring an action, and the actual bringing of the action"; but this *dictum* was disapproved in *Sims v. Everhardt*, 102 U. S. 300, 307, a case which arose from Indiana, and by a number of Indiana cases: *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100, 108; *Sims v. Bardoner*, 86 Ind. 87, 96; 44 Am. Rep. 263, 270; *Richardson v. Pate*, 93 Ind. 423, 426;

47 Am. Rep. 374, 376. The case, therefore, is not law upon this point; and it is difficult to see how any such view could be sustained, where the common-law rights of the husband in the lands of his wife exist, and he joins in the conveyance, since it is very questionable whether she could disaffirm by any act, and even if she could, she could not, of course, recover possession of the land as long as the coverture lasted, and the disaffirmance would be in reality an idle act: See *Sims v. Everhardt*, 102 U. S. 300, 307. Nevertheless it has been held, under such circumstances, that while she would not be obliged to disaffirm during her coverture, she might do so if she pleased, and maintain an action to quiet her title to the land, although she would not be entitled to its possession: *Sims v. Smith*, 86 Ind. 577; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; and see *Ihley v. Padgett*, 27 S. C. 300. If coverture is a disability which will prevent the running of the statute of limitations, but if, notwithstanding, a married woman is permitted to sue concerning her lands independently of her husband, and the common law concerning the marital rights of the husband does not exist, then it would seem she might disaffirm her deed, executed while an infant, during the existence of the coverture, although she would not be obliged to do so: See *Buchanan v. Hubbard*, 96 Ind. 1; 119 Ind. 187, 193; and see *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429.

If it be true that an infant *feme covert* will not be prevented from disaffirming a deed of conveyance of her own lands by any mere lapse of time while the disability of coverture lasts, we should say that it would certainly be true that the lapse of time would not bar her right to disaffirm a deed by which she released her dower in the lands of her husband, since she would have no right to avoid her release by claiming dower during the lifetime of her husband: *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; and see *Sanford v. McLean*, 3 Paige, 117, 122; 23 Am. Dec. 773, 775; *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374.

It was held, in a state where curtesy exists, that where an infant *feme covert* and her husband executed a deed of her lands, and the wife died after coming of age, leaving her husband and two minor children surviving her, as the husband could not sue, since the deed was binding upon him as to his estate by the curtesy, and as the wife could not sue alone, the statute of limitations never began to run against the wife during her lifetime, and consequently did not begin to run against her children, who continued to be infants, so as to bar their claim to the land; and besides, since upon the death of the wife the grantee became invested with an estate for the life of the husband, the statute would not begin to run against the heirs of the wife until the termination of the life estate, as well as the removal of their disabilities: *Matherson v. Davis*, 2 Cold. 443, 449, 450; and see, to the same effect, *Harris v. Ross*, 86 Mo. 89; 56 Am. Rep. 411.

Lapse of time, taken in connection with other circumstances, may possibly preclude a *feme covert* from repudiating a deed of her lands, executed during infancy. But where a female infant, residing in one state, executed there a deed of lands in another state, and afterwards married, but it did not appear whether before or after her majority, nor where she and her husband resided after the execution of the deed, nor that the husband acquiesced in the deed after he knew of it, it was held that the lapse of about five years after the wife's majority, without any attempt to disaffirm the deed, did not, under the circumstances, prevent the husband and wife from disaffirming it: *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; and that the silence and inaction of an infant *feme covert* for thirty years after the execution of a deed of her

lands by herself and husband, and for more than twenty-six years after she attained her majority, coupled with the fact that she lived in the city where the lands were situated, and was probably aware that valuable improvements were being made, did not amount to an affirmance of the deed: *Youse v. Norcoms*, 12 Mo. 549, 563; 51 Am. Dec. 175; and again, that a disaffirmance by an infant *feme covert* of a deed of her lands, executed by herself and husband, thirty-three years after she attained her majority, was within a reasonable time, where she continued under coverture, and where the husband had received the entire consideration of the lands, and she was under his control, and he refused to permit her to disaffirm the deed until shortly before the commencement of the suit in question to quiet her title against the heir of her grantee in possession: *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; also, that an infant *feme covert*, who unites with her husband in a conveyance of his lands, was not estopped from disaffirming the deed after her husband's death, and claiming her interest in the lands as widow, by the fact that the grantee, or his successors, have, with her knowledge, made valuable improvements upon the lands, if such improvements were made prior to her husband's death: *Richardson v. Pate*, 93 Ind. 423, 428; and it is further held, in *Buchanan v. Hubbard*, 96 Ind. 1, that a married woman was not estopped from disaffirming, during coverture, a deed of her own lands, executed during infancy, from the fact that the grantee, with her knowledge, after reaching majority, made improvements upon the lands; and also that the fact that she united with her husband in enjoying or exercising dominion over property received by the husband as part of the consideration did not preclude her from asserting the disability of infancy against the grantee, or his successors. But, on the other hand, where a female infant joined in a conveyance of her husband's lands, and for thirteen years after she attained her majority, and her husband's death, lived in the vicinity of the lands, which were being greatly improved by the grantee, it was held that she was thereby precluded from avoiding her deed, and claiming dower in the lands: *Hartman v. Kendall*, 4 Ind. 403, 404.

The time within which the grantor must disaffirm her deed executed during infancy, after the disability of coverture is removed, we should say, in accordance with our views expressed under the last preceding head, would properly be fixed by the statute of limitations, which begins to run at the removal of the disability, and that her right to disaffirm would not be barred until barred by the statute. Some of the foregoing cases seem, however, to hold that she must disaffirm within a reasonable time after becoming discovert. The question does not appear to be distinctly discussed in any case.

CONSEQUENCES OF DISAFFIRMANCE — CONTRACT IS RENDERED VOID AB INITIO. — The disaffirmance of a contract by a minor annuls or renders it void on both sides *ab initio*: *Boydlen v. Boydlen*, 9 Met. 519, 521; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *French v. McAndrew*, 61 Miss. 187; *Schrock v. Crowl*, 83 Ind. 243; *Rice v. Byer*, 108 Ind. 472; 58 Am. Rep. 53, 55; *Hoyt v. Wilkinson*, 57 Vt. 404. Therefore, if an infant sells a tract of land and executes a title bond, and on coming of age sells the land to another person, and executes to him a title bond, the effect of the disaffirmance of the first contract by the second is to extinguish from the beginning any interest at law or in equity which the first vendee may have acquired under the contract, and hence he gets no priority over the second vendee by obtaining a deed of the land from the vendor after such disaffirmance, especially if the first vendee had not paid full value, and had taken the deed with notice of the second contract: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76

Am. Dec. 209; and if a grantor disaffirms a deed executed during infancy, the conveyance being rendered void *ab initio*, he is entitled to charge the grantee for rents during the entire time that he occupied the land, claiming under the deed: *French v. McAndrew*, 61 Miss. 187.

INFANT'S RIGHTS, IN GENERAL, ON DISAFFIRMANCE OF CONTRACT.—Where the contract of an infant effects a transfer of his property, his rights on disaffirming the contract are clear. If his real estate is sold and possession delivered, the title is revested in him by the disaffirmance, and he can, without any doubt, recover the land, if it is still in the hands of the party who contracted with him, and if it has been transferred, even to a *bona fide* purchaser for value, he may, as above seen, still recover it. If he sells his real property, but has retained possession, no affirmative action on his part is, of course, required. If he sells and delivers his personal property, the title is likewise revested in him on disaffirming the contract, and he is entitled to the property in whosoever hands it may be, and may retake the same, and may maintain an action of replevin or trover for it: See *Shipman v. Horton*, 17 Conn. 481; *Bailey v. Burnberger*, 11 B. Mon. 113; *Towle v. Dresser*, 73 Me. 252; *Bloomington v. Chittenden*, 74 Mich. 698. And therefore no action of trespass can be sustained against him for taking the property into his possession: *Shipman v. Horton*, 17 Conn. 481. We doubt, also, if any demand would, on principle, ever be a necessary prerequisite to maintaining replevin or trover for the property, the contract being rendered void *ab initio* by the rescission: But see *contra*, *Stafford v. Roof*, 9 Cow. 626; *Cogley v. Cushman*, 16 Minn. 397; *Betts v. Carroll*, 6 Mo. App. 518. Of course, the repudiation of a sale of personal property will not vest in the infant a title to goods which he never owned, but which were purchased by the vendee from the avails of the property sold to him by the infant: *Shipman v. Horton*, 17 Conn. 481. The foregoing propositions suppose that the infant has not, on or after the disaffirmance, transferred the property, real or personal, to some other person. If such a transfer is made, we should say, however, that the transferee stands in the shoes of the infant, so far as a recovery of the property may be concerned.

An infant who has mortgaged his crops to secure advances cannot be indicted for afterwards disposing of the crops, since the contract of mortgage, when disaffirmed by the subsequent disposition, became absolutely void, and the infant could not be held amenable to the criminal law for the violation of a void contract: *State v. Howard*, 88 N. C. 650. In *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418, it was held that where a sewer was constructed through the defendant's lot, at the joint expense of himself and plaintiff, who owned the adjoining upper lot, under a written agreement entered into while defendant was an infant, the latter's disaffirmance of the contract operated as a revocation of the easement created by it, and the plaintiff's continued use of the sewer thereafter would be a nuisance, which the defendant might abate by obstructing the sewer.

If an infant purchases a chattel, and gives his promissory note for the price, his disaffirmance of the contract operates to divest the payee of his title to the note, and to reinvest him with the title to the chattel, so that no action can be maintained on the note against the infant, either by the payee or his subsequent transferee: *Hoyt v. Wilkinson*, 57 Vt. 404. An infant indorser of a note may disaffirm his indorsement and intercept payment to the indorsee: *Hastings v. Dollarhide*, 24 Cal. 195; and may even disaffirm the transfer, and recover of the maker, notwithstanding the maker paid the paper to the transferee before the infant's disaffirmance of the assignment: *Briggs v. Mc-*

Cabe, 27 Ind. 327; 89 Am. Dec. 503, 506; *contra*, *Welch v. Welch*, 103 Mass. 562; and see *supra*, "Bills and Notes." And where the payee of a non-negotiable note, who was a minor, exchanged it with a third person for a watch, but on the next day tendered back the watch and demanded the note, which was refused, and the maker of the note, being informed of the transaction, gave a new note for the debt, it was held that there could be no recovery against the maker on the first note by a subsequent transferee, since when the assignment of the note was rescinded by the minor the note ceased to be the property of the assignee, and the maker had then the right to consider it as still the property of the minor, and he became discharged from liability thereon when he gave the new note in lieu thereof: *Willis v. Twambly*, 13 Mass. 204.

If, also, an infant makes a special contract to labor, on disaffirming the contract he may recover on a *quantum meruit* for the services performed, as though no special contract had been made, and, furthermore, the damages sustained by the employer by reason of the infant's abandoning the contract, or otherwise failing to comply with its terms, cannot be taken into consideration in the action by the infant: See *supra*, "Service."

INFANT'S RIGHT TO RECOVER BACK MONEY PAID BY HIM ON DISAFFIRMANCE. — The right of an infant to recover back money paid by him on disaffirming his contract is a question about which there has been a good deal of difference of opinion. The notion that he cannot recover seems to be founded on a reported *dictum* of Lord Mansfield in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, as follows: "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This *dictum* was approved by Chief Justice Gibbs in the much-discussed case of *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and the rule announced that an infant who pays money on a valuable consideration could not recover the money back, after having partially enjoyed the consideration; and therefore an infant who took a lease of a house, occupied the premises for a time, and paid the rent, could not recover back the rent so paid, on avoiding the lease and quitting the premises. And in *Wilson v. Kearse*, Peake Add. Cas. 196, Lord Kenyon held, at *nisi prius*, that though an infant who had entered into a contract to purchase the good-will and stock of a public house could not be compelled to complete it, yet he could not, on refusing to go on with the contract, maintain an action to recover back a deposit which he had paid. In *Corpe v. Overton*, 10 Bing. 252, 3 Moore & S. 738, the next case which presented the question, it was decided that an infant who agreed to enter into a partnership with a tradesman, and who paid a deposit towards the purchase of an interest in the business, which was to be forfeited to the tradesman if the infant failed to fulfill the agreement, might rescind the agreement, and recover back the money so paid by him. The court did not, in terms, purport to overrule *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, but distinguished it on the ground that in it the infant had received something of value for the money he had paid, and could not put the defendant in the same position as before, while in the case before the court the infant had derived no benefit from the transaction, and, besides, was subjected to a penalty.

In *Ex parte Taylor*, 8 De Gex, M. & G. 254, an infant paid, by means of borrowed money, a premium upon entering into a partnership, and before he became of age disaffirmed the contract of partnership. The court went back to *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and *Wilson v. Kearse*, Peake Add. Cas. 196, and held that the infant could not have recovered back the

premium had his partners remained solvent, and therefore could not prove for it under their bankruptcy; Lord Justice Turner saying: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right, upon his attaining his majority, to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back"; and concluding with the language of Lord Kenyon in *Wilson v. Kearse*, Peake Add. Cas. 196: "If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot, on attaining his majority, recover the money back." Finally, in *Everett v. Wilkins*, 29 L. T. 846, the plaintiff, during his infancy, entered into an agreement with the defendant for the purchase of a one-half share in the defendant's public-house business. Under the agreement, the plaintiff was to pay an installment of the purchase-money at once, and the balance at a future uncertain time. The defendant was to provide board and lodging for the plaintiff and his wife, the plaintiff paying therefor, and the plaintiff was not to receive any of the fruits of the partnership until the balance of the purchase-money was paid. The plaintiff paid an installment, and went with his wife to board and lodge with the defendant, and shared in the management of the business, but afterwards, and before his majority, rescinded the agreement. It was held that the plaintiff might recover back the installment paid under the agreement, less the amount due for board and lodging [necessaries]. The case, it will be observed, is the same in principle as *Corpe v. Overton*, 10 Bing. 252; 3 Moore & S. 73S. As to the right of an infant, under the Infants' Relief Act, 1874, 37 and 38 Victoria, chapter 62, to recover back money paid by him in pursuance of a contract made void by the act, see *Valentini v. Canali*, L. R. 24 Q. B. D. 166.

In this country, it has been held, on the authority of *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and Lord Mansfield's *dictum* in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, that where an infant does work and pays money on account of the purchase price of land, which was agreed to be conveyed to him in the future, he could not, by avoiding the contract, recover compensation for his labor, and get back the money paid: *McCoy v. Huffman*, 8 Cow. 84. But the case differs from *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, in that the infant never had the possession and enjoyment of the premises; and it is expressly disapproved, and so far, at least, as it denies the right of the infant to avoid his contract under which services were rendered, and recover the value of the services, is overruled in *Medbury v. Watrous*, 7 Hill, 110. See also *Weeks v. Leighton*, 5 N. H. 343; overruled in *Lufkin v. Mayall*, 25 N. H. 82. In several cases it has also been held, in conformity with *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, that where an infant puts money into a partnership business, or pays money in consideration of being admitted as a partner in a business, he cannot, after remaining a partner for a time, recover back the money so paid: *Moley v. Brine*, 120 Mass. 324; *Page v. Morse*, 128 Mass. 99; *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; and see *Breed v. Judd*, 1 Gray, 455; also see *supra*, "Partnership Agreements and Transactions." And in *Crummey v. Mills*, 40 Hun, 370, it was held that an infant could not, on coming of age, recover back money paid and stock deposited with brokers as a margin for the purchase of more stock, he having failed to keep his margin good, and his stock having been consequently all sold out, leaving him indebted to the brokers; the court saying: "No rule of law has ever permitted a minor to avoid a contract of which he has enjoyed the benefit, and recover back the

consideration paid on the attainment of his majority"; and also quoting 1 Parsons on Contracts, *322, to the effect that "if an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained from him by fraud." But compare *Ruchizky v. De Haven*, 97 Pa. St. 202.

On the other hand, it is maintained that where the minor has received no benefit from the contract under which he has paid money, as where he has purchased property of which he never obtains the possession, he may, on repudiating the contract, recover back the money: *Robinson v. Weeks*, 56 Me. 102; *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; the court saying in the first of these cases: "There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be"; disapproving *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, and *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and explaining the latter case; and in *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640, it was decided that the vendor was not entitled to deduct from the amount of money sued for the expense of advertising and selling the property again, brought about by the plaintiff's rescinding the contract. See also *Ruchizky v. De Haven*, 97 Pa. St. 202, where money was deposited by a minor with brokers as margins in stock speculations; and *Holt v. Holt*, 59 Me. 464, the case of a gift of money by an infant; but compare *Welch v. Welch*, 103 Mass. 562; *Brown v. Town of Canton*, 4 Lans. 409. And it has also been held that if an infant purchases property, he may recover back the price paid, if he restores or offers to restore the property to the vendor: *Riley v. Mallory*, 33 Conn. 201; *Cooper v. Allport*, 10 Daly, 352; *McCarthy v. Henderson*, 138 Mass. 310; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; and see *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; compare *Shirk v. Shultz*, 113 Ind. 571; although a restoration is not necessary if the property has been taken from him, either by the vendor or by some third person: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Lemmon v. Beeman*, 45 Ohio St. 505; and in *McCarthy v. Henderson*, 138 Mass. 310, it was held that the vendors were not entitled to recoup for the use of the property while in the possession of the minor. It has been likewise decided that an infant might avoid an agreement of partnership, and recover back the money which he was induced to invest in the business, on restoring the benefits received from the partnership: *Sparman v. Keim*, 83 N. Y. 245; and in *Heath v. Stevens*, 48 N. H. 251, it was held that "An infant, upon rescinding an executed contract, may recover for what he has done or paid under it, provided he restore or account for what he has received under the contract"; and hence, where the defendant gave the plaintiff, who was then an infant, information respecting bounties paid for enlistment in New York, paid the plaintiff's fare to New York, and agreed to pay his fare back again if he was not accepted as a recruit, for which the plaintiff paid the defendant two hundred dollars out of his bounty, the plaintiff might rescind the contract and recover what he had paid under it, but in such an action the money advanced by the defendant to the plaintiff should be allowed the defendant, and it should be left to a jury to say what should be a further reasonable sum for the defendant to have on account of what he did and the risks he took.

In regard to the foregoing cases, it may be said, in the first place, that Lord Mansfield's dictum in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, is unquestionably not law; and in the next place, we think that *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, cannot be sustained. We think it per-

fectly clear that if the infant has received no benefit under the contract, he may, on disaffirming it, recover back any money which he may have paid; and we think it equally clear that the result is the same where the infant restores or offers to restore property obtained by him by virtue of the contract from the other contracting party; for, in the language of the court in *McCarthy v. Henderson*, 138 Mass. 310, "he is in the position of an infant who has paid money under a void contract and without consideration, and is entitled to recover it back." Furthermore, we think that the infant should be permitted to recover back the money paid by him without restoring or offering to restore property received under the contract which remains in his hands at the time, although such property, because of the disaffirmance of the contract, undoubtedly belongs to the other contracting party, who may retake it if he can, or maintain any appropriate action for it. If the infant has received a benefit under the contract of a nature like that in *Holmes v. Blogg*, 8 Taunt. 503, 2 Moore, 552, which cannot be restored, or if he has obtained property which he has consumed, destroyed, or in any way disposed of during his minority, so that it no longer remains in his hands, we do not see why, on principle, the infant may not still recover back the money paid. The notion that the opposite contracting party must be restored to his original condition before the infant can recover back the money paid is unsound. We do not see any difference in reason between the case where an infant parts with money and the case where he parts with property, and why he should not be able to recover the one under precisely the same conditions as the other. Where, however, what the infant has received under the contract has also been money, it may be that, to avoid circuity of action, a deduction of that sum should be made from the amount of the infant's recovery; and to this extent we think the foregoing case of *Heath v. Stevens*, 48 N. H. 251, is correct.

ADULT'S RIGHT TO RECOVER BACK CONSIDERATION FROM INFANT ON DISAFFIRMANCE.—Since the disaffirmance of a contract by an infant annuls or renders it void on both sides *ab initio*, it follows that the opposite contracting party has the right to reclaim any property transferred to the infant under the contract, and which may remain in the infant's hands. To hold that the infant might repudiate the contract, and still retain the property received by virtue of it, would be, in the language of Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, to make the privilege of infancy not a shield, but a sword. Hence if an infant disaffirms his purchase of personal property, the title revests in the vendor, who may reclaim the property from the infant if it be still in his hands, or may maintain trover for its conversion, although, perhaps, he may have consumed, destroyed, or parted with the property after the avoidance of the contract: *Bradger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Boyden v. Boyden*, 9 Met. 519, 521; *Walker v. Davis*, 1 Gray, 506; *Strain v. Wright*, 7 Ga. 568; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571; *Nichol v. Steger*, 2 Tenn. Ch. 328; affirmed in 6 Lea, 393; *Bennett v. McLaughlin*, 13 Ill. App. 349; or the property may be attached at the suit of the creditors of the vendor: *Betts v. Carroll*, 6 Mo. App. 518. "We cannot sanction the doctrine contended for," says Warner, J., in *Strain v. Wright*, 7 Ga. 568, "that an infant who obtains property by virtue of a contract with an adult may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant,

would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights."

This rule also unquestionably applies to a purchase of real estate by an infant which he afterwards disaffirms. And in case of a sale of real property by an infant, and we may add that the same must be true of a sale of personal property subsequently disaffirmed by him, the purchaser may likewise recover the consideration transferred to the infant, if the infant still retains it: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214; and see *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732. We do not see why this rule should not apply equally where the consideration is money, as where it is anything else, although it may be true that the identical money paid cannot be recovered. This, however, was denied in *Dill v. Bowen*, 54 Ind. 204; the court saying: "Having disaffirmed the contract, the law imposes upon her [the infant] no legal obligation to repay the purchase-money. This is implied in the proposition that she may disaffirm without restoring or offering to restore the purchase-money. If an infant disaffirm a contract after coming of age, he must do it *in toto*; that is to say, if he has property in his hands acquired by the contract, the other party may reclaim it. But if the property has passed from his hands, or if he has received money, the law imposes no obligation upon him to account for the property, or repay the money, upon his disaffirmance of the contract. It is not necessary that the other party should be placed *in statu quo*." We do not think that this confused and unreasoned statement can detract very much from what we have just said to the contrary. There is, notwithstanding, one truth which it recognizes, and which should be carefully borne in mind, namely, that where the infant has consumed, destroyed, or in any manner parted with the original consideration received by him, so that none of it remains in kind in his hands, he is under no obligation to repay its value or restore an equivalent: See *Nichol v. Steger*, 2 Tenn. Ch. 328; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214; and if property received by the infant is in his hands in an injured condition, he is not liable for the injury, unless, perhaps, under some circumstances, in an action of tort: See *Carpenter v. Carpenter*, 45 Ind. 142.

INFANT'S OBLIGATION TO RESTORE CONSIDERATION ON DISAFFIRMANCE. — The obligation of an infant to restore the consideration received by him as a condition precedent to the disaffirmance of his contract, or to his obtaining relief based upon such disaffirmance, is a question which has an intimate connection with the one just discussed, — of the right of the other contracting party to recover back the consideration parted with, from the infant, on the disaffirmance. That question supposed that the contract had been avoided, and that the adult was the actor. Here the infant is the actor, and is attempting to obtain some relief against his contract, based upon his privilege of infancy and his right to repudiate his agreements. It would seem to be plain that where the infant is sued upon his contract, he is under no conditions in asserting its invalidity on account of his infancy. As was well said in *Eureka Company v. Edwards*, 71 Ala. 248, 256, 46 Am. Rep. 314, 315: "Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one [and we may add, before he reaches that age], then, on demand

or suit, he can be held to account for it"; and see also *West v. Gregg's Adm'r*, 1 Grant Cas. 53, 55. It will be noticed that the court is speaking, not of a suit to recover back from the minor the consideration parted with, but of a suit to enforce the contract against him.

It is difficult to see upon what theory of pleading or practice the infant could be required in such an action against him on the contract to restore the consideration, if he wished to take advantage of his infancy, unless a restoration of the consideration be a condition precedent to a disaffirmance, which is very seldom maintained. Yet in *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209, it was held that an infant who purchases goods for the purposes of trade, and does not return them, is liable for so much of the price as is equal to the benefit derived by him from the purchase; the court saying: "The true rule is, that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract"; and in *Bartlet v. Bailey*, 59 N. H. 408, it was also said that "a person seeking to avoid his contract on the ground of infancy must account for what he has received under it by restoring or paying the value of whatever remains in specie within his control, and allowing for the benefit derived from whatever cannot be restored in specie. This doctrine has been repeatedly recognized in actions brought to recover what has been paid, or compensation for what has been done, under contracts made by infants. No reason exists why it is not equally applicable to cases where infancy is set up as a defense. Whether an infant is plaintiff or defendant in an action cannot affect his legal rights as to his contracts"; and it was therefore decided, where the plaintiff sold and delivered milk to the defendant, who was a minor engaged in the milk business, and who sold the milk to his customers, that the plaintiff was entitled to recover of the defendant the value of the benefit derived by him from the purchase of the milk. According to these New Hampshire cases, there does not seem to be very much real difference between an infant's general contracts and his contracts for necessities, as to his liability. It is almost needless to say that the position taken by them as to an infant being liable, at all events to the extent of the benefits received by him, is not correct on principle, nor is it sustained by the authorities. It seems also to be held by other cases that in an action against an infant on his contract, he must restore the consideration if he would disaffirm: *Dickerson v. Gordon*, 24 N. Y. St. Rep. 448; *Combs v. Hawes*, 8 Pac. Rep. 597 (decided under the California Civil Code).

The obligation of an infant to restore the consideration received by him under a contract which he claims to disaffirm, where he is a party plaintiff in an action founded on the disaffirmance, has been the subject of a good deal of difference of opinion, and there can hardly be said to be any well-defined rule. It has sometimes been held that a restoration of the consideration, or an offer to restore it, was a condition precedent to a disaffirmance by an infant of his contract, so that there could be no effectual avoidance unless this condition had been complied with: *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; and these cases, which were legal actions, appear to disregard the inquiry whether the consideration still remains in the infant's hands or not; and see *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732. It is safe to affirm that the authorities generally do not require the performance of any such condition to a disaffirmance; and although some of them may say that, under certain

circumstances, an infant cannot disaffirm his contract and maintain an action to recover back the property or money parted with, unless he restores or offers to restore the consideration, yet we take it that all that is meant is, that a restoration or an offer to restore is simply a condition to the obtaining of the relief sought, and not to the disaffirmance itself. Were the contrary true, a minor could not, at least where he retained the consideration, defend an action on his contract on the ground of infancy, unless he first made a restoration or an offer to restore, and an action brought by him, based upon a disaffirmance, would be premature, unless this step had been observed.

In opposition to this view, that a restoration of the consideration, or an offer to restore it, is a condition precedent to a disaffirmance, Wells, J., says, in *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117, 122, where the action was a writ of entry: "Another ground relied on by the defendant is, that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void, if at all, so that it will no longer protect him in the retention of the consideration. Or if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*." See also, to the same effect, *Tucker v. Moreland*, 10 Pet. 58, 74; 1 Am. Lead. Cas. *224, *232; *Gibson v. Soper*, 6 Gray, 279, 282, 283; 66 Am. Dec. 414, 417 (lunatic's deed); *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Pitcher v. Laycock*, 7 Ind. 398; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Corey v. Burton*, 32 Mich. 30; *Dawson v. Helmes*, 30 Minn. 107, 113; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; *Vallandigham v. Johnson*, 85 Ky. 288; and see *Bartlett v. Drake*, 100 Mass. 176, compare *Lemmon v. Beeman*, 45 Ohio St. 505.

It is very evident if no consideration was ever received by an infant, either because the other contracting party had not paid it over at all, or because it had been paid over to some one else, as the father or husband of the infant, that the infant may disaffirm the contract and recover back the money or property transferred, or obtain any appropriate relief, either at law or in equity, without restoring or offering to restore the consideration: *Griffis v. Younger*, 6 Ired. Eq. 520; 51 Am. Dec. 438; *Robinson v. Weeks*, 56 Me. 102; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Clark v. Tate*, 7 Mont. 171; *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; *Fogelsang v. Null*, 67 Tex. 465; and see *Law v. Long*, 41 Ind. 586; *Richardson v. Pate*, 93 Ind. 423, 428. In *Fogelsang v. Null*, 67 Tex. 465, it was held that the fact the third party, who received the purchase-money for lands of the infant, and

failed to pay it over, was the recognized agent of the infant to receive it, was immaterial, since an infant could not appoint an agent to perform an act to his injury, although he might constitute an agent to do an act for his benefit, and whether the act was beneficial or injurious was left to the discretion of the infant. We think the decision correct, although the reason is absurd. It follows, from the foregoing, that where the infant transfers his property without any consideration whatever, that no obligation rests upon him to restore anything. Therefore it is unnecessary, in a bill to cancel a deed on the ground of the infancy of the grantor, for the complainant to offer to refund the purchase-money recited in the deed to have been paid, if he avers that the deed was procured without consideration: *Cook v. Toubms*, 36 Miss. 685; the infant is not bound by the recital of the consideration in the deed: *Cook v. Toubms*, 36 Miss. 685; but it is, of course, incumbent on the infant to establish, in such a case, that no consideration was in fact paid: *Wade v. Love*, 69 Tex. 522.

It has occasionally been broadly laid down in actions at law, brought by infants to recover money or property, based on their right to avoid their contracts, that an infant could not disaffirm his contract and recover back money paid or property transferred thereunder, without restoring or offering to restore the consideration received by him: *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228; *Farr v. Sumner*, 12 Vt. 28; 36 Am. Dec. 327; *Bailey v. Burnberger*, 11 B. Mon. 113, 115; *Bartholomew v. Finnemore*, 17 Barb. 428; and see *Bartlett v. Cowles*, 15 Gray, 445, which should be compared with *Gibson v. Soper*, 6 Gray, 279, 282, 283, 66 Am. Dec. 414, 417, and *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117, 122, cited *supra*; also compare the more recent Vermont cases of *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194, and *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678, with the earlier ones above cited; also see *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233. In *Bartholomew v. Finnemore*, 17 Barb. 428, an infant purchased a horse of the defendant, and paid for it in property. He kept the horse about a month, during which time, in consequence of his misuse of it, its value was greatly lessened, and then tendered it back to the defendant, and demanded the property he had delivered to the latter. It was held that he could not recover the property on a refusal to deliver it. Hand, P. J., said: "After he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration, or at least an equivalent. This the plaintiff did not do nor offer to do in this case. He had the use of the horse for some time, and probably, by improper treatment, reduced him to one half of his former value, for all of which he offered no compensation." This theory that the infant must restore the consideration received by him, or if it cannot for any reason be restored, he is chargeable with an equivalent, or rather with its value, has been carried to its fullest extent in New Hampshire, as already seen: *Heath v. Stevens*, 48 N. H. 251; *Kimball v. Bruce*, 58 N. H. 327; *City Savings Bank v. Whittle*, 63 N. H. 587; also *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408, discussed *supra*; compare *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345.

In other cases at law, brought by infants, it has been said that an infant who would rescind his contract must restore or offer to restore the consideration, if it be in his hands; but his obligation with respect to a restoration does not exist if he has lost, consumed, destroyed, or in any way parted with the consideration during his minority: *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Manning v. John-*

son, 26 Ala. 446; 62 Am. Dec. 732; *Green v. Green*, 69 N. Y. 553; 25 Am. Dec. 233; *Hangen v. Hachmeister*, 17 Jones & S. 34; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Craig v. Van Bebbber*, 100 Mo. 584; and see *Corey v. Burton*, 32 Mich. 30; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214, per Moneure, J.; *Gillespie v. Bailey*, 12 W. Va. 70, 92; 29 Am. Rep. 445, 449; Chief Justice Church saying, in *Green v. Green*, 69 N. Y. 553, 25 Am. Dec. 233: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether." In *Whitcomb v. Jostyn*, 51 Vt. 79, 31 Am. Rep. 678, an infant purchased a wagon, paying part of the purchase price, and giving his promissory note, secured by a lien on the wagon, for the remainder. The vendor afterwards took the wagon under his lien and sold it. It was held that as the vendor had retaken the wagon, there was nothing for the infant to do, to entitle him to recover the money paid by him towards the wagon, but to disaffirm the contract. And furthermore, that the infant's right of recovery was not affected by the fact that the wagon had depreciated in value while in his possession, by reason of use or otherwise, for he was "no more liable for the use of the wagon than for the agreed price." See also *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194, on the proposition that where an infant rescinds his contract of exchange offers to return the property received by him, and brings trover for his property, evidence that the property offered to be returned had depreciated in value is inadmissible, either for the purpose of defeating a recovery or reducing the damages. In *Lemmon v. Beeman*, 45 Ohio St. 505, it was held that where a minor purchased a stock of goods, he might disaffirm the purchase, and recover back the consideration paid, without restoring the goods, if they have been taken from him, whether rightfully or not, upon an execution against a third person. In such a case, he was not required, as a condition of his right to recover, to take any steps to regain the property taken from him. It was sufficient if it had ceased to be in his possession or subject to his control. Compare *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565.

There is still another line of cases taking the view that an infant may disaffirm his contract and recover back, in a court of law, property transferred, or money paid in pursuance thereof, without any condition as to restoring the consideration received by him: *Eureka Company v. Edwards*, 71 Ala. 248, 256; 46 Am. Rep. 314, 315; *Miles v. Lingerman*, 24 Ind. 385; *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; *Shirk v. Shultz*, 113 Ind. 571; *Chandler v. Simmons*, 97 Mass. 508, 514; 93 Am. Dec. 117, 122; *Walsh v. Young*, 110 Mass. 396; *Dawson v. Helmes*, 30 Minn. 107, 113; *Shaw v. Boyd*, 5 Serg. & R. 309; and see *Shuford v. Alexander*, 74 Ga. 293; *Pitcher v. Laycock*, 7 Ind. 398; *Law v. Long*, 41 Ind. 586; *Richardson v. Pate*, 93 Ind. 423, 428; although if the infant still has the consideration in his hands, the opposite contracting party is of course entitled to recover it in an action brought therefor. It follows, it is no defense to an action by an infant to recover possession of a horse that another horse received by him in exchange therefor has been so misused by him that though sound and of equal

value with the horse given by him in exchange at the time of the transaction, it became unsound and of no value: *White v. Branch*, 51 Ind. 210. We think that the rule of these cases better accords with pleading and practice in actions at law than either of the others noticed above. Particularly is the rule to be condemned which compels the infant, if he cannot restore the original consideration received, to restore or offer to restore an equivalent, or to account for the benefits derived therefrom. To so hold would operate, in the language of Chief Justice Church in *Green v. Green*, quoted above, "as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether."

It seems to be regarded by some authorities that if a person applies to a court of equity for relief against his contract on the ground of infancy, he will be required to do equity by restoring the consideration to the other contracting party if he still retains it, or if not, by paying an equivalent: See *Hillyer v. Bennett*, 3 Edw. Ch. 222, 225; *Gray v. Lessington*, 2 Bosw. 257, 262; *Smith v. Evans*, 5 Humph. 70; *Manning v. Johnson*, 26 Ala. 446, 452; 62 Am. Dec. 732, 734; *Bryant v. Pottinger*, 6 Bush, 473; *Bozeman v. Browning*, 31 Ark. 364; *Cummings v. Powell*, 8 Tex. 80; *Folts v. Ferguson*, 77 Tex. 301; and see *Pitcher v. Laycock*, 7 Ind. 389. Thus, says the vice-chancellor in *Hillyer v. Bennett*, 3 Edw. Ch. 222, 225, "if after an infant comes of age he seeks to disaffirm and avoid his contract in a court of equity, and files his bill there for the purpose of obtaining its aid in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party, and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back, especially if it appears that the other dealt with him in ignorance of the fact of nonage." And in *Gray v. Lessington*, 2 Bosw. 257, 262, it was held that an infant who goes into a court of equity to have her purchase of personal property rescinded, and her promissory notes and mortgage, given to secure a part of the purchase price, canceled, and the money paid by her returned, must do equity and restore the property, and make full satisfaction for the deterioration arising from its use. We do not think that so broad a rule can be sustained. The privilege of infancy should be recognized in equity to the same general extent as at law; and if the infant has in any way parted with the consideration during his minority, so that he no longer retains it, we do not think that equity should deny him relief unless he restores an equivalent. It seems to us that the maxim, "He who seeks equity must do equity," should not apply to such a case.

This latter is the view taken by other cases. If, therefore, an infant retains the consideration received from the other contracting party, equity may very properly require its restoration to the latter as a condition on which relief will be granted him in avoidance of his contract; but if the infant has lost, consumed, destroyed, or in any manner parted with the consideration during his minority, so that it no longer remains in his hands, his obligation with respect to a restoration is at an end: See *Eureka Company v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Reynolds v. McCurry*, 100 Ill. 356; *Brantley v. Wolf*, 60 Miss. 420; *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; and see *Gillespie v. Builey*, 12 W. Va. 70; 29 Am. Rep. 445; *Brandon v. Brown*, 106 Ill. 519, and cases cited; and certainly there would be no obligation to restore, if the purchase-money for an infant's lands had been paid to her husband and retained by him: *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; not even, it is held, where a large portion of it had been applied to the support of the infant and her family: *Bedinger*

v. *Wharton*, 27 Gratt. 857; and we should say that this principle would forcibly apply where an infant *feme covert* unites with her husband in a conveyance of his lands, in which she afterwards claims dower: See *Law v. Long*, 41 Ind. 586; *Richardson v. Pate*, 93 Ind. 423, 428. In *Weed v. Beebe*, 21 Vt. 495, it was held that where an infant, on coming of age, conveyed land purchased by him to a third person, who took with notice of the fact that a portion of the purchase price remained unpaid, the grantor might enforce his lien therefor in chancery without paying or offering to pay the amount already received by him; but here the infant had really ratified his purchase by the conveyance after majority.

If the suit is not brought by the infant himself, but by his subsequent grantee or purchaser, claiming that a prior conveyance or sale by the infant to the defendant had been disaffirmed, the question is presented, whether the same obligation to make a restoration of the consideration rests upon the plaintiff as would rest upon the infant had he sued instead. If it be held that a restoration or an offer to restore is a condition precedent to a disaffirmance, the defendant may of course show that this step had not been complied with: See *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801. But where such a ruling does not obtain, we are inclined to think it a sound doctrine that if the infant is not a party to the suit, any claim which the defendant whose previous contract has been disaffirmed may have on account of the consideration is a personal claim against the infant, and cannot be enforced in the action: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

In some of the states, the foregoing questions concerning the restoration of the consideration are controlled by statutes. Thus the following legislative attempt exists in California: "In all cases other than those specified in sections 36 and 37 [sections relating to contracts for necessities, and obligations entered into under the express authority or direction of statutes], the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent": Civ. Code, sec. 35. Section 17 of the Dakota Civil Code is the same in language, except that, instead of the words "or within a reasonable time afterwards," the section reads, "or within one year's time afterwards," and adds to the end of the section the words "with interest." It has been shown *supra*, "Statutory Regulation," that certain general contracts of infants under the age of eighteen are, in these states, absolutely void, while the others are voidable merely. So far as the foregoing section speaks of contracts made under the age of eighteen, it must have reference only to the latter, and not to those which are absolutely void, since these cannot be disaffirmed, in the proper sense of the word. It will be observed that the section says nothing about restoring the consideration when contracts made under the age of eighteen are disaffirmed, while it says that if the contracts are made by a minor over the age of eighteen, they may be disaffirmed "upon restoring the consideration to the party from whom it was received, or paying its equivalent." It would seem, therefore, that the disaffirmance by minors of contracts made under the age of eighteen is left to be governed by the general rules of the law upon the subject, and consequently no restoration or offer to restore should ever be required as a condition precedent to a dis-

affirmance, nor as a condition to obtaining relief in an action brought by the infant, except it be an equitable action, and only then when he has not parted with the consideration during his minority, but still retains it. But if a minor would disaffirm a contract made while he is over the age of eighteen, it appears to be a condition precedent to a disaffirmance that he should restore, or at least offer to restore, the consideration received by him, or pay its equivalent, and unless he observes this step, any attempted disaffirmance would be ineffectual. This seems to have been the view taken in *Combs v. Hawes*, 8 Pac. Rep. 597 (Cal.). There can be only one opinion about such a statutory distinction between contracts, and that is, that the distinction is extremely foolish, there being absolutely no reason whatever to justify its existence.

In Iowa, it is provided by section 2238 of the code that "a minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after attaining his majority." It has therefore been held, under this provision, that it is essential to the disaffirmance of a deed executed by the grantor during his minority that he return or tender the fruits received by him, if under his control: *Stout v. Merrill*, 35 Iowa, 47. The section, it is held, only requires the return of the identical money or property received by the minor, and not the payment of any other consideration, if that is gone: *Jenkins v. Jenkins*, 12 Iowa, 195; *Hawes v. Burlington etc. R'y*, 64 Iowa, 315; *Leacor v. Griffith*, 76 Iowa, 89, 94. "If," says the court in the last case, "he had disposed of the property, and squandered the money received from the other party, he may nevertheless avoid the contract."

In Indiana, it is enacted by a statute passed September 19, 1881, that "in all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said land; provided, however, that if she will allege, in her complaint, that she received no consideration for said sale, an issue may be made upon such allegation; and if, upon the trial, the court or jury find that any consideration was received by her, the court shall, in the finding and decree, declare such amount so found a first lien against said land in favor of the defendant": 2 R. S. 1883, sec. 2944. And "in all sales of real estate by an infant, he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age": 2 R. S. 1883, sec. 2945.

DISAFFIRMANCE, WHETHER SUBJECT TO SUBSEQUENT AVOIDANCE. — It has been seen that an infant is permitted to disaffirm certain of his contracts during his minority, and the question is presented whether, after coming of age, he may avoid such disaffirmance. The opinion has been expressed in some English cases that he may do so: *Newry etc. R'y v. Coombe*, 3 Ex. 565; *Northwestern R'y v. McMichael*, 5 Ex. 114, 127. We think, however, that a disaffirmance once made by the infant, although during his minority, should be held binding upon him. This was so decided in *Edgerton v. Wolf*, 6 Gray, 453. If the disaffirmance takes place after the infant attains his majority,

it should unquestionably, especially where the rights of others intervene, be binding, and not subject to a subsequent recall: See *White v. Flora*, 2 Over. 426, 432; see also *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418, 421. See a question of incomplete disaffirmance discussed in *Best v. Givens*, 3 B. Mon. 72, 74.

WHO MAY TAKE ADVANTAGE OF INFANCY. — It is a well-settled general rule that infancy is a personal privilege, of which no one is permitted to take advantage except the infant himself: *Coan v. Bowles*, 1 Show. 165, 171; *Grey v. Cooper*, 3 Doug. 65; *Shropshire v. Burns*, 46 Ala. 108; *Hastings v. Dollarhide*, 24 Cal. 195; *Frazier v. Mussey*, 14 Ind. 382; *Schrock v. Crawl*, 83 Ind. 243; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Hardy v. Waters*, 38 Me. 450; *Oliver v. Houdlet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *Hill v. Keyes*, 10 Allen, 258, 260; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238; *Voorhees v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Mason v. Denison*, 15 Wend. 64-66; *Parker v. Baker*, 1 Clarke Ch. 136; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Slocum v. Hooker*, 13 Barb. 536; *Jones v. Butler*, 30 Barb. 641; *Hesser v. Steiner*, 5 Watts & S. 476; *Kuns's Ex'rs v. Young*, 34 Pa. St. 60; *McGill v. Woodward*, 3 Brev. 401; *White v. Flora*, 2 Over. 426, 431; *Harris v. Musgrove*, 59 Tex. 401; *Wamsley v. Lindenberger*, 2 Rand. 478; Code of Georgia (1882), sec. 2732. This rule, which has been established from the earliest times, is utterly inconsistent with any other idea than that the contracts of infants are voidable merely, and not void. Being voidable only, it rests solely with the infant to say whether a contract made by him shall be binding or not.

It follows that a stranger to the contract cannot assert that it is not binding because entered into by an infant: *Keane v. Boycott*, 2 H. Black. 511, 515; *Douglas v. Watson*, 17 Com. B. 685, 691; 34 Eng. Law & Eq. 447, 551; *Baldwin v. Rosier*, 1 McCrary, 384; *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; *Ridgely v. Crandall*, 4 Md. 435, 441; *Thompson v. Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Mansfield v. Gordon*, 144 Mass. 168; *Soper v. Fry*, 37 Mich. 236; *Holmes v. Rice*, 45 Mich. 142; *Griffith v. Schwendeman*, 27 Mo. 412; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Dominick v. Michael*, 4 Sand. 374, 418; *Rose v. Daniel*, 3 Brev. 438; *Lester v. Frazer*, 2 Hill Eq. 529; *Riley Eq. 76*. To illustrate: In an action against the defendant for enticing away the plaintiff's servant, the defendant was not permitted to allege that the contract of service was void because the servant was an infant: *Keane v. Boycott*, 2 H. Black. 511, 515; and in an action on a note executed to the trustees of a college for the purpose of an endowment fund, and payable on condition that a certain sum should be "secured" for that purpose prior to a date named, an answer by the defendant that a portion of the required sum was secured by notes executed by infants is insufficient: *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; so an action against the general owners of a ship, which had been chartered by an infant, for not delivering goods, cannot be maintained if the contract of charter has not been avoided by the infant: *Thompson v. Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; again, it is no defense to an action of ejectment that the grantor, under whom the

plaintiff claimed, was an infant: *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; and in a suit to foreclose a mortgage, given to secure a promissory note, while the maker of the note may plead his infancy, a subsequent lien-holder cannot join in the defense: *Baldwin v. Rosier*, 1 McCrary, 384; and a conveyance, mortgage, assignment, or other transfer of property by an infant cannot be attacked as invalid because of infancy by his creditors: *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Lester v. Frazer*, 2 Hill Eq. 529; *Riley Eq.* 76.

Again, it follows that the adult party to the contract with the infant is bound, and cannot take advantage of the infancy: *Forrester's Case*, 1 Sid. 41; *S. C., sub nom. Gable v. Forester*, 1 Keb. 1; *Smith v. Bowen*, 1 Mod. 25; *Holt v. Ward Clarencieux*, 2 Strange, 937; *Warwick v. Bruce*, 6 Taunt. 118; affirming 2 Maule & S. 205; *Chicago etc. R. R. v. Lammert*, 19 Ill. App. 135, 140; *Johnson v. Rockwell*, 12 Ind. 76; *Beeson v. Carlton*, 13 Ind. 354; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Arnous v. Lesassier*, 10 La. 592; 29 Am. Dec. 470; *Oliver v. Howllet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Boyden v. Boyden*, 9 Met. 519, 521; *Stiff v. Keith*, 143 Mass. 224; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238; *Voorhees v. Wait*, 15 N. J. L. 343; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Yates v. Lyon*, 61 N. Y. 344; *Crymes v. Day*, 1 Bail. L. 320; *Harris v. Musgrove*, 59 Tex. 401; and see Code of Georgia (1882), sec. 2732. Hence, as seen *ante*, "Contracts to Marry," while the mere promise to marry of an infant is not binding upon him, yet the adult party to the contract is bound, and therefore the infancy of the plaintiff is no defense to an action for breach of promise against the adult: *Holt v. Ward Clarencieux*, 2 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496. And if a person contracts with an infant to receive from him a conveyance of land, which he knows, at the time of contracting, will be executed before the infant shall have arrived at his majority, he cannot avail himself of that fact in defense to an action on a promissory note for the purchase-money: *Beeson v. Carlton*, 13 Ind. 354; and if personal property be sold to an infant, the fact that the vendor retains or afterwards comes into possession of the property as guardian of the infant will not authorize him to rescind the sale: *Crymes v. Day*, 1 Bail. L. 320; even a contract of bailment, made by the bailee with the agent of an undisclosed principal, who is a minor, cannot be rescinded by the bailee on the ground of the principal's minority: *Stiff v. Keith*, 143 Mass. 224. There is one apparent exception to this rule, that the adult party to a contract with an infant cannot take advantage of the infancy of the other party; namely, an infant cannot maintain a suit for the specific performance of his contract, because the remedy is not mutual, since the defendant could not have maintained the suit against the infant plaintiff: *Flight v. Bolland*, 4 Russ. 298; and see *Carrell v. Potter*, 23 Mich. 377; compare *Smith v. Smith*, 36 Ga. 184.

For the same reason, if a joint co-promisor is an infant, the promisee, in an action brought upon the contract, cannot consider the contract as void as to the infant, but must join him as a party defendant: *Wamsley v. Lindenberg*, 2 Rand. 478; *Slocum v. Hooker*, 13 Barb. 536. The cases of *Burgess v. Merrill*, 4 Taunt. 468, *Gibbs v. Merrill*, 3 Taunt. 307, 313, *Assignees of Hull v. Connolly*, 3 McCord, 6, 15 Am. Dec. 612, maintaining the contrary, cannot be sustained. And if a defendant, in an action upon a joint contract,

sets up his infancy as a defense, the plaintiff may enter a *nolle prosequi* or discontinue as to him, and proceed to judgment against the other defendants: *Hartness v. Thompson*, 5 Johns. 160; *Mason v. Denison*, 15 Wend. 64-66; *Woodward v. Newhall*, 1 Pick. 500; *Cole v. Pennell*, 2 Rand. 174, 179; *Cutts v. Gordon*, 13 Me. 474; *Kirby v. Cannon*, 9 Ind. 371; *Taylor v. Danshy*, 42 Mich. 82; or, of course, the plaintiff may try the question of infancy, and if found against him, may still have judgment against the other defendants: *Cutts v. Gordon*, 13 Me. 474. The opinion entertained by the *nisi prius* cases of *Chandler v. Parkes*, 3 Esp. 76, *Jaffray v. Frebain*, 5 Esp. 47, that this practice could not be followed, but that the plaintiff should discontinue the action, and commence a new action against the adult defendants only, has been repeatedly condemned, and is no longer the law.

An adult defendant likewise cannot plead the infancy of his co-promisor, or join with him in a plea of infancy: *Van Bramer v. Cooper*, 2 Johns. 279; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13; and a joint plea of the infancy of one defendant being bad on demurrer as to the adult, is bad as to both: *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. So a firm of copartners cannot avail themselves of the exception to the rule that a party cannot rescind a contract and retain the consideration, existing in favor of infants, when they bring an action upon a policy of fire insurance after a settlement has been made with the company by an infant member of the firm: *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479.

The rule that the infancy of the payee of a bill or note is no defense to an action on the paper by an indorsee or transferee against the acceptor, drawer, or maker may also be placed on the ground that the privilege of infancy is personal: *Grey v. Cooper*, 3 Dong. 65; *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *Dully v. Brownfield*, 1 Pa. St. 497; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 382; *Garner v. Cook*, 30 Ind. 331; *Hastings v. Dollarhide*, 24 Cal. 195. And to an action on a promise to pay the note or other obligation of another, the fact that the latter was an infant is no defense: *Hesser v. Steiner*, 5 Watts & S. 476; *Kuns's Ex'rs v. Young*, 34 Pa. St. 60; and an injunction to restrain proceedings at law on a note of an infant, indorsed by his father as security, given for the purchase of lands by the infant, issued on a bill filed by the infant to disaffirm the sale, will be dissolved as to the father: *Parker v. Baker*, 1 Clarke Ch. 136.

The foregoing general rule, that no one can take advantage of the infancy of a party to a contract except the infant himself, is subject to some limitations. Thus it is well settled that a privy in blood, or in other words, the heir of an infant, may, when interested, avoid the infant's contracts on the ground of his infancy, provided, of course, the right to avoid has not been lost: *Whittingham's Case*, 8 Coke, 42 b; *White v. Flora*, 2 Over. 426, 431; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 365; *Dominick v. Michael*, 4 Sand. 374, 418; *Hardy v. Waters*, 38 Me. 450; *Hill v. Keyes*, 10 Allen, 258, 260; *Rlinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Bozeman v. Browning*, 31 Ark. 364; *Veal v. Fortson*, 57 Tex. 482; *Austin v. Charlestown Female Seminary*, 8 Met. 196, 203; Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17. So, also, an infant's personal representatives may disaffirm his contracts: *Hussey v. Jewett*, 9 Mass. 100; *Hill v. Keyes*, 10 Allen, 258, 260; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Counts v. Bates*, Harp. L. 464; *Parsons v. Hill*, 8 Mo. 135; *Ferguson v. Bell's Adm'r*, 17 Mo. 347, 351; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46

Ala. 108; *Hardy v. Waters*, 38 Me. 450; *Vaughan v. Parr*, 20 Ark. 600; *Bozeman v. Browning*, 31 Ark. 364; *Tillinghast v. Holbrook*, 7 R. I. 230, 243; *Hastings v. Dollarhide*, 24 Cal. 195; Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17.

But the guardian of an infant, it is held, cannot rescind the contracts of his ward: *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Crymes v. Day*, 1 Bail. L. 320; the court, in the first of these cases, saying: "The authority and interest of a guardian extend only to such things as may be for the benefit and advantage of the ward. If an infant makes a contract from which he derives a benefit, it cannot be avoided by his guardian; for this, being injurious to the infant, would be a violation of the guardian's duty." It was, however, decided in *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117, that the deed of conveyance of a minor may be avoided, after he becomes of age, by a guardian appointed over him as a spendthrift. "After the infant is of full age," says the court, "if unable to exercise his privilege, by reason of mental or legal incapacity, it seems reasonable, and consistent with the nature and purpose of this right, that it should be exercised for him, and in his name by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be, also, by a guardian appointed over his property for any cause for which adult persons are placed under guardianship." It has been also held that an assignee in insolvency cannot maintain a bill in equity to relieve the real estate of the insolvent from the encumbrance of a mortgage thereon, executed by the insolvent when a minor, and not ratified or disaffirmed by him after coming of age: *Mansfield v. Gordon*, 144 Mass. 168. "While the rights of an assignee," says Devens, J., "are not always tested by those of an individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors." An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, cannot be made by the trustee acting under it, especially when a court of equity is asked to compel him to render an account: *Jones v. Butler*, 30 Barb. 641.

It has sometimes been said that privies in estate with an infant might also take advantage of the privilege of infancy: *White v. Flora*, 2 Over. 426, 431; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124, 127; *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Dominick v. Michael*, 4 Sand. 374, 418; *Nelson v. Eaton*, 1 Redf. 498; but this *dictum* is erroneous: *Whittingham's Case*, 8 Coke, 42 b; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Bozeman v. Browning*, 31 Ark. 364; the last case denying the right to avoid to the infant's devisees. It should, however, be carefully noted that after the infant has disaffirmed his contract, a privy in estate, or indeed any one whatever, may take advantage of such disaffirmance: *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124, 127; *McGill v. Woodward*, 3 Brev. 401; *Williams v. Norris*, 2 Litt. 157; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 323; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Harris v. Cannon*, 6 Ga. 382. This is for the simple reason that when the contract has been avoided, it is as though it had never existed. One who claims to be the owner of property could therefore assert that a previous transfer of the property made during infancy by the person under whom he derives title had been disaffirmed by the latter. So sureties on the note of an infant given for the price of land purchased by him are not liable where

the infant disaffirms the contract after attaining majority, and restores the land to the grantor: *Baker v. Kennett*, 54 Mo. 82. And one to whom land has been conveyed, against which a mechanic's lien for materials furnished is sought to be enforced, may, after the grantor has disaffirmed the contract on the ground of infancy, avail himself of the disaffirmance in defense; and this, it is held, although the contract was disaffirmed by the grantor by a plea of infancy in the same action: *Price v. Jennings*, 62 Ind. 111. Also, where an infant mortgagor has, in a suit against him and his vendee to foreclose, pleaded his infancy, he thereby renders his mortgage void *ab initio*, and a separate answer by the vendee, alleging such infancy and avoidance, is good: *Shrock v. Crowl*, 83 Ind. 243. The right of avoidance, however, is not assignable: *Austin v. Charlestown Female Seminary*, 8 Met. 196, 203; and see *Armitage v. Widoe*, 36 Mich. 124.

RATIFICATION — WHAT CONTRACTS OF INFANTS MAY BE RATIFIED. — The ratification of a contract made during infancy necessarily presupposes that the contract was not absolutely binding, and, on the other hand, that it was no more than voidable. If the contract of an infant be, for any reason, void, very plainly there is nothing which can be ratified. Any so-called ratification could, at the most, be but a new contract, into which all the elements, including consideration, must enter. Those cases which hold an infant's contract, entered into by an agent, to be absolutely void, because an infant cannot appoint an agent, must, to be consistent, also hold the contract to be incapable of ratification, and such a ruling has sometimes actually been made: *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; *Wainwright v. Wilkinson*, 62 Md. 146; but see *supra*, "Delegation of Authority," and particularly the case of *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, in which the question of the ratification of a note executed by an agent of an infant was involved.

If any or all contracts of infants are made void by statute, then, of course, the contracts cannot be ratified. The Infants' Relief Act of England has already been noticed above, under the head "Statutory Regulation." By the second section of that act, it is provided that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." It has been held that this provision applies to ratifications made after the passage of the act of contracts entered into before that time: *Ex parte Kibble*, L. R. 10 Ch. 373; but that an action was maintainable by a *bona fide* indorsee for value, and without notice, against the acceptor of a bill of exchange, who accepted the bill after attaining twenty-one years of age, for a debt contracted during infancy, and after the passage of the act; although it seems that in such a case the acceptance would, as between the immediate parties to the bill, be a "promise or ratification," within the meaning of the section, upon which an action at the suit of the drawer would not lie: *Belfast Banking Co. v. Doherty*, 4 L. R. 1r. 124. It has also been held that this section applies to promises to marry: See *supra*, "Contracts to Marry"; and that therefore a ratification of such a promise, after the infant became of full age would not be binding, although a fresh promise would be: *Coxhead v. Mullis*, L. R. 3 C. P. D. 439; *Northcote v. Doughty*, L. R. 4 C. P. D. 385; *Ditcham v. Worrall*, L. R. 5 C. P. D. 410. For cases and comments upon statutes of states of this country, see *supra*, "Statutory Regulation."

Independently of statute, and the few cases which stubbornly insist that certain contracts of infants are void at common law, the rule is, that the general contracts of an infant may be ratified by him after coming of age, and thus rendered no longer subject to his disaffirmance.

NATURE AND EFFECT OF RATIFICATION.—It has sometimes been said that if a person, after attaining his majority, ratifies a contract made by him during infancy, he takes upon himself a new liability founded upon an existing moral obligation: *Thornton v. Illingworth*, 2 Barn. & C. 824, 826; 4 Dowl. & R. 545; *Wilcox v. Roath*, 12 Conn. 550; *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; *Fetrow v. Wiseman*, 40 Ind. 148, 157. Thus, says Bayley, J., in *Thornton v. Illingworth*, 2 Barn. & C. 824, 825, “if he makes a promise, after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a moral consideration existing before, it does not make a legal debt from the time of making the bargain”; and in *Hodges v. Hunt*, 22 Barb. 150, 151, Paige, J., says: “Although most of the contracts of infants are now held to be voidable, and not absolutely void, yet, as they are not binding on the infant, a new promise does not impart to them any legal validity so as to enable the creditor to enforce them; but the new promise creates a new contract, founded upon and deriving its aliment from the old demand, upon which the creditor may sustain a suit against the infant.” This theory seems to be a result of the old notion that many, if not most, contracts of infants are void, and is utterly unsound. The truth is, a ratification simply extinguishes the infirmity of infancy in the contract, so that the contract can no longer be disaffirmed. A ratification is not the creation of any new liability, but is merely the removal of an objection to an already existing and continuing liability. An infant’s contract is binding upon him until disaffirmed, and when ratified it ceases to be the subject of avoidance. As was correctly said by McGowan, J., in *Uhley v. Padgett*, 27 S. C. 300, 302: “From its very nature, a thing only voidable needs no positive confirmation, but stands good until impeached by a proper party. In the first instance, confirmation has no proper application to it, but when there is an effort to avoid the act, it becomes important to inquire whether there has been confirmation; for if so, the matter has passed beyond the control of the party, and is no longer voidable.” Compare a distinction made between an infant’s executed and his executory contracts, as to their binding force, commented upon *ante*, title “Void and Voidable.”

It may furthermore be regarded as settled, contrary to expressions of opinion found in some of the foregoing cases, that the ratification of a contract entered into during infancy relates back to the time the contract was made, and renders it valid from the beginning: *Slator v. Trimble*, 14 Ir. C. L. 342; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Reed v. Batchelder*, 1 Met. 559; *West v. Penny*, 16 Ala. 187, 191; *Doe ex dem. McCormick v. Leygett*, 8 Jones L. 425, 427; *Palmer v. Miller*, 25 Barb. 399; *Hall v. Jones*, 21 Md. 439; *Minock v. Shortridge*, 21 Mich. 304, 316. Thus, it is said by Graves, J., in *Minock v. Shortridge*, 21 Mich. 304, 315, “when a ratification occurs, it excludes all right to disavow the original undertaking, and makes it obligatory as against the defense of infancy. The new matter reaches back and renders the original contract binding from the time it was made, and the first agreement, having in its entirety received the assent of the promisor after the ceasing of his disability, is made in all its parts the binding contract of the parties.” It follows, therefore, that if a promissory note made during infancy is confirmed, a transferee holds the paper as a valid negotiable instrument, on which he can maintain an action in his own

name: *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Reed v. Batchelder*, 1 Met. 559; and a ratification by infants of a contract of sale of their lands will inure to the benefit of the party entitled under the original vendee: *Hall v. Jones*, 21 Md. 439. So it is held the ratification of a mortgage executed during infancy will cut off a voluntary conveyance of the premises by the mortgagor to a third person, in trust for the mortgagor's wife and children, made intermediate the execution of the mortgage and its ratification: *Palmer v. Miller*, 25 Barb. 399.

Finally, it is the rule that a ratification once validly made of a contract entered into by the party while an infant is binding upon him, and cannot be recalled or disaffirmed: *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418, 421; *Voltz v. Voltz*, 75 Ala. 555; *Hastings v. Dollarkide*, 24 Cal. 195; and see *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

SUIT SHOULD BE BROUGHT ON THE CONTRACT RATIFIED, and if infancy is pleaded, the plaintiff should reply the confirmation. This is generally conceded to be the proper rule of pleading when a contract made during infancy is subsequently ratified, although some of the cases intimate that the plaintiff might, in case the defendant had made a new promise after coming of age, declare on the new promise: *Hunt v. Massey*, 5 Barn. & Adol. 902, 903; *West v. Penny*, 16 Ala. 187, 191; *Stern v. Freeman*, 4 Met. (Ky.) 309, 312; *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; *contra*, *Bliss v. Perryman*, 1 Scam. 484. In *Stern v. Freeman*, 4 Met. (Ky.) 309, 312, Bullitt, J., says: "Probably where a person after coming of age has promised to pay a debt contracted during infancy, or has done an act from which the law implies such a promise, the plaintiff might declare upon the new promise, relying upon the original consideration to support it. But he is not obliged to do so. He may declare upon the original contract, and show the new promise, like any other ratification, in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may, therefore, sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise, or other act of ratification, by which the defendant has deprived himself of the right to avoid the contract. In such a case, the only effect of the ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy."

If the contract is ratified by an absolute promise, we think that the action should always properly be brought upon the contract, and not upon the new promise. There seems to be no principle upon which the new promise, in such a case, can be regarded as a contract supplanting the contract ratified. It is true that there is a theory, noticed under the preceding head, that a ratification simply creates a new liability, based upon a moral consideration, but there is no sound reason to support it. Those who maintain the theory are compelled to say that the rule in question, by which an action can be brought upon the contract ratified, is an anomaly: See *Hodges v. Hunt*, 22 Barb. 150, 151. There are cases, however, where a new promise may not amount to a ratification at all, but an original undertaking, and where, therefore, no action can be brought upon the contract made during infancy, but only upon the new promise; or where the new promise may amount to a conditional ratification, and hence where no action can be brought upon the origi-

nal contract, or, perhaps, upon the new promise, until the condition has been performed. These cases can be best explained by quoting the language of Mr. Justice Graves in *Minock v. Shortridge*, 21 Mich. 304, 316, as follows: "The minor, on coming of age, may, however, fail or decline to assent to a confirmation of the first agreement, but may be willing to make himself liable upon a new, express, or implied undertaking based on the original consideration. He may, expressly or by implication, agree to terms which necessarily create a conditional, qualified, or restricted liability, and in such case, the first agreement is not ratified by the second. A new agreement is constituted, which is operative only from the time of its creation, and effective according to its nature. If the promise or act of the party after majority amounts to a conditional ratification, instead of a new substantive engagement, the contract made during minority may then be enforced, but not until the condition is fulfilled." And see *post*, "Ratification of Contracts, Executory on Infant's Part, by New Promises or Acknowledgments," and particularly the quotation under that head from *Edgerly v. Shaw*, 25 N. H. 514, 517; 57 Am. Dec. 349, 351.

If the rules of pleading do not admit of a reply, as in some of the code states, and the defendant, in an action upon a contract, pleads infancy, the plaintiff may give the ratification in evidence without alleging it in his original or in an amended complaint: *Stern v. Freeman*, 4 Met. (Ky.) 309; *Hodges v. Hunt*, 22 Barb. 150; but where a reply to affirmative matter in the answer is required, and there is no reply of a ratification to a plea of infancy, evidence of such ratification is inadmissible, it being affirmative matter: *Fetrow v. Wiseman*, 40 Ind. 148. Infancy is, of course, admitted by the replication of a new promise to a plea of infancy, and hence need not be proved by the defendant: *Goodsell v. Myers*, 3 Wend. 479.

RATIFICATION AFTER SUIT BROUGHT.—It has been very generally held that a ratification of a contract entered into during minority must be made before suit brought, in order that the action can be sustained against a plea of infancy: *Thornton v. Illingworth*, 2 Barn. & C. 824; 4 Dowl. & R. 545; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Ford v. Phillips*, 1 Pick. 202; *Freeman v. Nichols*, 138 Mass. 313; *Merriam v. Wilkins*, 6 N. H. 432; 25 Am. Dec. 472; *Hale v. Gerrish*, 8 N. H. 374; *Aldrich v. Grimes*, 10 N. H. 194, 198; *Martin v. Byrom*, Dud. (Ga.) 203, 204. This rule is founded on the notion that the contract of an infant is utterly invalid until it is ratified, and that the ratification creates the liability, although the rules of pleading permit an action to be brought on the contract. Thus, says the court in *Ford v. Phillips*, 1 Pick. 202, "the right of a party to recover is to be tried by its validity at the time when the action is commenced"; and in *Merriam v. Wilkins*, 6 N. H. 432, 25 Am. Dec. 472: "In the case of infancy, there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. The contract of an infant to pay for goods sold and delivered to him is, unless the goods are necessities, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified."

The rule, therefore, rests upon reasoning wholly indefensible, and it seems surprising that such a case as *Hyer v. Hyatt*, 3 Cranch C. C. 276, should have adopted it. Since, as has been said, the action is brought upon the contract itself, and not upon the ratification, and since the ratification simply

avoids the objection of infancy, it would seem clear that a ratification, although made after the commencement of the action, should overcome the plea of infancy. This is the view taken by some cases, and we think it correct: *Wright v. Steele*, 2 N. H. 51; *Best v. Givens*, 3 B. Mon. 72; *Slator v. Trimble*, 14 Ir. C. L. 342, 353; and see *Doe ex dem. McCormic v. Leggett*, 8 Jones L. 425, 427. The subsequent New Hampshire cases have, however, overruled *Wright v. Steele*, 2 N. H. 51, and taken the erroneous position noticed above.

RATIFICATION OF PART OF TRANSACTION. — The consequences of ratifying a part of a transaction have been fully discussed *ante*, under the title "Disaffirmance of Part of Transaction," and need not be repeated here. It is enough to say, as was said there, that a person cannot affirm a portion of a single transaction entered into during infancy, and repudiate the rest. He must abide by it, or disaffirm it *in toto*. And if he ratifies a part of the agreement, he ratifies it all.

RATIFICATION CANNOT BE MADE UNTIL FULL AGE. — It has been seen that an infant, in order that he may be completely protected, is permitted by the law to disaffirm certain of his contracts during minority. But, on the other hand, he can never ratify a contract while his infancy continues: *Corey v. Burton*, 32 Mich. 30; *Bank of Silver Creek v. Browning*, 16 App. Pr. 272. The reason is evident. Any attempted ratification would be subject to the same infirmity as the contract itself, and could not possibly render the contract binding, so that it could not afterwards be disaffirmed. But a replication to a plea of infancy, that the defendant, since the making of the promises, attained the age of twenty-one, and that, before the commencement of the suit, he ratified and confirmed the promises, is good after verdict, though it omits to allege that he ratified and confirmed after he became of age: *Cohen v. Armstrong*, 1 Maule & S. 724.

It might be here noticed that if the plaintiff replies to a plea of infancy that the defendant, after he attained the age of twenty-one years, ratified the contract, and the defendant takes issue on the allegation, the plaintiff need only prove the ratification, and the defendant must show his infancy at the time, the presumption being that when a person contracts he is of proper age, and the incapacity lying within the defendant's knowledge, and therefore properly to be proved by him: *Borthwick v. Carruthers*, 1 Term Rep. 648; *Hartley v. Wharton*, 11 Ad. & E. 934; 3 Perry & D. 529; *Bigelow v. Grannis*, 4 Hill, 206; *Bay v. Gunn*, 1 Denio, 108.

WHO MAY RATIFY. — So far as the question of disaffirmance of infants' contracts is concerned, it has been shown that infancy is a personal privilege, of which no one is permitted to take advantage except the infant himself, and his personal representatives and heirs. We do not see why the same rule should not apply to the ratification of infants' contracts. Indeed, it has been held that the contract of an infant may be ratified by his personal representatives after his death: *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Bozeman v. Browning*, 31 Ark. 364, 374, 378; and that acts by the personal representative of an infant which would have amounted to a ratification by the infant himself will likewise amount to a ratification by the personal representative: *Shropshire v. Burns*, 46 Ala. 108; and that, therefore, where an infant purchased a horse, and died in possession of the same before attaining majority, the taking possession and sale of the horse by the infant's administrator, as a part of the infant's estate, with full knowledge that it had been purchased by the infant, and that a promissory note

given by the infant for the price had not been paid, is a ratification of the purchase, and consequently infancy will no longer be a defense to an action on the note: *Shropshire v. Burns*, 46 Ala. 108; but see *contra*, *Counts v. Bates*, Harp. L. 464. Where, however, the heir of a person who had conveyed lands during infancy filed a statement in the court where administration of the infant's estate was had that he had no other claim against the estate, except the amount due on guardian's account, the statement having reference to personal estate solely, has no bearing upon his claim as heir, and therefore is no affirmation of the infant's conveyance: *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

We may observe, in conclusion, that although an infant himself has not the legal capacity to confirm his contracts until he reaches his majority, yet we think it cannot be questioned that any other person, as above, to whom the law gives the privilege of ratifying the infant's contracts, and who himself labors under no disability, may exercise the privilege before the time at which the infant would have arrived at full age, had he lived: See *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108.

RATIFICATION IS QUESTION OF INTENTION, to be inferred from the conduct or words of the party ratifying: *Rainsford v. Rainsford*, Speers Eq. 385, 392; *Davidson v. Young*, 38 Ill. 145, 153; *McCarty v. Carter*, 49 Ill. 53, 56; 95 Am. Dec. 572, 576; *Durfee v. Abbott*, 61 Mich. 471, 478; *Scott v. Scott*, 29 S. C. 414. "Ratification," says the court in *McCarty v. Carter*, 49 Ill. 53, 56, 95 Am. Dec. 572, 576, "by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words." It is possible, however, that a party who will be deemed to have ratified his contract, made during infancy, by his conduct after coming of full age, may have no distinct idea of ratification, but his conduct be nevertheless inconsistent with any other result, as where, after coming of age, he retains property purchased for an unreasonable time, or uses it as his own, or sells it. In such a case, we should say that it would make no difference whether he distinctly contemplated a ratification or not. This is perhaps what Chancellor Harper had in mind when he said, in *Rainsford v. Rainsford*, Speers Eq. 385, 392: "I have looked a good deal into the cases in relation to the confirmation of contracts made by infants, and it appears to me either that it must directly appear that the act was intended to confirm, or that it was of such a nature as to operate a fraud on the other party if the contract were not affirmed, or what perhaps amounts to the same thing, to give an advantage to the infant contracting party to which he would not be entitled but on the supposition of the validity of the contract."

In *Burdett v. Williams*, 30 Fed. Rep. Rep. 697, where a minor, four months after coming of age, filed a petition to become a co-libelant in a libel by certain seamen of a vessel, under their written contract for wages, in which nothing was said in regard to his minority, and it appearing that he was neither intelligent nor provident, but that having heard that his associates had brought a suit for wages, obtained the services of the lawyer who was acting for the rest, it was held that there was not sufficient evidence of intelligent action to show a ratification of the contract.

The question as to what acts will amount to a confirmation has been held to be one which should be submitted to and determined by a jury, under proper instructions from the court: *Durfee v. Abbott*, 61 Mich. 471, 478; and see *Irvine v. Irvine*, 9 Wall. 617; *Southerton v. Whittock*, 1 Strange, 690.

RATIFICATION MUST BE VOLUNTARY, the action of a free mind, exempt from all constraint and disability. This proposition is sustained by a few decisions and by the *dicta* of many cases, and is unquestionably correct, since the confirmatory acts involve a mental assent. It applies particularly to a ratification by means of an express promise: *Harmer v. Killing*, 5 Esp. 102; *Kay v. Smith*, 21 Beav. 522; *Sims v. Everhardt*, 102 U. S. 300, 312; *Alexander v. Hutcheson*, 2 Hawks, 535, 536; *Dunlap v. Hales*, 2 Jones L. 381, 382; *Turner v. Gaither*, 83 N. C. 357, 363; 35 Am. Rep. 574, 577; *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Reed v. Boshears*, 4 Sneed, 118; *Fetrow v. Wiseman*, 40 Ind. 148; *McCarty v. Carter*, 49 Ill. 53, 56; 95 Am. Dec. 572, 574. A promise, or other positive act of confirmation, must, therefore, not be made under duress, or procured through fraud. In *Chandler v. Simmons*, 97 Mass. 508, 512, 93 Am. Dec. 117, 120, it was held that a ratification by a person of his deed of conveyance, made during infancy, by waiver, or implied from acts or from an omission to avoid, requires on his part a mental and legal capacity to exercise the right, and to bind himself by such act or omission; and his express acts of confirmation are in the nature of a contract, and require all the elements of a contract, except a new consideration, to give them effect; and, therefore, the express ratification by an adult of a deed of conveyance made by him while a minor is void, if made after proceedings to place him under guardianship as a spendthrift have been taken, which resulted in the appointment of a guardian, under a statute which provides that "if a guardian is appointed upon such complaint, all contracts, except for necessities, and all gifts, sales, or transfers of real or personal estate, made by the spendthrift after such filing of the complaint and order, and before the termination of the guardianship, shall be void."

RATIFICATION, WHETHER MUST HAVE BEEN MADE WITH KNOWLEDGE OF NON-LIABILITY. — The rule is sustained by the decisions and *dicta* of a considerable number of cases that a new promise, or other express confirmatory act of a contract entered into during infancy, must, in order to amount to a binding ratification, be made by the party with full knowledge that he is not legally liable upon the contract: *Harmer v. Killing*, 5 Esp. 102; *Tucker v. Moreland*, 10 Pet. 59, 76; 1 Am. Lead. Cas. *224, *233; *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Alexander v. Hutcheson*, 2 Hawks, 535, 536; *Dunlap v. Hales*, 2 Jones L. 381, 382; *Turner v. Gaither*, 83 N. C. 357, 363; 35 Am. Rep. 574, 577; *Scott v. Buchanan*, 11 Humph. 468; *Reed v. Boshears*, 4 Sneed, 118; *Norris v. Vance*, 3 Rich. L. 164; *Petty v. Roberts*, 7 Bush, 410; *Fetrow v. Wiseman*, 40 Ind. 148; *Baker v. Kennett*, 54 Mo. 82; *Owen v. Long*, 112 Mass. 403; *Eureka Company v. Edwards*, 71 Ala. 248; *Flechner v. Dickerson*, 72 Ala. 318; *Hutch v. Hutch's Estate*, 60 Vt. 160, 171. This rule, however, has been severely condemned, and it has been held, on the other hand, not to be necessary to a valid ratification that the party should know that he is not legally liable by reason of his infancy: *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Soward*, 40 Ohio St. 325; 48 Am. Rep. 687; *Ring v. Jamison*, 66 Mo. 424; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; compare *Owen v. Long*, 112 Mass. 403; the court saying in *Morse v. Wheeler*, 4 Allen, 570: "It is a long-established legal principle that he who makes a contract freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it"; and in *Tytl v. Sergeant*, 18 Barb. 320, it was held that it is to be presumed, in the absence of evidence to the contrary, that at the time a person makes a new promise to pay a debt incurred during infancy, he was aware of his rights, and knew the facts necessary to establish his exemption from legal liability.

While we agree with what the court says in *Morse v. Wheeler*, 4 Allen, 570, in its application to contracts, we do not think that it should be applied to the removal of a disability. It seems to us that if the objection of infancy to a contract is to be removed, the party should, as a rule, know that such an objection exists, before he is held bound by his acts and conduct.

BURDEN OF SHOWING RATIFICATION RESTS UPON HIM WHO CLAIMS IT. — If, then, to an action on a contract, the defendant pleads infancy, unless the plaintiff takes issue upon that fact, or unless he shows that the contract was for necessities, he will be obliged to reply a ratification by the defendant after coming of full age, if a reply is permitted by the rules of pleading, and, at all events, prove the ratification: *Dockery v. Day*, 7 Port. 518; *Fant v. Cathcart*, 8 Ala. 725; *Walsh v. Powers*, 43 N. Y. 23, 26, 27; 3 Am. Rep. 654, 655; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28; *Cutlin v. Huddox*, 49 Conn. 492; 44 Am. Rep. 249, 254; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336. Although, in such a case, as seen above, under the head "Ratification cannot be Made until Full Age," it does not devolve upon the plaintiff to prove, in the first instance, that the ratification was made by the defendant after full age, but the burden rests upon the defendant to show his infancy at the time.

HOW A RATIFICATION MAY BE MADE. — There are three modes by which a contract made during infancy may be ratified: By express words; by acts and conduct which reasonably imply a ratification; and by an omission, under certain circumstances, to disaffirm within a reasonable time after reaching full age: See *Little v. Duncan*, 9 Rich. L. 55, 59; 64 Am. Dec. 760, 762; *Norris v. Vance*, 3 Rich. L. 164, 168; *Tobey v. Wood*, 123 Mass. 88, 89; 25 Am. Rep. 27, 28. These modes of ratification will now be considered.

NEW CONSIDERATION IS NOT REQUIRED TO A VALID RATIFICATION. — This is a rule which applies particularly to new promises made after full age. It has been seen that a ratification is simply a waiver of the objection of infancy to the contract, and that an action should be based, not upon the ratification, but upon the contract. If, then, the contract, as is assumed, had a consideration, nothing further in that respect is required, in order to sustain an action upon it. Even the theory that the action is really founded on the ratification asserts that the moral obligation growing out of the contract is a sufficient consideration to support the ratification. Hence, in any aspect, no new consideration is necessary: *Kay v. Smith*, 21 Beav. 522; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Conklin v. Ogborn*, 7 Ind. 553; and see *Chandler v. Simmons*, 97 Mass. 508, 512; 93 Am. Dec. 117, 120. It is sometimes said that a new promise must be equivalent to a new contract, or must possess all the ingredients of a complete agreement, in order to constitute a valid ratification: *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; but this statement supposes that it is upon the new promise that the action is to be sustained, and even then, as just said, no new consideration is required. We think that the judges who assert such a *dictum* have been deceived by resemblances. A ratification must be the free and voluntary act, not brought about by deception, by a person having a competent mind; but it is no contract in any proper sense of the word.

RATIFICATION, WHETHER MUST BE IN WRITING. — Unless required by statute to be in writing, a ratification, being simply a waiver of the objection of infancy, and not a new contract, may be verbal, although the contract ratified be a deed of conveyance, or an instrument under seal generally, or, we should say, any contract required by law to be in writing: *Phillips v.*

Green, 5 T. B. Mon. 344, 353; *Wheaton v. East*, 5 Yerg. 41, 62; 26 Am. Dec. 251, 253; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *West v. Penny*, 16 Ala. 187, 191; *Vaughan v. Parr*, 20 Ark. 600; *Stokes v. Brown*, 4 Chand. 39; 3 Pinney, 311. Compare *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; and see *post*, "Ratification of Deeds, Leases, and Mortgages by Declarations and Recitals." In fact, it has been seen, the retention by the party of the specific consideration received during infancy for an unreasonable time after coming of age may itself amount to an affirmance, as also will the exercise of acts of ownership over the property: See *supra*, "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age." The effect of the ratification of a deed or contract relating to realty may, however, be controlled by the recording acts. If, as was said in *Bluck v. Hills*, 36 Ill. 376, 380, 87 Am. Dec. 224, 225, the ratification is by means of a written instrument, the instrument should be recorded, in order to protect the grantee, and if the ratification is by other means, a subsequent purchaser from the infant, after attaining full age, must have notice thereof, in order that he may be bound.

By Lord Tenderden's Act, 9 George IV., chapter 14, section 5, it was provided that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." This enactment has been substantially adopted in a number of the states of this country: Ky. Gen. Stats. 1887, c. 22, sec. 1; Miss. Rev. Code 1871, sec. 2893; 1 Mo. R. S. 1879, sec. 2516; S. C. Gen. Stats. 1882, sec. 2023; Va. Code 1887, sec. 2840; 2 W. Va. R. S. 1879, c. 95, sec. 1. The Arkansas statute differs somewhat: "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith": Digest of Stats. 1884, sec. 3384. And the present Maine statute reads as follows: "No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessities, or real estate of which he has received the title and retains the benefit": R. S. 1883, c. 111, sec. 2.

It is very evident that Lord Tenderden's Act does not apply to every case of confirmation of a contract made during infancy. It applies to every express "promise to pay any debt" contracted during infancy, but it does not apply to an express promise to perform any other contract made during infancy, unless such promise is embraced in the word "ratification": See *Stern v. Freeman*, 4 Met. (Ky.) 309; and that there is a distinction between "promise" and "ratification," see *Mawson v. Blane*, 10 Ex. 206, 210, per Parke, B. The statute, also, does not apply, at least not generally, to ratifications other than by means of promises. Thus where an infant entered into the service of a milk-seller, and covenanted not to carry on the same business within two miles of the plaintiff's house for two years after quitting the service, and after he came of age he continued in the same service for eighteen months without repudiating the contract, it was held that this conduct amounted to a ratification of the contract in equity, and an injunction to restrain a breach of the covenant was granted: *Cornwall v. Hawkins*, 41 L. J. Ch. 435; 26 L. T. 607; 20 Week. Rep. 653. The court held that the statute would not be allowed to be made an instrument of fraud, and the defendant

could not rely upon it to enable him to repudiate the contract, after having taken the benefit of it for a considerable time after coming of age. Again, if an infant purchases personal property, and after coming of age sells the same, he thereby ratifies the contract, and is liable for the price, notwithstanding the statute: *Robinson v. Hoskins*, 14 Barb. 393; the court saying: "It is true that the plaintiff cannot sue upon the defendant's promise, made after he was of age, to pay the debt incurred during infancy, unless such promise is evidenced by a writing; but if the purchase is made during infancy, and the thing purchased has been kept and used by the infant till his arrival at age, and then converted to his own use, such conduct amounts to an election by the adult to stand by the contract made while he was an infant." We may add that the same would be true of any case where the infant continues to enjoy the consideration after coming of age. The Kentucky statute does not require the plaintiff to produce a written ratification, but only requires that the "ratification, or some memorandum or note thereof," shall be in writing, and therefore it is held a writing showing that the defendant has performed an act of ratification is as effective as one containing an express ratification: *Stern v. Freeman*, 4 Met. (Ky.) 309; and where a writing, addressed to another than the plaintiff, is relied upon, not as constituting a ratification or containing a promise, but as evidence of a ratification previously made by the defendant, it is entitled to the same weight as if it had been addressed to the plaintiff: *Stern v. Freeman*, 4 Met. (Ky.) 309.

If a case falls within the statute, the promise or ratification must, of course, be in writing. Hence no action can be maintained to recover for goods sold to a minor, unless the contract of purchase be ratified by a writing signed by him after arriving at the age of twenty-one years, or by some person thereto by him lawfully authorized: *Thurlow v. Gilmore*, 40 Me. 378; a verbal promise to pay will not suffice; nor can a set-off be sustained of a debt contracted by the plaintiff during infancy, and not ratified by him in writing after full age: *Rawley v. Rawley*, L. R. 1 Q. B. D. 460. The writing, furthermore, to amount to a ratification, must be a recognition by the party, after attaining majority, of the debt as a debt binding upon him: *Harris v. Wall*, 1 Ex. 122; *Maccord v. Osborne*, L. R. 1 C. P. D. 568; *Rowe v. Hopwood*, L. R. 4 Q. B. 1. "Any written instrument signed by the party," say Baron Rolfe in *Harris v. Wall*, 1 Ex. 122, "which in the case of adults would have amounted to the adoption of the act of a party acting as agent will, in the case of an infant who has attained his majority, amount to a ratification." And, says Cotton, L. J., in *Trowell v. Shenton*, L. R. 8 Ch. D. 318, 325, "a ratification in writing must, either in terms, or on the fair construction of the instrument, refer to the contract which is to be ratified, and treat it as a subsisting contract." Accordingly, it has been held that a written promise to pay a debt contracted during infancy was sufficient, although it did not contain the name of the creditor, the amount due, or the date, parol evidence being admissible to supply these particulars: *Hartley v. Wharton*, 11 Ad. & E. 934; 3 Perry & D. 529; but a promise made by a person at full age to pay a debt guaranteed by him during infancy, "as a debt of honor," is not such a ratification as is required by the statute to charge him: *Maccord v. Osborne*, L. R. 1 C. P. D. 568; and where goods were supplied by the plaintiff to the defendant while he was an infant, and when he came of age an account with the items and prices was submitted to him, at the foot of which he signed: "Particulars of account to the end of 1867, amounting to £162 6d., I certify to be correct and satisfactory,"—this does not amount to a recognition of the

debt as an existing liability, so as to be a ratification of the contract within the statute: *Roue v. Hopwood*, L. R. 4 Q. B. 1. So where an infant sold a horse with warranty of soundness, and took from the vendee a note in which it was stipulated that the horse should remain the vendor's property until the note was paid, an indorsement written on the note by the vendor after he became of age, and when the note was paid, that "the within note being paid, I hereby discharge the property thereby secured," cannot be construed as a ratification in writing of the warranty of the horse: *Bird v. Swain*, 79 Me. 529.

RATIFICATION OF CONTRACTS, EXECUTORY ON INFANT'S PART, BY NEW PROMISES OR ACKNOWLEDGMENTS.—There is a distinction, to some extent, as to what will amount to a ratification, between contracts which are executory on the part of an infant and those which are executed. It is not difficult to understand why the law might possibly require more positive acts to confirm the former than the latter. Yet we should say that where the ratification is based upon some such act of the infant after attaining full age, as the retention of the property received by him under the contract for an unreasonable time, the use or sale of the property, the acceptance of the consideration from the opposite party, and other such acts or conduct which are inconsistent with any other idea than an intention to abide by the contract, it makes no difference, or very little difference, whether the contract is executory or executed on his part. A ratification will be inferred in the one case about, if not quite, as readily as in the other. Where, however, words or declarations are relied upon to constitute a ratification, then, if the contract is executory on the part of the infant, especially if it is for the payment of money by him, the rule is sustained by numerous authorities that a mere acknowledgment of liability, as in the case of the statute of limitations, will not be sufficient to constitute a ratification, but that there must be an express or direct promise or confirmation: *Thrupp v. Fielder*, 2 Esp. 628; *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358; *Wilcox v. Roath*, 12 Conn. 550; *Catlin v. Huddox*, 49 Conn. 492; 44 Am. Rep. 249; *Bennett v. Collins*, 52 Conn. 1; *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Conklin v. Ogborn*, 7 Ind. 553; *Petrow v. Wiseman*, 40 Ind. 148; *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28; *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 103; *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; *Whitney v. Dutch*, 14 Mass. 457, 460; 7 Am. Dec. 229, 230; *Ford v. Phillips*, 1 Pick. 202, 203; *Tappan v. Abbot*, cited 1 Pick. 203; *Barnaby v. Barnaby*, 1 Pick. 221, 223; *Thompson v. Lay*, 4 Pick. 48, 49; 16 Am. Dec. 325; *Peirce v. Tobey*, 5 Met. 168, 172; *Smith v. Kelley*, 13 Met. 309, 310; *Proctor v. Sears*, 4 Allen, 95; *Baker v. Kennett*, 54 Mo. 82; *Wright v. Steele*, 2 N. H. 51; *Hale v. Gerrish*, 8 N. H. 374; *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Alexander v. Hutcheson*, 2 Hawks, 535; *Dunlop v. Hales*, 2 Jones L. 381; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574; *Hinely v. Margaritz*, 3 Pa. St. 428; *Chambers v. Wherry*, 1 Bail. L. 28; *Reel v. Boshears*, 4 Sneed, 118; *Hutch v. Hutch's Estate*, 60 Vt. 160; compare *Orvis v. Kimball*, 3 N. H. 314.

A ratification certainly will not be inferred from incidental and collateral circumstances, in the face of the party's explicit declarations that he did not intend to become bound: *Minock v. Shortridge*, 21 Mich. 304; nor will an offer to compromise be sufficient, since it is not even an acknowledgment of liability: *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Bennett v. Collins*, 52 Conn. 1; nor does a submission of the question of liability to arbitration prove or tend to prove a ratification: *Benham v. Bishop*, 9 Conn. 330; 23 Am.

Dec. 358; but where the defendant, in an action of *assumpsit* for the price of goods sold, defeated the action on the ground that the account had been merged in a note executed by him therefor, it was held that he thereby necessarily affirmed the validity of the note, and the confirmation could be successfully replied to a plea of infancy set up by him in an action on the note: *Best v. Givens*, 3 B. Mon. 72.

Since a mere acknowledgment will not be sufficient to constitute a ratification, a part payment will not suffice: *Thrupp v. Fieldler*, 2 Esp. 628; *Barnaby v. Barnaby*, 1 Pick. 221, 223; *Hinely v. Marjoritz*, 3 Pa. St. 428; *Catlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249; especially in case of a note, if it be evidenced by indorsements made by the payee on the note: *Catlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249. The following cases will also illustrate the proposition that a mere acknowledgment will not amount to a ratification. In *Ford v. Phillips*, 1 Pick. 202, 203, the defendant, in a conversation respecting a promissory note given by him when an infant, said that "he owed the plaintiff, but was unable to pay him; he would, however, endeavor to get his brother to be bound with him." It was held that this did not amount to a renewal of the promise. And where the defendant, after he came of age, said to the officer who had the writ to serve, "that his brother ought to have paid the note; that the writ should not go to court; that it should be settled; that he would see his brother, who ought to pay it," and after the writ was returned, "that he meant to go to jail on it," this evidence is likewise insufficient to establish a renewal of the promise: *Tappin v. Abbot*, cited 1 Pick. 203; so where the defendant, after attaining his majority, admitted that he owed a debt contracted during infancy, and said that "the plaintiff would get his pay," but refused to give a note, lest he might be arrested, it was also held that there was no such ratification as would render the defendant liable: *Hale v. Gerrish*, 8 N. H. 374; and where an infant purchased slaves, and gave a note for the price, and after he came of age, proposed in writing to give the slaves back and pay half the note, adding that if the holders of the note would not accept the offer, "I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part," there is no such new promise as will avoid the plea of infancy to an action on the note: *Dunkley v. Hales*, 2 Jones L. 381; and also where a minor received money of the plaintiff, and gave a note, promising to pay the same to the plaintiff's daughter, and after he came of age, being applied to by the daughter's husband, said it was not then convenient for him to pay it, but that on his arrival at a certain place, to which he was then bound, he should pay the plaintiff the money due him, it was held that this did not amount to an express promise to the plaintiff himself, or a renewal to him of the promise expressed in his note, and therefore a plea of infancy by his executors was a good defense to an action on the note; but as the evidence showed money in the hands of the deceased, intrusted to him, which he had not paid over, a general *indebitatus assumpsit* for money received for the use of the plaintiff might be maintained: *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167.

A direction by a testator in his will to pay his "just" debts, it is likewise held, is no answer to a plea of infancy: *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28; *Martin v. Mayo*, 10 Mass. 137-139; 6 Am. Dec. 103; *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; for, said the court in the first case, in speaking of the will, "It was made some time after the testator came of age, and it may have had reference to debts contracted after that period. At any rate, it contains a direction to pay only just debts, and there is

nothing in the case from which we can infer that what was not in law a debt could be considered by the testator as a just debt." But a different view was taken, under similar circumstances, in *Merchants' F. Ins. Co. v. Grant*, 2 Edw. Ch. 544, and a bond and mortgage were taken as confirmed, by a direction by the mortgagor in his will, made after full age, to pay "all my just debts." The authority for the latter case is *Hampson v. Lady Sydenham*, Nels. Ch. 55, in which it was held that, in equity, a bond debt of an infant should be paid, where he had executed a will, while still under age, though of sufficient capacity to make a will, directing that his executrix should pay all his debts out of his personal estate, particularly those to which he had set his hand. The fact that the will was made under age does not seem to have been noticed.

On the other hand, also, where an infant, after coming of age, wrote a letter to the indorsee of his promissory note, saying, "all that is justly due shall be paid," this was held a sufficient absolute and express promise to remove the bar of infancy, the mere fact of infancy not rendering the debt not "justly" due: *Wright v. Steele*, 2 N. H. 51; and where an infant, after coming of age, said to the plaintiff and another creditor, "When I return from this voyage, I will pay you both," and at another time told the plaintiff, when pressed for payment, that he had not the money then, but when he should return from the voyage, he would settle with the plaintiff, it was held that these declarations had an immediate reference to the indebtedness incurred during infancy, and amounted to an express promise of payment: *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 103. So where an infant made a promissory note, and when of age, being applied to for payment, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it, and send it to the creditor, this was held to be a sufficient ratification: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229. And a promise by an infant, after coming of age, to pay a promissory note, "if he signed it," is a sufficient ratification: *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307.

Furthermore, the promise or confirmation should be made by the infant, after attaining full age, to the opposite contracting party, or creditor, himself, or to his agent or attorney; at all events, admissions or declarations to a stranger cannot be relied upon as constituting a ratification: *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Gramis*, 2 Hill, 120; *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Chandler v. Glover's Adm'r*, 32 Pa. St. 509; and see *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; compare *Orris v. Kimball*, 3 N. H. 314; *Stern v. Freeman*, 4 Met. (Ky.) 309. A new promise, made to the attorney of the plaintiff, to whom the plaintiff had sent the note in question for collection, is binding: *Hodges v. Hunt*, 22 Barb. 150; and where the holder of a promissory note left it with his agent for collection, and the agent directed his clerk to present it to the debtor for payment, the clerk is not a stranger, and therefore a promise made to him is effectual to remove the defense of infancy: *Mayer v. McLure*, 36 Miss. 389; 72 Am. Dec. 190; so a promise by a party of full age to repay money which had been paid by a surety for him during his infancy, made to an agent of the surety, who was authorized to call on him for that purpose, is sufficient to charge him, notwithstanding there is no evidence that the agent disclosed his agency at the time, nor any express evidence that the party had knowledge of the authority: *Hoit v. Underhill*, 10 N. H. 220; 34 Am. Dec. 148.

The general rule on this subject under consideration is sometimes stated as though an express promise was always required. We think, however, that

this a mistake, and that there may be an express ratification without any promise whatever, although a mere acknowledgment will not answer. Thus, says Chief Justice Parker in *Whitney v. Dutch*, 14 Mass. 457, 460, 7 Am. Dec. 229, 230, "the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agrees to ratify his contract, not by doubtful acts, such as payment of a part of the money due, or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise"; and the learned chief justice again says, in *Thompson v. Lay*, 4 Pick. 48, 49, 16 Am. Dec. 325: "A ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in cases on the statute of limitations. A promise to pay is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise; as if the party should say, after coming of age, 'I do ratify and confirm,' or 'do agree to pay the debt.'" See also *Baker v. Kennett*, 54 Mo. 82; *Hatch v. Hatch's Estate*, 60 Vt. 160.

The use, then, of some such express words as "I ratify" is undoubtedly all that is required to constitute an affirmance, but we think that either such an express confirmation or an express promise is necessary. In our opinion the proposition is stated too broadly by some cases; as, for instance, *Alexander v. Hutchison*, 1 Dev. L. 13, where Henderson, J., says: "The law has prescribed no form in which this promise shall be made; it may be by words, it may be by signs or acts; anything which shows an acquiescence, or an assent of the party's mind, is sufficient." The latter portion of the quotation is not sustained by the authorities. In *Henry v. Root*, 33 N. Y. 526, 537, also, Davies, J., criticises the rule which requires an express promise on the part of the infant after attaining majority, and maintains that the contract of an infant may be revived by him "upon the same principles and for the same reasons and by the same means as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy." We believe, however, that the rule above stated as to the necessity of a direct promise or confirmation is correct, although the reasoning of some of the cases which support it is open to criticism. An express or direct promise or ratification is required, not because the original promise is void, or because an action is to be brought upon the new promise, for such, we have seen, is not the case, but simply because nothing short of an unequivocal expression of an assent to be bound will or ought to remove the objection of infancy.

Thus far we have been speaking of an absolute and complete promise or ratification; but besides this, the promise may be partial, or it may be qualified or conditional. The nature and effect of a partial promise were thus explained by Gilchrist, C. J., in *Edgerly v. Shaw*, 25 N. H. 514, 517, 57 Am. Dec. 349, 351: "The partial promise, or the promise to pay or perform a part of the original debt or agreement, is binding only to the extent of the new promise, and is not a ratification of the original debt, but a new and distinct promise, though founded upon the original consideration"; and with respect to qualified promises he says (pages 517, 351): "A new promise may be qualified in various ways. It may bind the promisor to pay the debt at a different time or place from these originally stipulated. It may be a promise to pay, not in money, but in specific articles or in personal services. These cases cannot be distinguished, in principle, from that last stated. They are new contracts, not ratifications of the old ones." He continues: "Within the class of qualified promises in renewal of contracts entered into by an infant are the cases of new promises, to be performed upon a condition or a contingency. They are distinguishable from other cases of qualified prom-

ises by the nature of the qualification. . . . If a new promise be made to pay or perform a contract made under age, upon a contingency or a condition, no action will lie until the happening of the contingency or the performance of the condition, for the old contract will not until that time have been confirmed, and the new agreement is distinct from it; and of that, in the case supposed, there will then have been no breach. When the contingency has happened, or the condition is fulfilled, the new contract becomes absolute, the original contract is ratified, and the plaintiff may declare upon it, or upon the new agreement. If he declare upon the original contract, and infancy be pleaded, he may reply a confirmation, and upon proper evidence he will be enabled to recover. Or he may declare upon the new promise, and set it forth with the necessary averments; and upon sufficient proof will be entitled to recover in that case." See also *Minor v. Shortridge*, 21 Mich. 304, 315.

If, then, an infant, after attaining majority, promises to pay an indebtedness "as soon as he is able," or "as soon as he could," no action can be sustained against him, by virtue of such new promise, without proof of his ability to pay: *Cole v. Saxby*, 3 Esp. 159; *Thompson v. Lay*, 4 Pick. 48; 16 Am. Dec. 325; *Proctor v. Sears*, 4 Allen, 95; *Everson v. Carpenter*, 17 Wend. 419; *Chandler v. Glover's Adm'r*, 32 Pa. St. 509; compare *Bobo v. Hansell*, 2 Bail. L. 114. In *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349, a promise, made after majority, by the maker of a promissory note executed in infancy, to pay it at the end of a specified time in labor, or else in money, was held to be a conditional promise, which became absolute upon the expiration of the specified time, whereby the original contract was confirmed, and the promisor made liable to suit on either contract. In *Taft v. Sergeant*, 18 Barb. 320, it was held that where the defendant, who had executed a promissory note during infancy, promised the payee, after coming of age, to give him the note of a third person, and to pay the balance in money, the new promise was an affirmation of the defendant's note, and failing to comply with the provisions of the new promise, his liability on the note directly was complete, and the note stood revived and ratified, and discharged of the special contract in relation to the mode of payment: See also *Stokes v. Brown*, 4 Chand. 39; 3 Pinney, 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760.

RATIFICATION OF DEEDS, LEASES, AND MORTGAGES, AND TRANSFERS OF PERSONAL PROPERTY BY DECLARATIONS AND RECITALS. — It seems that a ratification of a contract executed on the infant's part, such as his deed of conveyance, lease, or mortgage of his realty, or his sale of personalty, will be held to result from words somewhat less positive than in case of his executory agreements, just considered. In fact, as has been seen, according to one theory, an infant must disaffirm a deed of his lands within a reasonable time after attaining his majority, or he will be bound by his mere acquiescence: See *ante*, "Disaffirmance of Deeds within a Reasonable Time after Reaching Full Age." Yet the mere admission or recognition by a person of the fact that he had made a deed of conveyance during his minority will not amount to an affirmation of the deed: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. *224; *Bagby v. Fletcher*, 44 Ark. 153; *Craig v. Van Bebber*, 100 Mo. 584. Acts *in pais*, says Story, J., in *Tucker v. Moreland*, 10 Pet. 59, to amount to a confirmation of a deed, "should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable." And, says the court in *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 328, admitting that declarations are in any case sufficient to confirm a deed, yet loose and ambiguous words, from which inferences of opposite kinds may be drawn, ut-

tered incidentally by the grantor in casual conversations with third persons, and without deliberation, and without any view at the time of thereby confirming the deed, will not be sufficient. The declarations should at least be clear and unequivocal, and made with a view to ratification. Certainly, mere declarations of willingness by a person to confirm his deed executed during infancy, or a promise by him to make a deed of confirmation upon certain conditions, will not operate as an affirmance: *Clamorgan v. Lane*, 9 Mo. 442.

But where an infant made a lease, and on coming of age said to his lessee, "God give you joy of it," it was held that he thereby affirmed the lease: *Anonymous*, 4 Leon. 4; and where an infant conveyed his land, and after coming of age, told the grantee that he would never take advantage of his having been an infant at the time of executing the deed, and that it was his wish that the grantee should keep the land, this was held to be a confirmation of the deed, entitling the grantee to recover the land, in ejectment, from one to whom the grantor thereafter conveyed it: *Houser v. Reynolds*, 1 Hayw. (N. C.) 143. The declarations may be coupled with other acts or conduct of a confirmatory character, making a stronger case of ratification. Thus in *Ferguson v. Bell's Adm'r*, 17 Mo. 347, an infant executed a deed, and after coming of age, expressed satisfaction with her bargain, received part of the purchase price, and spoke of her intention to make a confirmatory deed, but died suddenly without doing so, there was held to be a sufficient ratification; the court saying: "Any act of Miss Bell showing her acquiescence in the sale, and deed thereon by her after she became of age, would be sufficient, — such as receiving a part of the consideration money for the land, and expressing herself satisfied with the contract"; and where an infant, shortly before coming of age, executed a deed of land for a full price, and after he arrived at the age of majority, was often in the neighborhood of the land, saw the purchaser making valuable improvements, said nothing in disaffirmance for about four years, but admitted on several occasions that he had sold the land, had been honorably paid, and was satisfied, and at one time authorized a proposition for its purchase, it was held that these circumstances fully warranted the jury in finding that he had affirmed the contract: *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; the court observing: "Anything from which his assent, after he arrives at age, may be fairly inferred will be sufficient to affirm the deed made during infancy, and prevent him from afterwards electing to disaffirm it." See also *Phillips v. Green*, 5 T. B. Mon. 344; but compare *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182. It was, however, held in *Matherson v. Davis*, 2 Cold. 443, 448, that the deed of an infant *feme covert* could not be ratified after she came of age, and while her coverture continued, by her declarations expressing her satisfaction with the terms of sale, nor in any manner, if at all, other than the mode provided by statute for the conveyance of the real estate of a *feme covert*. It seems to us that although the court says that the deed of a *feme covert*, executed and acknowledged according to statute, will pass the title as if she were a *feme sole*, yet the above ruling can only rest on the unsound theory that the deed passed no title.

Again, a deed executed by the grantor after coming of age, which refers to a deed executed by her during infancy, and purports to be made "in compliance" with the latter deed, operates as an affirmance of it: *Phillips v. Green*, 5 T. B. Mon. 344; and where an infant, after attaining his majority, indorsed on his deed, "I do acknowledge that I have signed, by making my mark, the within deed for the expressed purposes; and with the desire to ratify the same, I hereunto affix my hand and seal," and delivered the in-

strument to the grantee again, the deed is thereby confirmed: *Den ex dem. Murray v. Shanklin*, 4 Dev. & B. 289. There can be no doubt about the effect of such express words. The mortgage of an infant is also confirmed by the execution, after he comes of age, of a deed by which the land is conveyed "subject" to the mortgage: *President etc. of Boston Bank v. Chamberlin*, 15 Mass. 220; *Losey v. Bond*, 94 Ind. 67; and see *Allen v. Poole*, 54 Miss. 323; and where a person takes a lease of an infant's lands, and the infant on coming of age mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease: *Story v. Johnson*, 2 Younge & C. Ex. 586.

RATIFICATION BY BRINGING SUIT. — If a person, after coming of age, institutes an action to enforce a contract, or based upon a contract, entered into during his minority, there is no doubt that, under ordinary circumstances, he will be held thereby to have ratified the contract, because his conduct shows an intention to abide by it. Therefore an infant waives an avoidance of a purchase of land made by him, on the ground of infancy, by suing his grantor, after attaining his majority, for an alleged fraud in the sale: *Middleton v. Hoge*, 5 Bush, 478. But while a suit by an infant, after reaching full age, to enforce his agreement, is an act of affirmance, a suit by his assignee, claiming under an assignment from him during his minority, will have no such effect: *Currell v. Potter*, 23 Mich. 377. And where a minor, four months after coming of age, filed a petition to become co-plaintiff in a libel by certain seamen of a vessel, under their written contract for wages, in which nothing was said in regard to his minority, and it appearing that he was neither intelligent nor provident, but that having heard that his associates had brought a suit for wages, obtained the services of the lawyer who was acting for the rest, it was held that there was not sufficient evidence of intelligent action to show a ratification of the contract: *Burdett v. Williams*, 30 Fed. Rep. 697.

RATIFICATION BY ACCEPTING CONSIDERATION. — If a person, after attaining his majority, accepts the consideration of a contract made by him while an infant, such an act very plainly amounts to a ratification of the contract. As where an infant lessor accepts rent after reaching full age: *Ashfield v. Ashfield*, W. Jones, 157; *Litch*, 199; *Godb.* 364; *Smith v. Low*, 1 Atk. 489; *Stator v. Trimble*, 14 Ir. C. L. 342; or receives interest under his agreement: *Franklin v. Thornebury*, 1 Vern. 132; or accepts the purchase price of property sold by him: *Ferguson v. Bell's Adm'r*, 17 Mo. 347; *Doe ex dem. McCormick v. Leggett*, 8 Jones L. 425, 427; *Highley v. Barron*, 49 Mo. 103; or receives a portion of the consideration for a mortgage of his property: *Keegan v. Cox*, 116 Mass. 289; or receives the proceeds of an award, pursuant to a submission of his claim to arbitration: *Jones v. Phoenix Bank*, 8 N. Y. 228. But, it is held, an infant *feme covert* is not estopped from disaffirming a deed of her lands, in which she united with her husband, from the fact that after she came of age the grantee paid the husband a portion of the purchase price, unless she knew that such purchase-money was unpaid, and the grantee was ignorant of the fact that the grantor was an infant when she executed the deed: *Scranton v. Stewart*, 52 Ind. 68. In *Owens v. Phelps*, 95 N. C. 286, it was held that where it is sought to establish that a person has ratified a contract in regard to his property, made while an infant, evidence is admissible to show that the money received in pursuance of such contract was used for the infant's advantage, with his knowledge. The evidence does not of itself show a ratification, but is admissible as explanatory of what occurred.

RATIFICATION BY RETENTION OF PROPERTY PURCHASED. — The effect of the retention of property purchased by a minor, after he becomes of age, has already been considered above, under the title "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age." But little more remains to be added. As there stated, the retention of personal property purchased during infancy, by the vendee, for an unreasonable time after he attains his majority, without any act of disaffirmance on his part, is inconsistent with any other idea than that of ownership, and therefore it will of itself amount to a ratification of the contract; although if, after coming of age, he uses the property or exercises other acts of ownership over it in addition, as, perhaps, will generally be the case, we should say that the question of time is then unimportant, and the contract is thereby affirmed: See *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Bail. Eq. 223; *Eubanks v. Peak*, 2 Bail. L. 497; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; Georgia Code (1832), sec. 2731. So if an infant does not repudiate his contract of subscription for shares in a corporation within a reasonable time after coming of age, he will be held to have ratified the contract: *Cork etc. R'y v. Cazenore*, 10 Q. B. 935; *Leeds etc. R'y v. Fearnley*, 4 Ex. 26; *Northwestern R'y v. McMichael*, 5 Ex. 114; *Dublin etc. R'y v. Black*, 8 Ex. 181. An infant, also, who retains possession of real estate purchased or received in exchange by him for an unreasonable time after he attains full age thereby likewise affirms the contract of purchase or exchange: See *Cecil v. Comes Salisbury*, 2 Vern. 225; *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Boody v. McKenney*, 23 Me. 517, 524; *Baker v. Kennett*, 54 Mo. 82; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; and see *Evelyn v. Chichester*, 3 Burr. 1717; *Armfield v. Tate*, 7 Ired. L. 258; *Middleton v. Hoge*, 5 Bush, 478; *Ihley v. Padgett*, 27 S. C. 300; *Langdon v. Clayson*, 75 Mich. 204; Georgia Code (1852), sec. 2731; compare *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358. A similar rule may be said to exist in case of a settlement of boundaries made during his infancy: *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. An infant lessee who retains possession of the premises for an unreasonable time, and, perhaps, in any case, after a rent day, after he attains his majority, similarly ratifies the letting, as a consequence: *Boody v. McKenney*, 23 Me. 517, 524; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429; *McClure v. McClure*, 74 Ind. 108; *Muhon v. O'Farrell*, 10 Ir. L. R. 527.

The retention of property may, however, be under such circumstances as not to indicate an intention to affirm the contract. Thus an infant cannot be held to have ratified a contract of purchase of personal property, because the property is still retained by him, after he has done all in his power to secure a rescission, and has brought suit for that purpose: *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189, 191; and where an infant who had taken a conveyance of land made an attempt to disaffirm the contract before his majority, and again, within a few days thereafter, and upon the refusal of the grantor to rescind, offered to give the grantor a sum of money, together with the improvements erected by himself on the land, by way of compromise, and then abandoned the premises, and left them in a position for the vendor to occupy at any time he saw fit, his acts were sufficiently speedy and unequivocal to avoid the contract: *Baker v. Kennett*, 54 Mo. 82; so the retention of possession and receipt of rents by a party, after majority, of a lot of

land purchased for her in her infancy, is not a ratification of the purchase, where she repudiated the purchase on the day she reached full age, and brought an action within three months thereafter to recover out of its sale so much of her money as was expended in its purchase: *Scott v. Scott*, 29 S. C. 414.

Again, where an infant transferred a portion of goods purchased by him to a third person to secure a debt, his retention of these goods for sale, after he became of age, as the servant of the assignee, does not amount to a ratification of the contract of purchase: *Thing v. Libbey*, 16 Me. 55. In *Smith v. Kelley*, 13 Met. 309, an infant bought goods, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ. The goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice, after reaching his majority, of his intention not to be bound by the contract of sale. It was held that there was not a ratification of the contract by the defendant, and the action could not be maintained. The court said that while if an infant, after coming of age, used the property bought as his own, or sold it, or kept it a long time, that would be evidence of ratification, yet such use, disposition, or retention must be a voluntary act on the part of the minor, by which he manifests an intention to keep the property. In *Todd v. Clapp*, 118 Mass. 495, in an action to recover the price of goods sold to a firm, one member of which was an infant at the time of the sale, it appeared that the action was brought before the infant became of age, and that a portion of the goods sold were attached upon the writ, among other goods; that the attached goods were sold at auction by consent of all parties, and were bid off by the grandfather and guardian of the infant; and that the infant, after coming of age, purchased the goods of his grandfather, and afterwards used and sold them for his sole benefit. It was held that the court correctly ruled that the jury could not find, from these facts, that the infant ratified the original contract. The court said: "The ground upon which the retention and use by a defendant, after he becomes of age, of property bought while he was an infant, are held to be an affirmation of the contract of purchase, is, that these acts show a promise or undertaking to perform it after his incapacity to make contracts is removed. His only right to retain the goods is by virtue of the contract, and he can conscientiously do it only upon the assumption that the contract is valid. But the case at bar is different. The defendant, Clapp, after he became of age, did not claim or hold the goods under or by virtue of the contract with the plaintiffs. He held them by virtue of a new and independent contract of purchase. There is no inconsistency in his claim to hold the goods under this new purchase and his claim that his contract with the plaintiffs was invalid, and no inference can be drawn, from his thus holding the goods, of an intention to ratify and affirm the plaintiffs' contract." And in *Maupin v. Grady*, 71 Mo. 278, where a minor, on the sale of land under a deed of trust executed by his mother and brother to secure a debt, gave his promissory note for the balance of the debt remaining after the sale, and, after coming of age, the minor bought the land from the purchaser, it was held, in an action against him on the note, that the doctrine that infancy could not be invoked as a defense to a note while the defendant held the property for which it was given was not applicable, since the note was not given for the land. See also *Baker v. Stone*, 136 Mass. 405; *Carrell v. Potter*, 23 Mich. 377. It has also been held that the fact that a married woman united with her husband in enjoying or exercising dominion over property received by the husband as part of the

consideration for a conveyance of her lands does not preclude her from asserting the disability of infancy against her grantee or his successors: *Buchanan v. Hubbard*, 96 Ind. 1.

Furthermore, an infant who enters into a partnership does not, by receiving profits of the partnership during his minority, and retaining the same after he comes of age, become liable for partnership debts contracted before dissolution, which occurred before he came of age: *Dana v. Stearns*, 3 Cush. 372, 375; and the fact that infants retained and sold the crops raised by them on land which they had leased is not a ratification of their contract to pay rent, the consideration of the latter agreement not being crops, but the use of land, and the appropriation by defendants of the fruits of their labor not being such a positive and unequivocal act as to indicate an intention to bind themselves for the rent: *Fleener v. Dickerson*, 72 Ala. 318; so where a minor contracts for materials and labor for the improvement of his property, his receipt of the rents from the property so improved, after he becomes of age, will not amount to a ratification of the contract so as to give the contractor a mechanic's lien upon the property: *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. In *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27, a firm, of which an infant was a member, gave certain checks in payment for goods, and the infant supposed, when he came of age, and until after the firm's dissolution, that the checks, which were duly protested for non-payment, were paid. At the dissolution, which was seven weeks after the infant attained his majority, during which time he drew money from the firm for his personal use, some of the goods were unsold, but he did not know it, and his partners agreed with him to assume and pay all the firm debts. It was held that these facts would not justify a finding that there was a ratification by the infant of his promise to pay the checks.

RATIFICATION FROM FAILURE TO DISAFFIRM WITHIN REASONABLE TIME AFTER REACHING FULL AGE. — The question of the ratification of a contract made during infancy by the mere failure to disaffirm it within a reasonable time after attaining majority, where there has been no property retained or used, and no other act of affirmance, has already been fully discussed, and needs no further consideration: See *supra*, titles "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age," "Disaffirmance of Deeds within Reasonable Time after Reaching Full Age," and "Disaffirmance of Deeds of Infant Females Covert after Reaching Full Age."

RATIFICATION BY SALE OR CONVEYANCE OF PROPERTY PURCHASED. — If an infant purchases personal property, and after coming of age, sells the same, such an act of ownership will very evidently amount to a ratification. If the retention or use of property ratifies the contract, certainly a sale of it will have that effect: *Cheshire v. Barrett*, 4 McCord. 241; 17 Am. Dec. 735; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 45; *Robinson v. Hoskins*, 14 Bush, 393; *Shropshire v. Burns*, 46 Ala. 108; *Minock v. Shortridge*, 21 Mich. 304; compare *Aldrich v. Grimes*, 10 N. H. 194, 193; *Counts v. Bates*, Harp. L. 464. And there is no distinction, in this respect, between personal and real property. A sale and conveyance of real estate purchased during infancy is an affirmance of the contract of purchase: *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Williams v. Mabee*, 7 N. J. L. 500; *Middleton v. Hoge*, 5 Bush, 478; *Johnston v. Fournier*, 69 Pa. St. 449; *Thomas v. Pullis*, 56 Mo. 211, 219; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Buchanan v. Hub-*

bard, 119 Ind. 187. But if an infant purchases real estate, and agrees as part of the consideration to pay off a mortgage thereon, and subsequently, but before she comes of age, conveys the land to another, the retention of the fruits of the sale after she attains her majority is not an affirmance of her agreement to pay off the mortgage: *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; see also *Currell v. Potter*, 23 Mich. 377; and where an administrator, who had sold the land of an infant without authority, other than the latter's consent, invested part of the purchase-money in another tract of land, which he conveyed to the infant, and the infant, on arriving at age, repudiated the sale by the administrator, and afterwards conveyed the land purchased with the proceeds of that sale, at the direction of the administrator, without in any way profiting thereby, it was held that this did not operate as a ratification of the sale by the administrator: *Davidson v. Young*, 38 Ill. 145.

RATIFICATION BY VARIOUS MISCELLANEOUS ACTS.—There are a number of cases of a miscellaneous character concerning what acts or conduct will amount to a ratification, which remain to be noticed. An infant, it is held, confirms a purchase of land made by him, the title to which was taken in his mother's name, by executing and recording an instrument, after attaining his majority, by which he proclaimed his mother to be the true and only owner of the land, and declared himself to be her agent, manager, and co-occupant only, and by his continued use of the land as her property, held for his benefit: *Middleton v. Hoge*, 5 Bush, 478. A lease by an infant lessor is confirmed by him, where he, after reaching full age, gives a receipt to the lessee for an installment of rent, and indorses on the lease a confirmation thereof: *Slator v. Trimble*, 14 Ir. C. L. 342. And a ward affirms a contract with his guardian during infancy by executing, after majority, a receipt to the guardian for the property received under the contract: *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774. Where a minor executes a deed of conveyance, and, on arriving at age, executes, jointly with the grantee, a mortgage of the same premises to secure a debt of the grantee, this is an affirmance of the deed, the mortgage being executed in conjunction with the grantee at his instance and for his benefit: *Watkins v. Wassell*, 15 Ark. 73; and where an infant mortgagor, after coming of age, takes no steps to disaffirm the mortgage, but procures releases of portions of the premises from the mortgagee, "such conduct was utterly inconsistent with the claim that the mortgage was invalid, and was a distinct recognition of its validity": *Wilson v. Darragh*, 28 N. Y. St. Rep. 390; and also, where an infant, having come of age, and entered into partnership with third persons, took a lease for his firm of a part of certain property, which he had conveyed during infancy, from the person to whom he had made the conveyance, the lease is proper to go the jury, in an action by the infant to recover other parts of the land conveyed, to show an affirmance of his deed for the whole; and with such evidence before the jury, the court rightfully refused to charge that the evidence showed no affirmance: *Irvine v. Irvine*, 9 Wall. 617. A redelivery of a deed or mortgage by an infant, after coming of age, amounts to a ratification of the instrument: *Davidson v. Young*, 38 Ill. 145, 153; *Palmer v. Miller*, 25 Barb. 399; and see *Den ex dem. Murray v. Shanklin*, 4 Dev. & B. 289.

An infant, after coming of age, ratifies an award made upon a submission by his guardian that the ward and infant heir shall pay an annuity to the widow in lieu of dower, where he pays part of the money then due, promises to pay the rest of that installment, and says that he had lodged property in his brother's hands to meet an annual payment: *Barnaby v. Barnaby*, 1 Pick.

221. If an infant partner, after attaining full age, transacts the business of the firm, receives its moneys, and pays its debts, these acts, unexplained, amount to a confirmation of the partnership, and make him liable for a debt of the firm contracted during his infancy: *Miller v. Sims*, 2 Hill (S. C.) 479; compare *Crabtree v. May*, 1 B. Mon. 289. An infant ratifies a contract of service by continuing in the service, without objection, after coming of age: *Forsyth v. Hastings*, 27 Vt. 646; *Spicer v. Eurl*, 41 Mich. 191; 32 Am. Rep. 152, 155; *Cornwall v. Hawkins*, 41 L. J. Ch. 435; 26 L. T. 607; 20 Week. Rep. 653.

TORTS OF INFANTS CONNECTED WITH CONTRACTS. — The liability of infants for torts connected with their contracts, as well as for torts in general, will be found discussed in the note to *Humphrey v. Doughlass*, 33 Am. Dec. 180; and what will now be said concerning the subject will be somewhat in the nature of a supplement to that note.

The general rule is elementary, as there said, that infants are liable for their torts; while, as has been seen, they are not liable, with certain exceptions, for the violation of their contracts. Even the contract of an infant made in settlement of his tort, it is held, stands on no privileged footing, but is voidable by him: *Shaw v. Coffin*, 58 Me. 254, 256; 4 Am. Rep. 290; *Hunks v. Deal*, 3 McCord, 257. "It must require," says the court in the last case, "at least as much capacity and discretion to contract about a tort as about the ordinary concerns of life." But the contrary, with much reason, has been held: *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519. If the tort of an infant is connected with his contract, it is a question of considerable dispute whether he should be held responsible because he is liable for his torts, or whether he may escape responsibility because he is not liable on his contracts. "Two principles," says Chalmers, J., in *Ferguson v. Bobo*, 54 Miss. 121, 127, "equally ancient and equally well settled with respect to the contracts and liabilities of infants, and which, as abstractly stated, seem not antagonistic, have been found in practice to produce two conflicting lines of decision, which it is difficult to reconcile; or rather, it is difficult to determine satisfactorily where one ends and the other begins: 1. The contracts of infants, except for necessities with which they have not been supplied by their guardians, impose no liability upon them which is not voidable at their election. 2. Infancy is a shield, and not a sword, and cannot be set up to defeat liability for torts, trespasses, or frauds." To give to each of these principles its appropriate force, and to prevent one from trenching upon the other is sometimes a difficult matter.

It has been seen that a minor is not estopped at law from setting up his infancy as a defense to an action upon his contract from the fact that he fraudulently represented himself to be of full age at the time the contract was entered into, or made any other false representations, whereby he induced the other contracting party to give him credit. In other words, his false representations as to his age, means of payment, and the like, will not render a contract, procured on their faith, binding upon him at law. He may, however, be estopped in equity, under such circumstances, from avoiding his contract on the ground of infancy. See *ante*, title "Infant's Concealment or Misrepresentation as to Age, etc." It is an entirely different question where an action is brought against the infant, not upon the contract, but sounding in tort, to recover damages for the fraud: See the observations of Chief Justice Parker in *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146. The rule is said to be general, that where the substantial ground of action is contract, a party cannot, by declaring in tort, render the infant liable, when he would

not have been liable on the contract. And it has been maintained that an infant is consequently not liable in an action, which would be, at common law, an action on the case, to recover damages for falsely representing himself to be of full age, whereby the plaintiff was induced to enter into a contract with him, which he failed or refused to perform: *Johnson v. Pie*, 1 Lev. 169; 1 Keb. 905, 913; 1 Sid. 258; *Price v. Hewett*, 8 Ex. 146, 148; *Bartlett v. Wells*, 1 Best & S. 836; *Brown v. McCune*, 5 Sand. 224, 229; *Nash v. Jewett*, 61 Vt. 501; and see *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. Dunham*, 1 Root, 272. "While it is true, as a general proposition of law," says the court in *Nash v. Jewett*, 61 Vt. 501, "that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*."

For the same reason, it has also been held that infancy is a bar to an action of deceit against a vendor for fraudulently selling property as his own, when it belonged to another: *Grove v. Neville*, 1 Keb. 778; *Doran v. Smith*, 49 Vt. 353; Chief Justice Pierpont saying in the latter case: "The representations alleged in the declaration are of the same character and stand upon the same principles as representations as to the quality of the property, — they enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved, or there can be no recovery. The contract is the basis of the action; the fraud is predicated upon the contract." And it has likewise been held, as intimated in the last quotation, that infancy is a good defense to an action to recover damages for a fraudulent warranty, representation, or concealment, on the sale of a chattel, as to its condition or quality: *Green v. Greenbank*, 2 Marsh. 485; *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235; *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659; *Prescott v. Norris*, 32 N. H. 101; *Hewitt v. Warren*, 10 Hun, 560; and we should say that this would be particularly true where the action, founded upon a false warranty, is, in form, *ex contractu*; as where the breach of warranty is pleaded as an offset to an action by the infant on promissory notes: *Morrill v. Aden*, 19 Vt. 505. "An infant," says the court in *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659, "is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; but where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense." And in *Prescott v. Norris*, 32 N. H. 101, Chief Justice Perley observes: "If the tort or fraud of an infant arises from a breach of contract, although he may have been guilty of false representations or concealments respecting the subject-matter of the contract, he cannot be charged for a breach of his promise by changing the form of the action. In this case, the claim of the plaintiffs arises out of representations made on the sale, which were substantially part of the contract of sale. And false representations made by an infant at the time of his contract are regarded as so far part of it that he may set up his infancy as a defense. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable."

On the other hand, *Johnson v. Pie*, 1 Lev. 169, 1 Keb. 905, 913, 1 Sid. 258, which is the pioneer case on this subject, has been disapproved by some authorities in this country; and it has been held that where an infant obtains property on the faith of his fraudulent representations that he is of full age, an action

for the damages thereby sustained can be maintained against him: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly, 334; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; and see *Carpenter v. Carpenter*, 45 Ind. 142; *Ferguson v. Bobo*, 54 Miss. 127 131; *Yeager v. Knight*, 60 Miss. 730. Chief Justice Parker, in *Fitts v. Hall*, 9 N. H. 441, says that such a representation was not a part of the contract, nor did it grow out of it, or in any way result from it. The distinction is a fine one, and does not seem to be fully appreciated by some of the later cases which reach the same end. The rule is eminently an equitable one, and although its foundation is somewhat shadowy, there is an inclination to sustain it as correct, and to hold it distinguishable from the cases where an infant fraudulently sells property as his own, or makes a fraudulent warranty as to its soundness or quality.

In *Word v. Vance*, 1 Nott & McC. 197, it was even held that an action of deceit would lie against an infant for falsely warranting a horse, exchanged with the plaintiff, to be sound; but the case stands alone in this ruling. In *Wallace v. Morss*, 5 Hill, 391, it was held that an infant who fraudulently obtains goods on credit, with an intention not to pay for them, was liable in tort to the party injured. The kind of action in tort does not appear, nor is any reason given for the decision; but it might be suggested in explanation that the defrauded party could have himself rescinded the sale under such circumstances, and have maintained trover or replevin. See also *Ashlock v. Vivell*, 29 Ill. App. 388. It is also true that if goods are sold to a minor for cash, and he fraudulently obtains possession of them without paying the cash, his infancy will not shield him from liability in an action on the case or in trover: *Mathews v. Cowan*, 59 Ill. 341; the fraud is really independent of the contract. It has been further held that an infant who is arrested for fraud in obtaining goods cannot be discharged from arrest on the ground that he is an infant: *Schunemann v. Paradise*, 46 How. Pr. 426; and that a minor may be prosecuted criminally for obtaining goods under false pretenses, although he might not be liable civilly for the particular fraud committed: *People v. Kendall*, 25 Wend. 399; 37 Am. Dec. 240. It should also be noted that if an infant avoids his contract for the purchase of property, whether the contract was induced by fraud or not, the contract being thereby rescinded on both sides, the vendor may maintain an action against the infant to recover the property if it be still in his possession, or damages for its conversion if he still has it at the time of avoidance of the contract, although, we should say, he should thereafter consume, destroy, or in any manner dispose of it: See the authorities cited *supra*, title "Adult's Right to Recover back Consideration from Infant on Disaffirmance."

Again, while an infant who hires a chattel is not liable for any non-feasance, or want of or failure to use care and skill, so long as he keeps within the terms of the bailment, yet if he departs from the object of the bailment, and uses the article for a different purpose than that for which it was hired, he is liable as for a conversion, and if he injures the chattel by any willful and positive act, he is responsible in damages for the injury: *Burnard v. Haygis*, 14 Com. B., N. S., 45; *Walley v. Holt*, 35 L. T. 631; *Homer v. Thwing*, 3 Pick. 492; *Green v. Sperry*, 16 Vt. 390; 42 Am. Dec. 519; *Thorne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85; *Ray v. Twiss*, 50 Vt. 688; 28 Am. Rep. 519; *Eaton v. Hill*, 50 N. H. 235; 9 Am. Rep. 189; *Campbell v. Stakes*, 2 Wend. 137; 19 Am. Dec. 561; *Fish v. Ferris*, 5 Drer, 49; *Moore v. Eastman*, 1 Hun, 578; 4 Thomp. & C. 37. In Pennsylvania, it has, however, been denied that if an infant hires a chattel, as a horse, for one purpose, and uses it for another, and it is injured while being so used, trover will lie to

recover damages for the conversion, on the ground that the action "is an attempt to convert a suit, originally in contract, into a constructive tort, so as to charge the infant": *Penrose v. Curren*, 2 Rawle, 351; 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts, 9. These cases are clearly opposed to the weight of authority; and the same may be said of *Jennings v. Rowlatt*, 8 Term Rep. 335, and *Schenk v. Strong*, 4 N. J. L. 87, so far as they hold that an infant is not liable in any form of action for willfully and maliciously injuring an article of personal property hired by him.

Some of the decisions denying the infant's liability under the foregoing circumstances seem to do so, to a partial extent at least, on the ground that actions on the case, which were brought against the infants, could not be maintained. And in *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561, it was said: "If the infant was liable at all, trespass was the proper form of action. An action on the case necessarily supposes the defendant to have a right to the possession of the property under the contract of hiring at the time the injury is committed. Independent of the contract of hiring, the defendant would have no right to the possession, and trespass would be the proper remedy. If the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defense to such an action; for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy. The cases of *Jennings v. Rowlatt*, 8 Term Rep. 335, and *Green v. Greenbank*, 2 Marsh. 485, were cases of that description." But this technical view is disregarded by other decisions, and in *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189, it was expressly, and we think correctly, repudiated.

It has also been otherwise held that an action of trover may be maintained against an infant for the conversion of goods intrusted to his care: *Vasse v. Smith*, 6 Cranch, 226; 1 Am. Lead Cas. *237; *Peigne v. Sutcliffe*, 4 McCord, 387; 17 Am. Dec. 756; so detinue will lie against an infant, where goods were delivered to him for a special purpose not accomplished: *Mills v. Graham*, 1 Bos. & P. N. R. 40. Infancy, even, is no bar to an action of trover for specie and bank-bills deposited by the plaintiff with the infant as a stakeholder, pursuant to an illegal contract between the plaintiff and a third person: *Lewis v. Littlefield*, 15 Me. 233; 17 Me. 40. And where a farm was leased to an infant, the lessor reserving the property in the crops as security for the rent, the infancy of the lessee constitutes no defense to an action of trover by the lessor for the conversion of the crops, since the liability of the lessee did not arise from any breach of contract, but from an unlawful appropriation to his own use of the lessor's property: *Barter v. Bush*, 29 Vt. 455; 70 Am. Dec. 429. So an infant prevailing on a plea of infancy in an action on a note given by him for a chattel which he obtained by fraud is still liable to an action of tort for the conversion of the chattel: *Walker v. Davis*, 1 Gray, 506; and see *supra*, "Adult's Right to Recover back Consideration from Infant on Disaffirmance." But where a complaint alleged an agreement between the parties, by which the defendant was to take and sell goods for the plaintiff, and account, at certain prices, for all he should sell, and return the goods not sold, and after alleging a demand of the defendant to return the goods, or account for the avails, pursuant to the agreement, alleged as a breach that the defendant had neglected and refused to account, but there was no allegation of a conversion, it was held that the action was upon contract, and not for a tort, and that infancy, therefore, constituted a good defense: *Munger v. Hess*, 28 Barb. 75.

In an infant has embezzled or tortiously or criminally taken money, or

converted into money property acquired in such a manner, he is even liable in an action for money had and received: *Briston v. Eastman*, 1 Esp. 172; *Peake* N. P. 223; *Elwelly v. Martin*, 32 Vt. 217; *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290; and see *Peigye v. Sutcliffe*, 4 McCord, 387; 17 Am. Dec. 756. "If," says the court in *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290, "the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of an adult, and *assumpsit* maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor."

SOEDER v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.

[100 MISSOURI, 673.]

EVIDENCE THAT DEATH RESULTED FROM DEFECTIVE RAIL, WHAT SUFFICIENT TO GO TO JURY.—In an action against a railway company to recover damages for the death of a brakeman, evidence showing that the deceased was engaged at night in switching cars of the defendant upon a track in which there was a defective rail, in passing over which a car would be jolted; that when last seen he was standing on the top of one of the cars in the discharge of his duties; and that his dead body was found in a condition and at a place consistent with the inference that he had been thrown from the top of the car by the jolting caused by its passing over the defective rail, and run over by the wheels of the car,—is sufficient to authorize the submission of the case to the jury, although no one witnessed the accident. And whether there was a substantial defect in the track caused by the defective rail, and whether the deceased was familiar with the track in question, are questions for the jury, as different conclusions might be drawn from the evidence thereon.

KNOWLEDGE BY EMPLOYEE OF UNSAFE CONDITION OF APPLIANCE DOES NOT DEFEAT RECOVERY WHEN.—The knowledge of a brakeman of the unsafe condition of the railroad track upon which he was killed will not defeat a recovery for his death, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work on it by the use of care and caution.

WIDOW SUING FOR DEATH OF HUSBAND MAY TESTIFY AS TO NUMBER OF HER INFANT CHILDREN; and it is not such error as will call for a reversal to permit her to testify that she has an infant child by a former husband, where there is nothing in the amount of the damages assessed to suggest the idea that it may have been affected by the fact that she had such child.

ACTION to recover damages. The opinion states the case.

B. Pike, for the appellant.

A. R. Taylor, for the respondent.

BRACE, J. This is an action by the widow of William Soeder for damages for the death of her husband, alleged to

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

ALSTON *v.* HAWKINS.

[105 NORTH CAROLINA, 3.]

PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME, or the rebuttal of such presumption, is a question of law, which, when the facts are established, the court must determine, and not leave to the discretion of the jury.

PAYMENT, PRESUMPTION OF. — When insolvency is relied upon to rebut the presumption of payment arising from lapse of time, the creditor must show that it existed during the entire statutory period next after the maturity of the debt.

PAYMENT, REBUTTING PRESUMPTION OF. — Non-residence alone is not sufficient to rebut the presumption of payment arising from lapse of time. It is, however, competent, when connected with other circumstances, such as insolvency, as tending to rebut such presumption.

PRESUMPTION OF PAYMENT — EVIDENCE TO REBUT. — Where the presumption of payment, arising from lapse of time, is the sole ground relied upon by the defendant, the evidence of a witness interested in the result of the action is inadmissible to rebut the presumption; otherwise, if actual payment is relied upon.

SUIT on a note dated August 4, 1856, on which credit of one hundred dollars was indorsed June 1, 1866. Defendant relied upon the presumption of payment. Plaintiff sought to rebut this presumption by proof of defendant's non-residence since 1857, and also introduced, over objection, the following letter from defendant:—

“CANEY POST-OFFICE, MATAGORDA CO., TEX.,

“March 23, 1871.

“*Dear Charles,*— I received your letter last week requesting me to send you five thousand dollars, which is impossible for me to do. All my crop of last year will not bring more

than five thousand dollars. I have not paid the thousand dollars I borrowed to send you. I promised to pay it out of last crop, which I will do. I owe other debts, but cannot pay them just now. I have had my property so fixed my creditors cannot disturb it; but I will pay every debt I owe in the world, but I must have a little time to do so. When I sell my sugar I will send you all the money I can. I expected to get some money from the bank. The suit has not been decided in the supreme court. I think I will recover half after a while. I have a full supply of hands this year, cultivating all the plantation. Hope to make a good crop this year. . . .

"Yours truly, JAMES B. HAWKINS."

The court intimated that there was no evidence to rebut the presumption of payment. Plaintiff then took a nonsuit, and appealed.

J. B. Batchelor and John Devereux, Jr., for the appellant.

E. C. Smith, for the respondent.

SHEPHERD, J. "The presumption of payment arising from lapse of time under the statute is one which the law itself makes, and it has such an artificial and technical weight that whenever the facts are admitted or established, the court must apply it as an inference or intendment of the law; and so, too, the question whether that presumption has been rebutted is one of law, which, when the facts are ascertained, the court must determine, and not leave to the discretion of the jury": *Ruffin, J., in Grant v. Burgwyn*, 84 N. C. 560.

It is well settled that when insolvency is relied upon to rebut the presumption, the creditor must show that it existed during the entire statutory period next after the maturity of the debt: *Grant v. Burgwyn*, 84 N. C. 560; *McKinder v. Littlejohn*, 4 Ired. 198; *Walker v. Wright*, 2 Jones, 156.

Applying these principles to the case before us, it is clear that the plaintiff has failed to rebut the presumption of payment arising from his long inaction. Assuming that the statute did not commence to run until the 1st of January, 1870, we have a period of seventeen years in which the plaintiff has made no effort whatever to enforce the payment of his claim. The only evidence as to the insolvency of the defendant during all of these years is contained in a letter written by him on March 23, 1871, and addressed to "Dear Charles." It does not appear that this person is in any way connected with this debt, nor does the letter so identify the indebtedness

therein mentioned with the bond sued upon as to warrant us in holding that it amounts to an acknowledgment. Treating it, however, either as an acknowledgment, or, more properly, as evidence merely of insolvency at its date, there is no testimony as to the continuance of such insolvency during the succeeding sixteen years.

It needs not the citation of authority to show that this proof is insufficient to repel the presumption of payment. The learned counsel, however, insist that the non-residence of the defendant should have been submitted to the jury. In *Kline v. Kline*, 20 Pa. St. 503, Woodard, J., in speaking of this position, says that "if it had ever been held to be, it might be doubted whether the rule ought not to be abrogated now, since the facilities of intercommunication have multiplied so wonderfully in all directions. But such a rule has never been established. The states of this confederacy are not foreign countries in respect to each other. We have a common federative head and a common constitution, which secures to the citizens of each state all the privileges and immunities of citizens of the several states. The tribunals of Ohio are as open to the citizen of Pennsylvania as his own courts, and if he will not avail himself of his privileges, he may not take advantage of his own inaction to rebut a statutory presumption of law."

In the cases cited by the plaintiff (*Armfield v. Moore*, 97 N. C. 34, and *Lilly v. Wooley*, 94 N. C. 412), there are suggestions as to the hardship of requiring a creditor to resort to a distant forum in order to collect his debt; but the statute of presumption was not then under consideration, and the remarks of the justices who delivered the opinions cannot, therefore, be regarded as authority upon the question before us.

Especially is this true when we consider that this court has several times emphatically decided that non-residence alone is not sufficient to rebut the presumption. In *Campbell v. Brown*, 86 N. C. 376, 41 Am. Rep. 464, Ruffin, J., in delivering the opinion of the court, said that the presumption of payment is one "that may be rebutted by proof of circumstances which raise a stronger counter-presumption, and, as was said in *McKinder v. Littlejohn*, 4 Ired. 198, evidence of a change of residence, or even distant residence, may be received for this purpose in aid of other evidence, such as the insolvency and general destitution of the debtor. But we

know of no authority proceeding from this or any other court for saying that a mere change of residence is of itself sufficient wholly to prevent the presumption which the law, by an intendment of its own, raises from the lapse of the prescribed number of years, without something having been done on the part of the creditor to enforce the satisfaction of his demand."

Although non-residence is competent, when connected with other circumstances tending to rebut the presumption, we cannot hold that it is sufficient when the only circumstance with which it is to be considered is the insolvency of the debtor for only the second year of the statutory period, leaving the preceding year and the succeeding sixteen years wholly unaccounted for.

The furthest that the court has ever gone in this direction was in *McKinder v. Littlejohn*, 4 Ired. 198. There was evidence of the continuous insolvency of the debtor for twenty-five years, with the exception of eighteen months during the first seven or eight years, when it was shown that the defendant had property. During this time he was a non-resident of this state. The court said that "the circumstance of distance between the debtor and the creditor might, we think, be left to the jury, with the fact of a continuous insolvency during the residue of the twenty years, as some evidence that the debtor did not pay the debt during that small space of time. . . . The distance is material only as preventing the possession of property by the debtor for but a short period from counteracting the effect of insolvency as a circumstance repelling the presumption of payment. For if the debtor, living more than a thousand miles from the creditor, and in a situation between which and the place of the creditor's residence there was but little communication, should have had in possession property of value to pay the debt but for a very short time, so that the jury should think the creditor did not know of it, and could not get payment out of that property, it might be regarded as being substantially a continued insolvency, especially where, as here, the debtor seems barely to have had possession of property without its appearing how he got it and whether he had paid for it." It will be observed how cautious the court is in giving any efficacy to such evidence, even in a case of long and continued insolvency, and the decision is put upon the ground that, owing to the distance, the plaintiff might not have known of the possession of property by the defendant.

How different is the case before us. Here, as we have said, the only proof of insolvency are the declarations in the letter of 1871, from which it plainly appears that the debtor is in possession of considerable landed property, on which, he complains, there was only raised a crop of five thousand dollars the previous year. He calls it "my property," and frankly admits that he has had it so "fixed" that his creditors cannot disturb it. He has a suit in the supreme court, and thinks that he "will recover half after a while." He has "a full supply of hands" "cultivating all the plantation," and hopes to make a good crop. He is giving his whole attention to it. Surely this does not indicate such poverty as to render it impossible for the defendant to pay, nor are the circumstances of such a nature as to discourage the plaintiff from a vigorous effort to subject the property to the payment of his claim.

In McKinder's case, the testimony, as we have remarked, was considered, because it was improbable that the creditor knew of his debtor possessing property for the short period of eighteen months. In our case, the creditor is actually informed by the debtor of his possession of a large property, and of his effort to prevent his creditors from reaching it, thus furnishing to the creditor valuable written testimony which he could use in subjecting the property to the satisfaction of his claim. It would, we think, be stretching the principle of *McKinder v. Littlejohn*, 4 Ired. 198, very far, to hold that such testimony is legally sufficient to go to the jury.

The plaintiff further contends that the statute does not run during the absence of the debtor from the state, and for this he relies upon *Summerlin v. Cowles*, 101 N. C. 473. In that case, the late chief justice remarked that while there is no saving clause in the statute of presumption (Rev. Code, c. 65, sec. 9), "yet when it is adopted as a measure of time in which an action must be brought, it must, by reason of the same analogy, be accompanied with the qualification attaching to all limitations, and mentioned in section 9, preceding." This suggestion on the part of the learned chief justice was unnecessary to the decision of the case, as it will be observed that the defendant relied upon the statute of limitations. This will more particularly appear by an examination of the papers on file in this court.

We cannot consider the suggestion as authority, as it is entirely opposed to many cases in which the point was directly presented and distinctly decided to the contrary:

Headen v. Womack, 88 N. C. 468; *Houck v. Adams*, 98 N. C. 519; *Hamlin v. Mebane*, 1 Jones Eq. 18; *Hodges v. Council*, 86 N. C. 181; *Campbell v. Brown*, 86 N. C. 376; 41 Am. Rep. 464. His honor was correct in ruling that the testimony offered was not legally sufficient to rebut the presumption of payment.

We are also of opinion that Dr. Willis Alston was properly excluded as a witness for the plaintiff. He was interested in the result of the action, and falls directly within the inhibition of the code, section 580. It is urged that this section does not apply, because the defendant pleaded both the statute and actual payment. Where actual payment is pleaded and "relied" upon, the statutory prohibition has no application; but merely pleading actual payment does not prevent its operation. Here the defendant offered no testimony whatever, and "relied" solely on the presumption of payment arising from the lapse of time. It is very plain that our case is not within the exception: *Brown v. Cooper*, 89 N. C. 238.

Upon a review of the whole case, we are unable to find any error.

Affirmed.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME. — Independently of the statute of limitations, the law raises a presumption, in the absence of explanatory evidence, that a debt which has been due and unclaimed, and without recognition or payment of interest for twenty years, has been paid. This presumption is not conclusive. Still, the burden of proof is thrown on the creditor to show that payment of the debt has not been made: *Bentley's Appeal*, 99 Pa. St. 500; *Phillips v. Adams*, 78 Ala. 225; *Peter's Appeal*, 106 Pa. St. 340; *Lash v. Von Neida*, 109 Pa. St. 207; *White v. Moore*, 23 S. C. 456; *Didlake v. Robb*, 1 Woods, 680.

In *Bentley's Appeal*, 99 Pa. St. 500, the court said: "A debt which has been due and unclaimed, and without recognition for twenty years, in the absence of explanatory evidence, is presumed to have been paid. This presumption, *prima facie*, obliterates the debt, and the *onus* of proof is upon the creditor, not to establish a new contract, as in the case where a debt is barred by the statute of limitations, but to show that payment of the debt has not been made." To the same effect, *Gregory v. Commonwealth*, 121 Pa. St. 611, 6 Am. St. Rep. 804, where it is determined that all debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, are presumed to have been paid. This presumption is an artificial rule of law, is not a bar to an action on the original contract, and therefore a new promise is not necessary to sustain such action.

The evidence to rebut the presumption of payment after twenty years must be satisfactory and convincing, especially when the suit is not brought until after the death of the debtor. In such case the defendant stands upon a presumption of law binding upon both court and jury, until overcome by proof, and the plaintiff in rebuttal must assume the burden of proof, and ad-

duce evidence sufficient, if believed, to counteract the presumption. Whether the evidence is true is a question of fact for the jury; whether it legitimately gives rise to the inference of non-payment is a question of law for the court. This case is followed in *Porter v. Nelson*, 121 Pa. St. 628; *Breneman's Appeal*, 121 Pa. St. 641; *Runner's Appeal*, 121 Pa. St. 649; and in accord with this holding is that in *Reed v. Reed*, 46 Pa. St. 239.

The rule as thus stated has been applied to all sorts of indebtedness, as, for instance, to bonds: *Smith v. Benton*, 15 Mo. 371; *Haskell v. Keen*, 2 Nott & McC. 160; *Cottle v. Payne*, 3 Day, 289; *Levy v. Hampton*, 1 McCord, 145; *Durham v. Greenly*, 2 Harr. (Del.) 124; *Tinsley v. Anderson*, 3 Call, 329; *Boyd v. Harris*, 2 Md. Ch. 210; *Delany v. Robinson*, 2 Whart. 503; *Denniston v. McKeen*, 2 McLean, 252; *Louie v. Stowell*, 4 Jones, 235; *Rogers v. Bishop*, 5 Blackf. 108; *Bird v. Inslee*, 23 N. J. Eq. 363; *Morrison v. Funk*, 23 Pa. St. 421; *Wellingham v. Chick*, 14 S. C. 93; *Shubrick v. Adams*, 20 S. C. 49; *Langston v. Shands*, 23 S. C. 149. It is a well-settled rule of law that a bond is presumed to have been paid after the lapse of twenty years from its maturity. But this presumption may be repelled by satisfactory evidence. If less than twenty years have elapsed, the presumption does not arise; still, even then, lapse of time may be relied upon, in connection with other circumstances, as evidence of payment: *Booker v. Booker*, 29 Gratt. 65; *Norvell v. Little*, 79 Va. 141. The presumption that a bond has been paid, which arises after a lapse of twenty years, is not a legal bar. It is a presumption of fact which must be held conclusive, unless rebutted by satisfactory evidence that it has not been paid, or showing good and sufficient reasons why longer forbearance has been given. Thus where the parties reside in a county whose condition was such during the civil war as to render it highly improbable that debts would or could be collected during the timesuch war continued, this time should not be considered as forming part of the time whose lapse gives rise to the presumption of payment. If it is shown that by the understanding of the parties the bond was not to be paid until a future time, the time which elapsed from the giving of the bond, to such future time, should not be considered as forming any part of the time whose lapse gives rise to the presumption, though the bond on its face is payable on demand: *Hale v. Pack*, 10 W. Va. 145. A legal presumption of the payment of a bond given to secure the payment of money does not arise from mere lapse of time, where the bond has not been due for twenty years before the commencement of suit to recover on it. If a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction from mere lapse of time does not arise; and while the mere lapse of such time affords no presumption of law, that the debt is paid, still, payment may be inferred by the jury from circumstances though the lapse of time is short of the period of twenty years. So when an action is brought on a bond, if twenty years have elapsed between the time of its becoming due and of the institution of the suit, the defendant may, without pleading the statute of limitations, rely upon the presumption of payment; and upon issue joined or plea of payment, payment may be inferred from circumstances, coupled with lapse of time short of a period of twenty years: *Sadler v. Kennedy*, 11 W. Va. 187; *Calwell v. Prindle*, 19 W. Va. 604. The payment of a bond or covenant will not be presumed from the mere lapse of fourteen years from the time it was due: *Calwell v. Prindle*, 11 W. Va. 307. If the obligee in the bond is an infant when the cause of action accrues, payment will be presumed in five years after he attains full age, if that is twenty years from the accruing of the action. Payment made by heirs or devisees on the bond of their deceased ancestor will not destroy the

presumption of payment as against the estate of the ancestor: *Gibson v. Lowndes*, 28 S. C. 285; *Bartlett v. Bartlett*, 9 N. H. 398.

The same rule is applied to mortgages. Thus more than twenty years having elapsed since the maturity of the mortgage debt, the law will presume the mortgage satisfied: *Agnew v. Renwick*, 27 S. C. 562; *Bowie v. Poor School Society*, 75 Va. 300; *Pryor v. Wood*, 31 Pa. St. 142; *Inches v. Leonard*, 12 Mass. 379; *Jackson v. Wood*, 12 Johns. 242; *Sweetser v. Lowell*, 33 Me. 446. A mortgage is presumed to be satisfied, if no claim has been made and no interest paid upon it within twenty years after it became due, and no circumstances are shown to explain the delay and rebut the presumption: *Barned v. Barned*, 21 N. J. Eq. 245; *Downs v. Sooy*, 28 N. J. Eq. 55. In Vermont, the presumption of payment of a mortgage arises in fifteen years after its maturity: *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144. A presumption of payment does not arise from the fact that no interest has been paid on the mortgage for nineteen years: *Boon v. Pierpont*, 28 N. J. Eq. 7. In *Jarvis v. Albro*, 67 Me. 310, the mortgagor remained in possession of the mortgaged premises for more than twenty years after the execution of the mortgage, and during that time there was no evidence that the mortgagee asserted any claim under the mortgage, nor that its validity was in any way recognized by the mortgagor; and the court said that "upon these facts a presumption arises that the mortgage had been paid, and ceased to be a subsisting title. This rule is so well settled that no citation of authority is needed. But this presumption is not conclusive upon the mortgagee. He may rebut it by proof that the mortgage debt had not been paid, and that the mortgage had not been extinguished." The presumption, based on lapse of time, that a mortgage has been paid, is one that can be rebutted by circumstances: *Baent v. Kennicutt*, 57 Mich. 268. But when the period of twenty years has elapsed, very slight evidence will sustain the presumption of payment arising from the lapse of time: *Pattie v. Wilson*, 25 Kan. 326. Still, the inference of payment arising from mere lapse of time is not sufficient to overcome convincing proof of non-payment: *Delaney v. Brunette*, 62 Wis. 615. In *Tripe v. Marcy*, 39 N. H. 439-448, the court said: "We have examined, however, a question that has been argued touching this point, and concur with the views of counsel for the defendant to this extent: that when the mortgagor is permitted to retain possession of the land for twenty years without interruption, the presumption is, that the mortgage debt has been paid, or had no valid existence, unless this presumption is repelled by the payment of interest, or other act recognizing the validity of the mortgage. This we conceive is established on great authority. But we are not prepared to hold that this presumption arises short of twenty years from the time the mortgage debt becomes due. Otherwise we might be asked to presume a debt paid before the stipulated time of payment has arrived. This presumption arises from the long delay to enforce payment; but surely no such delay can be charged until the time has arrived when the creditor is entitled to demand it. In this respect the presumption accords with the general provisions of our limitation laws, which limit suits to the time prescribed after the cause of action has accrued. When the mortgagee is in possession, the right of the mortgagor will be barred in twenty years from the entry of the breach of condition. So if the mortgagee suffers the mortgagor to remain in possession twenty years after breach of condition, payment is presumed. In both cases the time is reckoned from the breach of condition."

The unexplained possession, by a mortgagor, of premises for less than twenty

years may be left to the jury, in connection with partial payments of the mortgage debt, as tending to show the debt fully paid: *Gould v. White*, 26 N. H. 178.

In the absence of proof that real estate decreed to be sold upon foreclosure of a mortgage in 1856 was ever sold, it may be conclusively presumed, in an action of ejectment commenced in 1883, that the mortgage debt was paid, and that the property was never sold: *Gage v. Downey*, 79 Cal. 140.

The presumption of payment also arises on notes or other evidence of indebtedness not under seal, and not paid within twenty years from maturity. Thus in an action on a note more than twenty years overdue, although the statute of limitations may not be a bar because of the maker's absence from the state, still there is a presumption of payment; and evidence that the holder was poor during that period is competent to fortify the presumption: *Bean v. Tonnele*, 94 N. Y. 381; 46 Am. Rep. 153. The presumption of payment arising from lapse of time is the same, whether the debt is evidenced by bond or note, and arises after the lapse of twenty years, and not before, in the absence of evidence rebutting the presumption. But the presumption may in all cases be rebutted: *Lash v. Von Neida*, 109 Pa. St. 207; *Clark v. Clement*, 33 N. H. 563; *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. Rep. 804; *Boyce v. Lake*, 17 S. C. 481; 43 Am. Rep. 618; *Dickson v. Gourdin*, 26 S. C. 391. The burden of proof is on the maker to show payment within twenty years, or facts from which the jury may properly infer payment: *Morrison v. Collins*, 127 Pa. St. 28; 14 Am. St. Rep. 827. The circumstance that the maker was able to pay will not rebut such presumption; still, this proof, together with a showing that the holder has been constantly pressed for money, may justify the finding of payment within the twenty years: *Morrison v. Collins*, 127 Pa. St. 28; 14 Am. St. Rep. 827. The absence of the debtor from the state during the greater part of the period relied upon to create the presumption will rebut it, but the fact that the debtor at a certain time during the period relied upon was bankrupt will not of itself have this effect: *Daggett v. Tallman*, 8 Conn. 168. In such case, the presumption may be aided or rebutted by surrounding circumstances rendering it probable that the note has or has not been paid within a period short of the twenty years: *Criss v. Criss*, 28 W. Va. 388. In calculating whether the twenty years have elapsed without payment, the time in which for any reason the creditor has no legal right to bring suit on the note must be excluded: *Criss v. Criss*, 28 W. Va. 388; *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618; *Mason v. Spurlock*, 4 Baxt. 554.

Judgment against one of the obligors on a joint and several note will not rebut the presumption of payment arising in favor of the other obligor from the lapse of time; a voluntary payment, however, by one of such obligors, within the twenty years, will rebut the presumption of payment by the other: *Hall v. Woodward*, 26 S. C. 557. Proof that the surety on a note had said that the payee had promised him not to push him for payment during his, the surety's, lifetime is sufficient to rebut the presumption of payment: *Fisher v. Phillips*, 4 Baxt. 243. Where the note sued on was due in 1872, and payments thereon were made as late as 1879, the maker having failed between that time and 1883, when suit was brought, the court decided that lapse of time did not raise a presumption that the note was paid, and was not entitled to much consideration: *Walker v. Russell*, 73 Iowa, 340.

Where, in an action on a note, payment by the execution of a new note is pleaded by way of defense, the jury may consider, with other circumstances, the time which has elapsed since the time of the alleged payment, as the

presumption of payment arising from the lapse of time applies as well where a specific manner of payment is pleaded as where payment is alleged in a general way: *Manning v. Meredith*, 69 Iowa, 430. Where the debt is payable by installments, the presumption of payment arising from lapse of time applies to each installment as it falls due: *State v. Lobb*, 3 Harr. (Del.) 421. If a bill is filed to settle an account which accrued more than twenty years prior thereto, the presumption of payment will prevail, in the absence of proof of the justice of the claim, during that time: *Kingsland v. Roberts*, 2 Paige, 193; *Ellison v. Moffatt*, 1 Johns. Ch. 46.

As a general rule, the unexplained lapse of twenty years from the time that a judgment is rendered raises a legal presumption that it has been paid: *Campbell v. Carey*, 5 Harr. (Del.) 427; *Burton v. Cannon*, 5 Harr. (Del.) 13; *Clark v. Clement*, 33 N. H. 563; *Thomas v. Hummcutt*, 54 Ga. 337; *Willingham v. Long*, 47 Ga. 540; *Bird v. Inslee*, 23 N. J. Eq. 363; *Thayer v. Mowry*, 36 Me. 287; *Clurpman v. Loomis*, 36 Conn. 459. The presumption thus arising is, however, always rebuttable: *Knight v. McComber*, 55 Me. 132; *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349; *Burt v. Casey*, 10 Ga. 178; *Scott v. Isaacs*, 85 Va. 712; and evidence of payments on the judgment within that time, or admissions that it is due, will rebut the presumption: *Burton v. Cannon*, 5 Harr. (Del.) 13; *Bissell v. Jaudon*, 16 Ohio St. 498. Any lapse of time less than twenty years will not generally, *per se*, raise the presumption of payment: *Murphy v. Philadelphia Trust Co.*, 103 Pa. St. 380; *Daly v. Erricsson*, 45 N. Y. 786. While the presumption of payment of a claim founded on a judgment does not arise until twenty years after its rendition, it is well settled that a shorter period than that, aided by circumstances which contribute to strengthen the presumption, may furnish sufficient grounds to justify the jury in inferring the fact of payment: *Briggs's Appeal*, 93 Pa. St. 485; *Moore v. Smith*, 81 Pa. St. 183; *West v. Brison*, 99 Mo. 684. In an early case in Arkansas, the court determined that after the lapse of ten years from the date of a judgment, the law presumes that it is paid: *Woodruff v. Sanders*, 15 Ark. 143. And this presumption is conclusive, unless the plaintiff, in the absence of any effort to enforce payment of the judgment, shows such facts and circumstances as will satisfy the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment: *Rector v. Morehouse*, 17 Ark. 131.

In Tennessee, the unexplained lapse of sixteen years raises a rebuttable presumption that a judgment has been paid: *Kilpatrick v. Brashear*, 10 Heisk. 372; *Bender v. Montgomery*, 8 Lea, 586; *Anderson v. Settle*, 5 Sneed, 202; *McDaniel v. Goodall*, 2 Cold. 391. The presumption of payment of a judgment arising from lapse of time is a general one, and applies as well between the parties to the judgment as between the plaintiff and subsequent creditors. In the absence of countervailing proof, it is a good defense to a *scire facias* to revive a judgment: *Van Loon v. Smith*, 103 Pa. St. 238.

The rules applied to judgments as to presumption of payment from lapse of time are also applied to the payment of legacies by administrators and executors. Thus the lapse of twenty years from the time when a legacy becomes payable, without claim or demand by the legatee, and without recognition of the right by the executor or administrator, creates a legal presumption of its payment: *Bonner v. Young*, 68 Ala. 35; *O'Brien v. Holland*, 3 Blackf. 490; *Okeson's Appeal*, 2 Grant Cas. 303; *Kerlee v. Corpening*, 97 N. C. 330; *Bentley's Appeal*, 99 Pa. St. 500; *Wingett's Appeal*, 122 Pa. St. 486; *Hooper v. Howell*, 52 Ga. 315; *Rayland v. Morton*, 41 Ala. 344. And a court of equity will not, in the absence of peculiar circumstances, entertain a bill to

compel distribution after the lapse of that time: *Worley v. High*, 40 Ala. 171. The presumption thus arising may be rebutted by satisfactory evidence: *Hayes v. Whitall*, 13 N. J. Eq. 241; the burden of proof being on the legatee to show that the legacy has not been paid: *Bentley's Appeal*, 99 Pa. St. 500; *Foulk v. Brown*, 2 Watts, 209. Proof of the death of a *feme covert* legatee, whose husband survived her, no administration having been taken on her estate, will not repel the presumption of payment of a legacy arising from lapse of time: *Foulk v. Brown*, 2 Watts, 209. Evidence that during the period the administrator has said to a stranger that he would not pay the legacy, because the legatee was rich enough without it, is insufficient to overcome the presumption of payment: *Bentley's Appeal*, 99 Pa. St. 500. Nor is the presumption rebutted by proof of disability, such as infancy or coverture on the part of the legatee: *McCurtney v. Bone*, 40 Ala. 533. But where an executrix, having a discretion as to the payment of pecuniary legacies, notifies the non-resident legatees that she has the money on hand to pay them, and makes partial payment, this is a recognition of an express trust, and no presumption of payment arises, as against the legatees, until the lapse of twenty years: *Girard v. Fullerer*, 84 Ala. 323. The presumption of payment of a legacy does not arise short of twenty years, unless aided by evidence of circumstances which raise the presumption. Thus the payment of a legacy will not be presumed in seven years: *Strohm's Appeal*, 23 Pa. St. 351.

The rule of presumption of payment from the lapse of twenty years applies to taxes. In *Hopkinton v. Springfield*, 12 N. H. 328, 330, the court said: "A presumption of payment arises in relation to bonds, mortgages, judgments, etc., after the lapse of twenty years, if there is no evidence to repel it, and to show that the debt is still unsatisfied. Taxes cannot have any higher character in this respect than debts due by specialty, and of record. The assessment is in the nature of a judgment, and the warrant for the collection operates like an execution. There is no reason, that we can discover, why the same principle should not be applied to them." The same doctrine is announced in *Dalton v. Bethlehem*, 20 N. H. 595; *Colebrook v. Stewartstown*, 28 N. H. 75; *Andover v. Merrimack County*, 37 N. H. 437. This presumption may be rebutted; but unless this is done, lapse of time, aided by other circumstances, will raise the presumption of payment: *Elliott v. Williamson*, 11 Lea, 38.

The due execution of a trust will be presumed after the lapse of twenty years: *Drysdale's Appeal*, 14 Pa. St. 531; and though a continuing trust may be presumed to be paid from the lapse of time, still, where the trust is recognized by the trustee as continuing, the presumption of payment, which otherwise would arise after the lapse of twenty years, is avoided, and an informal settlement made by him in the probate court, in which he charged himself with assets received, and claimed credits for disbursements, operates as such recognition: *Werborn v. Austin*, 82 Ala. 498.

Under the North Carolina statute a presumption of payment of bonds, notes, or other evidences of indebtedness arises in ten years from maturity: *Hall v. Gibbs*, 87 N. C. 4. This presumption is not one of law, but of fact, which may be rebutted by proof that no payment has been made, or such other facts as are sufficient in law to remove the presumption: *Long v. Clegg*, 94 N. C. 763. Thus the recognition of subsisting indebtedness by the personal representatives of the obligee in a bond, and a promise to pay the same, is sufficient to rebut the presumption of payment: *Tucker v. Baker*, 94 N. C. 162. So payment on a bond within ten years from maturity by the assignee

in bankruptcy of one of the obligors repels the presumption: *Belo v. Spach*, 85 N. C. 122. But the admission of one obligor, that a bond has not been paid, will not rebut the presumption in favor of his co-obligor, nor will the mere admission of the obligor sought to be charged have that effect; nor is the presumption against him rebutted by the recovery of judgment by default against his co-obligor within ten years: *Rogers v. Clements*, 98 N. C. 180.

In an action against the obligee in a bond, an admission that neither he nor his surety has paid the bond is sufficient to rebut the presumption of payment, nothing else appearing: *Cartwright v. Kerman*, 105 N. C. 1. But the admission of his administrator that he has not paid it will not rebut the presumption: *Grant v. Gooch*, 105 N. C. 278. The proof offered to repel the presumption of payment from lapse of time must, in order to be effectual, run through the entire period next after the maturity of the debt: *Rowland v. Windley*, 86 N. C. 36. Thus where insolvency of the obligor is relied upon, it must be shown to have existed during the entire period, thus establishing the inability of the obligor to pay: *Grant v. Burgwyn*, 84 N. C. 560.

In addition to what has already been said while treating this subject with respect to the different kinds of indebtedness to which the presumption has been applied, it may be here stated, as a general rule, that though the law does not raise a presumption of payment short of twenty years from the time when the indebtedness falls due, still there is no doubt that a shorter period than that, aided by circumstances which contribute to strengthen such presumption, may furnish sufficient grounds to the jury for inferring the fact of payment: *Briggs's Appeal*, 93 Pa. St. 485; *Davenport v. Labauve*, 5 La. Ann. 140; *Copley v. Edwards*, 5 La. Ann. 647; *Wooten v. Harrison*, 9 La. Ann. 234; *Fleming v. Emory*, 5 Harr. (Del.) 46; *Milledge v. Gardner*, 33 Ga. 397; *Atkinson v. Duncce*, 9 Yerg. 424; *Moore v. Pouge*, 1 Dru. 327; *Brubaker v. Taylor*, 76 Pa. St. 83; *Webb v. Dean*, 21 Pa. St. 29; *Tilghman v. Fisher*, 9 Watts, 441; *Williams v. Sims*, 1 Rich. Eq. 53; *Blake v. Quash*, 3 McCord, 205; *Garnier v. Renner*, 51 Ind. 372. This rule was applied in an action to revive a judgment nineteen years after it was rendered, in the absence of proof that execution had ever issued: *Diamond v. Tobias*, 12 Pa. St. 312; where the court said. "The rule is well established that where the period is short of twenty years, the presumption of payment may be aided by other circumstances besides the mere lapse of time. But exactly what these circumstances may be never has been and never will be defined by the law. There must be some circumstances; and where there are any, it is safe to leave them to the jury." In *Moore v. Smith*, 81 Pa. St. 182, more than sixteen years had elapsed since the rendition of a judgment, and the same doctrine was applied in an action to revive it.

In *King v. Coulter*, 2 Grant Cas. 77, the court said: "It was fifteen years, four months, and twenty-five days after the sealed note of the plaintiff's testator matured before this action was instituted for its recovery. No legal presumption of payment such as, unrebutted, the court would be bound to declare as a conclusion of law arose in that time; for the authorities all agree in fixing twenty years as the period necessary to such a presumption. But the question is, whether the time that did elapse was competent, in connection with such circumstances as were offered, to go to the jury as ground for their presuming payment of the note. The competency of such evidence does not depend on a particular period of years, though its effect will be proportioned to their number. The presumption strengthens as the time approaches to twenty years, and the circumstances needed to establish it may be measured by a diminishing scale. The further the time stops short

of twenty years the more cogent and decisive must be the circumstances relied upon; just as the further we advance beyond twenty years we require more persuasive circumstances to rebut the legal presumption. Twenty years assumed as the point for that presumption, the scale is reversed by which we measure the circumstances that tend to establish or countervail it. In both instances it is for the jury to apply the proofs under direction of the court. If evidence be offered which in the judgment of the court will, in connection with the lapse of time, reasonably tend to convince the jury that the debt has been paid short of twenty years, or that it has not been paid, notwithstanding that period, it is the duty of the court to receive it, and to submit it to the jury with such instruction as shall enable them to estimate it at what it is really worth. The point to be attained is moral conviction of the fact; and whilst it is not to be founded on evidence insufficient to convince reasonable men, we are not to exact mathematical certainty, nor to expect more than moral demonstration."

This rule was applied in *Hughes v. Hughes*, 54 Pa. St. 240, where a debt from a son to his father was overdue eighteen years and three fourths when suit was brought, and had been due over fifteen years during the lifetime of the obligor. To aid the presumption of payment from lapse of time, evidence was admitted to show the needy circumstances of the obligee, and the easy and solvent condition of the obligor. The court said: "Slight circumstances may be given in evidence for that purpose, in proportion as the presumption strengthens by the lapse of time; but still they must be such as aid the presumption arising from time. They must be, as it is said, persuasive that the time would not have been suffered to elapse had the debt remained unpaid." To the same effect, *Wood v. Egan*, 39 La. Ann. 684. In *Phillips v. Adams*, 78 Ala. 225, it was determined that to create the presumption of payment by lapse of time short of twenty years, positive evidence is not required. It may be established by circumstances such as will satisfy the jury that the continued existence of the debt is highly improbable, as where the vendor, though in necessitous circumstances, did not file his bill to enforce his lien on land until nineteen years from the date of the contract, and fourteen years after the death of the purchaser, and showed no excuse for his delay. If a bill is filed to enforce an alleged vendor's lien on land against a subpurchaser more than twelve years after the maturity of the debt, the complainant admitting that she and her husband, since deceased, well knew of the existence of the lien, but took no steps to enforce it, though very poor, and needing the money to supply the common necessities of life, and also knew that the purchaser became insolvent in less than one year from the date of the contract, but interposed no objection to a sale publicly advertised, these facts raise a strong presumption of payment: *May v. Wilkinson*, 76 Ala. 543. Slight circumstances may be left to the jury on the issue of payment of a bond when sixteen years have elapsed: *Blackburn v. Squibb*, Peck, 60. And the lapse of fourteen years after the last installment on a bond and mortgage fell due, taken in connection with other facts tending to prove payment, is sufficient to raise the presumption of payment: *Bauder v. Snyder*, 5 Barb. 63.

In *Milledge v. Gardner*, 33 Ga. 397, a period of over nineteen years had elapsed from the accrual of the cause of action on a note to the bringing of the suit, and during that time the debtor was solvent, and the holder insolvent; and besides, the holder had been compelled to pay a debt due by the debtor as his security, and on a settlement, the debtor had given his and another's note to a third person for the balance, which note had been reduced

to judgment by such holder. The court considered these facts, unexplained, as sufficient to raise the presumption of payment.

The presumption of payment arising from the lapse of twenty years, or a shorter period of time, may be rebutted by any evidence which is sufficient to satisfy the minds of the jury that the debt has not in fact been paid. An acknowledgment of an existing indebtedness, within the period required to raise the presumption, is sufficient to rebut it. More than twenty years had elapsed after a bond became due, a settlement took place between the respective parties to it, and the obligor then acknowledged the bond to be due and unpaid, — this was considered sufficient to rebut the presumption of payment: *Eby v. Eby*, 5 Pa. St. 435. So an admission that the debt has not been paid, with a positive declaration by the debtor that he does not intend to pay it, rebuts the presumption: *Reed v. Reed*, 46 Pa. St. 239. And evidence that demand for payment was made where the obligor, in a bond, acknowledged that it was unpaid, and gave some property to be applied in payment, which was entered as a credit on the bond, is sufficient, with other circumstances, to rebut the presumption of payment: *White v. Beaman*, 96 N. C. 122. If the debtor acknowledges a bond as a subsisting obligation within thirteen years after its maturity, the currency of presumption of payment dates only from the acknowledgment: *Roberts v. Smith*, 21 S. C. 455. So where the mortgagor acknowledged, in writing, that his mortgage, on which nothing had been paid, was still a valid security, such acknowledgment destroys the presumption of payment from lapse of time: *Murphy v. Coates*, 33 N. J. Eq. 424. And again, where judgment is rendered on a claim secured by mortgage of the judgment debtor, and where, in a subsequent action to foreclose the same within fifteen years from the date of the claim, he consents to a decree ordering the sale of the mortgaged premises, and that the proceeds may be applied to discharge the amount in the decree found to be due on the claim embraced in such judgment, such consent is an acknowledgment of an existing indebtedness upon the judgment, and an action thereon will not be barred until the expiration of fifteen years from the date of the acknowledgment: *Bissell v. Jaudon*, 16 Ohio St. 498.

Part payment of the debt at any time within the period required to raise the presumption of payment will rebut it; thus payment of interest on a bond by the principal will rebut the presumption of payment as well to the surety as to himself: *Dickson v. Gourdin*, 26 S. C. 391; 29 S. C. 343. So payment on a bond within the time required to raise the presumption of payment by the assignee in bankruptcy of one of the obligors repels the presumption arising from lapse of time: *Belo v. Spach*, 85 N. C. 122; *Hamlin v. Hamlin*, 3 Jones Eq. 191.

The presumption of payment arising from lapse of time may also be rebutted by showing the inability of the debtor to pay the debt because of his insolvency during all, or nearly all, the time since the indebtedness became due. In *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536, this rule was applied to the payment of a judgment, and the court said that "the indigent circumstances of a debtor, his hopeless insolvency and inability to pay his debts, are properly admissible in evidence for the purpose of repelling presumption of payment or satisfaction, arising from lapse of time." To the same effect, *McLellan v. Crofton*, 6 Me. 307-334. Where the insolvency of the debtor is shown to have existed during the greater portion of the time, proof of a short interval of solvency, of which the creditor was ignorant, will not affect the rebuttal of the presumption of payment: *McKinder v. Littlejohn*, 4 Ired. 198; 1 Ired. 66. The issuance and return of an execution *nulla*

bona is a circumstance rebutting the presumption of payment of a judgment from lapse of time: *Black v. Carpenter*, 3 Baxt. 350.

As is shown by the principal case, insolvency of the debtor relied upon to rebut the presumption of payment must be shown in North Carolina to have existed during the entire statutory period: *Grant v. Burgwyn*, 84 N. C. 560. The insanity of the debtor will rebut the presumption of payment arising from lapse of time: *McLellan v. Crofton*, 6 Me. 334. So the near relation of the parties may repel the presumption; thus the situation of the parties, the mortgagor having married the daughter of the mortgagee, and had issue, is of itself sufficient to rebut the presumption. In other words, the fact that the parties interested were nearly related, and the collection of the money might have occasioned distress, and even the payment of interest inconvenience, taken in connection with the fact that part of the money included in the mortgage was an advancement, and not to be repaid, is sufficient to repel the presumption of payment arising from the lapse of twenty years: *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685. The existence of war, preventing the creditor from maintaining suit, will rebut the presumption. Hence if the parties to a bond reside in a country, the condition of which during war is such as to render it highly improbable that debts could or would be collected during that time, it should not be considered as forming part of the time whose lapse gives rise to the presumption of payment: *Hale v. Pack*, 10 W. Va. 145; *Jackson v. Pierce*, 10 Johns. 414; *Bailey v. Jackson*, 16 Johns. 210; 8 Am. Dec. 309; *Dunlop v. Ball*, 2 Cranch, 184. So the intent or agreement of the parties may be shown to rebut the presumption, as where it is proved that by the understanding of the parties by whom a bond was executed that it was not to be paid until a future time, although the bond on its face was payable on demand, the time which elapsed from the giving of the bond to such future time should not be considered as forming any part of the time whose lapse gives rise to the presumption of payment: *Hale v. Pack*, 10 W. Va. 145. So where a surety on a note against which a presumption of payment from lapse of time was asked during the time to sell his land to another, but replied that he could not, as his creditor, if he did, would push him on his note, which he had promised not to do during his lifetime,—this will rebut the presumption of payment: *Fisher v. Phillips*, 4 Baxt. 243. A deed of trust was made and recorded in 1841; afterwards there were repeated sales of the land by the grantor and those claiming under him, the purchasers having no actual notice of the deed of trust until 1876; the court ruled that the presumption of payment was rebutted by the circumstances of the case: *Bowie v. Poor School Society*, 75 Va. 300. The presumption of payment from lapse of time is also treated in the note to *Husky v. Maples*, 88 Am. Dec. 590.

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Sales by trustee.



the defendant to show that it occurred before it received the goods for transportation. That is the only material question in the case.

We think the better reason and policy, and the greater number of cases adjudged, favor the rule to require the carrier which delivers goods damaged, and which are shown to have started on their journey over connecting lines of transportation in good condition, to exculpate itself from liability by showing that the injury did not occur by its default.

Affirmed.

CARRIERS — DAMAGED FREIGHT — BURDEN OF PROOF. — The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of a connecting carrier, and the burden of proof is on him to show that they were not in good condition when received by him: *Beard v. Illinois C. R'y Co.*, 79 Iowa, 518; *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353. *Prima facie*, the carrier is liable for goods upon proof of acceptance thereof for carriage, and of loss or damage thereto while in transportation: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722. And the burden of proof rests upon the carrier to show the absence of negligence upon its part: *Lindsley v. Chicago etc. R'y Co.*, 36 Minn. 539; 1 Am. St. Rep. 692, and note.

TYLER v. HERRING.

[67 MISSISSIPPI, 169.]

TRUSTEE'S SALE CONDUCTED BY HIS AGENT — FAILURE OF TRUSTEE TO TAKE POSSESSION. — TRUSTEE'S SALE IS NOT RENDERED INVALID by the fact that the sale was cried by a person selected by the trustee, whose act the trustee afterwards confirmed, nor by the latter's failure to take possession of the land before the sale, though the trust deed declared that upon default the trustee should immediately take possession, and after giving notice, sell the land therein described.

TRUSTEE'S SALE. — THE PERFORMANCE OF THE MERE MINISTERIAL ACTS OF posting the notice and making sale by agents selected by the trustee does not affect the validity of the sale.

TRUSTEE'S SALE, PRESUMPTION IN SUPPORT OF. — The presumption is to be indulged that a trustee did those acts *in pais* which were conditions precedent to the valid execution of the power of sale. The force of this presumption may be overcome by any competent evidence sufficient to produce an equilibrium, or to leave the preponderance so lightly in favor of the presumption as that the jury do not believe some act to have been done which was essential to the validity of the sale.

EVIDENCE. — TRUSTEE'S DEED WHICH RECITES that the sale had been made after giving notice as required by the deed of trust establishes *prima facie* that proper notice has been given; but the effect of the deed in this respect may be overcome by any competent evidence which, notwithstanding the deed and its recitals, leaves the jury unable to say that the notices were given.

ACTION of ejectment. The plaintiff's title was dependent upon a sale made by a trustee acting under a deed of trust given to secure a debt due the plaintiff. The trustee was, on account of his illness, unable to attend the sale, and conduct it in person, and therefore directed his brother to make it as his agent. All the acts which the brother did were ratified by the trustee. The trust deed provided that upon default in payment of the debt the trustee should immediately take possession, and after giving notice of sale, sell the land described in the deed. After the default in the payment of the debt, the trustee demanded possession of the land, but being refused, proceeded to sell without first obtaining such possession. Judgment in favor of the plaintiff. Defendant appealed.

Haden and Dodd, for the appellants.

Monroe McClurg, and Brame and Alexander, for the appellee.

COOPER, J. The sale under the deed of trust was not invalid either because the trustee did not take possession of the land before the sale, or for the reason that, the trustee being sick, the land was cried off by a person selected by him, whose act he afterwards ratified and approved.

The provision of the deed of trust, that "upon default of payment of the debt secured the trustee shall immediately take possession, and having given notice, sell the land conveyed," etc., was intended to confer upon the trustee the right of possession, but did not make such taking possession a condition precedent to the power of sale: *Vaughn v. Powell*, 65 Miss. 402.

The performance of the mere ministerial acts of posting the notices and making the sale by agents selected by the trustee does not affect the validity of the sale: *Jones v. Sergeant*, 45 Miss. 332.

The deed from the trustee to the purchaser, Herring (who was beneficiary in the deed of trust), recites that the sale was made after notice had been given in the manner prescribed by the deed. This was by posting notices in three public places in the county for the period of ten days preceding the day of sale.

The trustee was introduced as a witness on behalf of plaintiffs, and on cross-examination stated that he did not personally post any one of the notices, and only knows they were posted by what he has been told. Other evidence introduced by plaintiff showed that one of the notices had been posted

for the required time; as to the other two, it appears that the trustee gave them to an agent, and directed him to post one at Briscoe's mill and the other at Rickett's mill, these being public places within the county. It was then proved by a certain witness that some time before the sale of the property he saw the two notices at the above-named places; but this witness could not remember whether this was ten days before the day of sale.

In this condition of the evidence, the court, at the instance of the plaintiff, charged the jury as follows: "The law presumes that the notices were posted as stated in the trustee's deed, and if the defendants deny that they were, they must show to the satisfaction of the jury, by the evidence, that they were not so posted."

The first instruction for the defendants, which was refused by the court, was this: "The burden of proof is upon the plaintiff to satisfy the minds of the jury by a preponderance of the evidence before them that Monroe McClurg, trustee, posted or had notices posted in three public places in Attala County of the sale of the lands in controversy, and if the jury are not so satisfied, they must find for the defendants."

If by the instruction given for the plaintiff it was intended to state that the recitals in the deed of the trustee that the notices had been posted should control until it was shown by positive and direct testimony that they were not so posted, then the instruction was too rigid against the defendants. The presumption is to be indulged that the trustee did those acts *in pais*, which were conditions precedent to a valid exercise of the power of sale, as held in *Graham v. Fitts*, 53 Miss. 307, and in the absence of any evidence to the contrary, such presumption must prevail. But it is not required of the defendant to rebut such presumption by introducing evidence sufficient to show that the notices were not in fact posted. The presumption is not a conclusive one; its force and effect may be impaired by any competent evidence, and when opposing evidence is introduced sufficient to produce an equilibrium, or to leave the preponderance so slightly in favor of the presumption arising from the deed as that the jury do not believe the act to have been done, then the defendants are entitled to their verdict.

The court, by refusing the instruction asked by the defendants, that the burden of proof was upon the plaintiff to establish the fact of posting the notices, imposed upon them,

not the burden of meeting a *prima facie* case made by the plaintiff's evidence, but the burden of producing a clear and sufficient preponderance of evidence on the whole case. The true view is, that the plaintiff begins and ends with the burden of proof. Introducing the trustee's deed, he makes a *prima facie* case; it then devolves upon the defendant to meet the case thus made, failing in which the plaintiff is entitled to recover. But the defendant meets the case made by the plaintiff when his evidence equals in value and weight that of the plaintiff, or so nearly does so as to leave the plaintiff's evidence insufficient to establish the fact it was introduced to prove.

In the case before us, if the jury, on the whole evidence, believed the notices to have been given as required by the deed of trust, the plaintiff was entitled to a verdict; if, on the other hand, on the whole evidence, they were unable to say that the notices were so posted, then the plaintiff failed to make out his case, and the verdict should have been for the defendant.

The judgment is reversed and cause remanded.

* SALES AND CONVEYANCES BY TRUSTEES. — We propose in this note to treat of sales and conveyances by trustees, and the circumstances under which such sales and conveyances will be adjudged either void or voidable.

In some instances, property, whether real or personal, is held in trust without the instrument vesting title in the trustee, indicating that it is so held. When such is the case, the trustee, while dealing with persons who have no notice of the trust, has the same power as if he were the holder of the equitable as well as of the legal title. In other words, a purchaser from him in good faith and without notice of the trust obtains the title of the trustee, and holds it discharged of the trust, and free from all obligation to account to the beneficiary: *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291; *Wyse v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149; *Prevo v. Walters*, 5 Ill. 35; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Thompson v. Gilliland*, Addis. 296; *Bracken v. Miller*, 4 Watts & S. 102; *Hudnal v. Wilder*, 4 McCord, 294; 17 Am. Dec. 744; *Henderson v. Dodd*, 1 Bail. Eq. 138; *Ex parte Williams*, 18 S. C. 209; *Perry on Trusts*, sec. 218.

To entitle a purchaser from a trustee to hold the property discharged from the trust, it is, of course, necessary that he be an innocent purchaser in good faith. We shall not stop to consider at length who is such a purchaser. It suffices our present purpose to state that he must be a purchaser for a valuable consideration, and such consideration must have been paid and a conveyance of the legal title taken before receiving notice of the trust: *Paul v. Fulton*, 25 Mo. 156; *Freeman on Executions*, sec. 141; *Perry on Trusts*, sec. 221. Notice of a trust will be imputed to a purchaser when there is any declaration or recital in the deeds through which he must deraign title, either asserting the existence of the trust, or sufficient to incite inquiry in a man of common prudence, where such inquiry, if pursued, would have re-

vealed the existence of the trust: *Brannon v. May*, 42 Ind. 92; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Perry on Trusts*, secs. 222-224; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; note to *Gale v. Mensing*, 64 Am. Dec. 201. Notice of a trust is not, however, confined to the recitals in the deeds through which the trustee acquires title. It may be acquired in any of the various modes by which notice may be given in other cases, and if a beneficiary under the trust, or his agents or lessees, are in possession, that fact is sufficient to put an intending purchaser on inquiry, and to charge him with notice of the trust, if no inquiry is made: *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 434; *Pell v. McElroy*, 36 Cal. 268; *Perry on Trusts*, sec. 223. *Contra*, *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508.

If the grantee of a trustee is not a purchaser for a valuable consideration, or if, being a purchaser for a valuable consideration, he purchased with notice of the trust, actual or implied, unless the sale or transfer to him was authorized, he, if he acquires any title whatever, merely takes the place of his grantor, and becomes chargeable with the execution of the trust to the same extent that such grantor was chargeable before such transfer: *Ryan v. Doyle*, 31 Iowa, 53; *Stewart v. Chadwick*, 8 Iowa, 463; *Jones v. Shaddock*, 41 Ala. 262; *Webster v. French*, 11 Ill. 254; *Hagthorp v. Hook*, 1 Gill & J. 270; *Murray v. Balbou*, 1 Johns. Ch. 566; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Pinson v. Ivey*, 1 Yerg. 296; *Heth v. Richmond etc. R. R. Co.*, 4 Gratt. 482; 50 Am. Dec. 88; *Lincoln v. Purcell*, 2 Head, 143; 73 Am. Dec. 196; *Tobin v. Helm*, 4 J. J. Marsh. 288; and he may also be held jointly liable with the original trustee for the breach of the trust: *Barksdale v. Finney*, 14 Gratt. 338.

Where the rules of a law upon the subject have not been modified by statute, all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee. This conclusion necessarily followed from the refusal of the common law to recognize trusts or equitable titles, for unless such trusts or titles were to be considered, there was no reason why the trustee should not convey to whomsoever he pleased. His conveyance was therefore valid at law, and the rights of the beneficiary could be protected only by his seeking redress in equity and compelling the grantee to respect and to execute the trust, as the original trustee should have done: *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197, and note; *Taylor v. King*, 6 Munf. 368; 8 Am. Dec. 746; *Koester v. Burke*, 81 Ill. 436; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Walton v. Follansbee*, 131 Ill. 147; *Bank of U. S. v. Benning*, 4 Cranch C. C. 81; *D'Oyley v. Loveland*, 1 Strob. 45; *Reece v. Allen*, 5 Gilm. 236; 48 Am. Dec. 336; *Rowe v. Beckett*, 30 Ind. 154. An exception to this rule exists in Pennsylvania, probably having its origin in the blending, in that state, of the systems of law and equity. It is, in the opinion of the courts of that state, the duty of the grantee of property which is subject to a trust to reconvey to the original trustee; and they will presume that he has performed this duty, and by this presumption in effect annul the conveyance made to him by the original trustee, if in violation of the trust: *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 352. In California, also, it was determined that under a deed to a trustee giving him authority to sell his estate upon the approval of the grantor that it was incumbent upon one claiming under a conveyance from the trustee to show that such conveyance was made with the assent of the trustor, and that in the absence of such assent the conveyance must be treated as inoperative: *Sprague v. Edwards*, 43 Cal. 239. The disposition of the case before the court was doubtless correct, owing to the provision of the

statute of that state to be mentioned in a subsequent paragraph; but the action of the court was taken in apparent obliviousness of the statute, and was professedly based upon authorities whose pertinency to the subject under consideration we are unable to perceive.

A trust estate may be vested in two or more trustees, and a conveyance may be made by one or by some number less than the whole of the trustees. In England the opinion seems to be entertained that, though the conveyance is in contravention of the trust, and the signatures of the co-trustees and of the *cestui que trust*, whose assent is requisite to a sale, are all forged, still that such conveyance transfers the legal estate of the trustee who executed it: *Boursot v. Savage*, L. R. 2 Eq. 134. The decisions in the United States proceed upon the theory that the estate of trustees, being given to them to accomplish the purposes of a trust, must be regarded as an inseverable unit, and a conveyance by either trustee without the concurrence of the others as absolutely void: *Sinclair v. Jackson*, 8 Cow. 553-583; *Learned v. Welton*, 40 Cal. 349; *Ridgeley v. Johnson*, 11 Barb. 527; *Wilbur v. Almy*, 12 How. 180.

The statutes of New York, Michigan, Wisconsin, Minnesota, Kansas, California, and Dakota declare that when a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void: Cal. Civ. Code, sec. 870; Stimson's American Statute Law, sec. 1725. It is somewhat singular that these statutes have escaped judicial interpretation except in the first-named state, while in that state they have been quite frequently considered by its courts. The doubts most likely to arise concerning the signification of these statutes are, first, do they mean that inhibited conveyances shall be deemed void in law as well as in equity? and second, if void both at law and in equity, are they also void when, upon their face, they appear to be made pursuant to the authority conferred on the trustee? And the fact of their being in contravention of the trust must be established by extrinsic evidence; and knowledge of this fact cannot be brought home to the grantee or his successors in interest. With respect to the first question, there appears to be no doubt that an inhibited conveyance is void at law; that the legal as well as the equitable title remains in the trustee; and he may maintain an action to recover the property, or may exercise any other power, or perform any other duty, as if such conveyance had not been executed: *Zimmerman v. Kinkle*, 108 N. Y. 282; *Russell v. Russell*, 36 N. Y. 581; *Fitzgerald v. Topping*, 48 N. Y. 438; *Wetmore v. Porter*, 92 N. Y. 76. By these statutes the trust estate is made inalienable and indestructible, except by transfers not in contravention of the trust, and the courts have no power to authorize an inhibited conveyance to be made: *Douglas v. Cruger*, 80 N. Y. 15; *Cruger v. Jones*, 18 Barb. 467. Nor can validity be imparted to a conveyance in contravention of a trust by the fact that it appears on its face to be made pursuant to the trust, and the persons claiming under it have no notice that the facts asserted in it did not exist. The presence of the facts authorizing a conveyance are regarded as conditions precedent to the exercise of the power to convey; and in their absence the power does not exist, and the conveyance is as if a stranger to the title had made it: *Griswold v. Perry*, 7 Lans. 105; *Swarthout v. Curtis*, 5 N. Y. 301; 55 Am. Dec. 345. The leading case upon this topic is that of *Briggs v. Davis*, 20 N. Y. 15, 75 Am. Dec. 363, the facts of which were as follows: One Masten, being the owner of property, executed a conveyance thereof to three persons, in trust to sell the same for the benefit of his creditors. The trustees subsequently executed a reconveyance to the

grantor, of property which had not been disposed of by them, and in their reconveyance recited that the object of the trust had been accomplished. Masten, to whom this reconveyance was made, thereafter executed a mortgage to one who had no notice that the trust had not been fully executed, as recited in the reconveyance. An action was afterwards brought in the interest of creditors of Masten, who claimed that the debts due to them from him had not been paid at the time of the reconveyance; that such reconveyance was in contravention of the trust; and they therefore asked that the mortgage made by Masten be set aside and canceled. In affirming a judgment granting the relief prayed for, canceling the mortgage and enjoining its foreclosure, the court of appeals said: "A party about to take a title under such a reconveyance, with a knowledge of the terms of the trust, would know that it was an essential prerequisite to the validity of the deed that the trusts should have been actually performed. There is no principle which substitutes the declaration of the trustees, however solemnly made, in place of the fact which could alone authorize them to reconvey. The purchaser, if he would be safe, must not content himself with the recital that the trusts have ceased, but must ascertain, at his peril, whether such is the case. The statute avoids all deeds which are, in truth, in contravention of the trust, and there is no exception in favor of such as are fraudulently made to appear in consonance with it by means of untrue statements inserted in them. We have been referred to the statutory provision declaring that the title taken under a trustee authorized to sell is not to be impeached on account of the misapplication of the money paid for such title by the trustees. The conveyances here upheld are such as are made in fact and in form in pursuance of the trust, and where the only fault is the subsequent misconduct of the trustees in embezzling or misapplying the money; and I conceive that the enactment has no application to a case like the present." After mentioning authorities which in England maintain that a *bona fide* purchaser for a valuable consideration, who acquires the legal title, shall be protected against a prior equity, of which he had no notice, the court held that these authorities could have no application because the statute under consideration precludes a grantee of a conveyance made in contravention of a trust from obtaining the legal title, and said that the title did not pass, because the trustees "could not legally make an operative conveyance, except in the execution of the trust, and the deed to Masten was not in the execution of the trust, but in disaffirmance of it. It was in hostility to it, and if operative, it subverted and put an end to it, though its objects were not accomplished. It was precisely such a conveyance as the statute referred to by the terms 'conveyances in contravention of the trust.' The mandate of the statute that such conveyances shall be absolutely void forbids us to hold that they shall pass the legal estate which was vested in the trustees, for the purpose of tacking equitable interests to it, or for any other purpose. I repeat, therefore, that this reconveyance, upon the facts which were established on the trial, was inoperative as against the creditors of Masten, and that they were, notwithstanding, entitled to have the land embraced in it subjected to sale for the payment of their debts."

One contemplating a purchase from a trustee must, as in other cases, remember that no grantor can transfer an estate of which he has never been seised: *Walton v. Follansbee*, 131 Ill. 147. In determining whether a trustee has an estate, and if so, what is its extent, the same investigation needs to be made and the same rules to be observed as in other cases, except that the estate vested in him may be determined from the general purposes of the trust, though not otherwise specially described or limited in the deed by

which the trust was created. In the absence of any statutory modification of the common law, a conveyance does not vest an estate of inheritance in the grantee, without the use of the word "heirs"; but this rule is not always applicable to conveyances of trustees. If the purposes of the trust are disclosed by the conveyance, and are such as cannot be accomplished unless the trustee acquires a fee, then an estate in fee vests in him, though the word "heirs" does not appear in the deed: *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Cleveland v. Hallett*, 6 Cush. 407; *Newhall v. Wheeler*, 7 Mass. 189; *Brooks v. Jones*, 11 Met. 191; *Gould v. Lamb*, 11 Met. 84; 45 Am. Dec. 187; *Sears v. Russell*, 8 Gray, 86; *Fisher v. Fields*, 10 Johns. 505; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Villiers v. Villiers*, 2 Atk. 72; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575. "The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore, the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle, two rules of construction have been adopted by courts: first, wherever a trust is created, a legal estate sufficient for the purpose of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not; and second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires": *Perry on Trusts*, sec. 312; *Ellis v. Fisher*, 3 Sneed, 231: 65 Am. Dec. 52; *Neilson v. Lagow*, 12 How. 93.

Having ascertained that the trustee has such an estate as he is willing to purchase, the next inquiry necessary on the part of an intending purchaser is, whether the trustee has power to sell. This power, we assume, must be found in the instrument vesting the estate in the trustee, or in some other instrument executed or assented to by him and declaring the purposes of the trust. We have been unable to discover any authority determining whether or not a trustee has power to sell when the trust estate is vested in him without any declaration being anywhere made regarding the extent of his powers or the purposes of the trust. In a case in one of the supreme courts of New York, it appeared that a conveyance had been made to one McLean, "as trustee for the association of the Open Board of Stockbrokers of the city of New York"; that the association was not incorporated, and consisted of about four hundred persons; that McLean, on the day of receiving the deed, conveyed the same property to a corporation known as "The Open Board of Stockbrokers' Building Company of the City of New York"; that a receiver was subsequently appointed for both the corporation and the association, and was authorized by the court to sell the same property, and on his making the sale, the title was objected to, on the ground that the trust to McLean was not defined, and therefore that it did not appear that he was authorized to convey as he had done. The court compelled the purchaser to take the title, saying that the trustee, under the statutes of the state, had power to convey, except in contravention of the trust, and that as there was no suggestion that his conveyance was in contravention of the trust, it must be adjudged to vest a perfect title: *People v. Stockbrokers' Building Co.*, 49 Hun, 349. The circumstances of this case were, however, very peculiar. The receiver who had made the sale represented the trustee's *cestui que trust*

as well as his grantee, and it was certain that the purchaser, whether the conveyance by the trustee was authorized or not, would succeed to a complete equity, and that there was no one entitled to assail the conveyance made by the trustee. If it be true when land is vested in one person as the trustee of another, and the purposes of the trust and the powers of the trustees are nowhere stated, that all transfers by the trustee are valid until shown to be in contravention of the trust, then every transfer by him must be held effective, because, as the trust is not disclosed, it is impossible to show affirmatively that anything whatever is in contravention of it. We apprehend, though we can find no authority upon the subject, that when a conveyance is made to one person as trustee of or for the use of another, unless through the operation of the statute of uses the legal as well as the equitable estate is thereby vested in the beneficiary, the law implies that the trustee shall continue to hold the property for the use and benefit of the beneficiary until the latter or his successor in interest demands a conveyance thereof, and that any conveyance by the trustee is in contravention of this implied duty, and will therefore be vacated in equity.

If there are directions in the instrument creating the trust showing that the property is to be retained until a designated time for the purpose of division, or of being turned over to some other person, or for any other purpose, the power of the trustee to sell does not exist, though there are other provisions which, if they stood alone, would confer this power. If land is conveyed in trust, first, to pay the debts of the grantor out of the rents and profits, second, for the support of himself, his wife and children, and third, at his death to be divided among his children, the trustee has no power to sell for the payment of the debts of the grantor, nor for any other purpose, however urgent the necessities for such sale may become: *Mundy v. Vauter*, 3 Gratt. 518. If a testator devises property to trustees, with the direction that they manage the same so as to produce income, which shall remain in their hands or under other control and management until the eldest child of his daughter shall arrive at the age of twenty-one years, or shall marry, and shall then divide the original property among the children of such daughter then living, any power to sell inferable from the direction to manage the property so as to produce an income is annulled by the directions to divide the original property among the children of his daughter after the oldest becomes of age: *Blanton v. Mayes*, 58 Tex. 422. So by expressly giving power to sell a portion of the estate devised to trustees, and testator manifests his intention that the like power shall not be exercised over the balance: *Anderson v. Anderson*, 31 N. J. Eq. 560.

On the other hand, it is quite certain that a power of sale need not be conferred on a trustee in direct or express terms, and may be implied from the purposes of the trust. Whenever a trustee is directed to do something, the doing of which cannot be accomplished otherwise than by a sale, then a power to sell is implied. Note to *Rankin v. Rankin*, 87 Am. Dec. 216; Perry on Trusts, sec. 766; *Curling v. Austin*, 2 Drew. & S. 129; *Eidsforth v. Armstead*, 2 Kay & J. 333; 25 L. J. Ch. 237; 4 Week. Rep. 279. Thus if a trust contemplates that the trustee will pay the grantor's debts: *Blutch v. Wilder*, 1 Atk. 419; *Winston v. Jones*, 6 Ala. 550; *Vallette v. Bennett*, 69 Ill. 632; *Barker v. Deronshire*, 3 Mer. 310; or will, if necessary, apply the body of the estate for the benefit or support of persons designated: *Ames v. Ames*, 15 R. I. 12; or will distribute the estate or its proceeds: *State v. Cincinnati*, 16 Ohio St. 170; a power of sale is implied. It has also been decided that where trustees were directed to divide property equally among seven persons,

and the property to be divided consisted chiefly of a single plantation that the grantor could not have intended that they should undertake to make a partition into seven equal parts, but that the power was best executed by a sale of the property and the division of its proceeds: *Winston v. Jones*, 6 Ala. 550. In truth, some of the courts have deemed trustees vested with an implied power to sell in instances in which it is doubtful whether the grantor ever contemplated the existence of such power. Thus in *Porter v. Schofield*, 55 Mo. 303, the purposes of the trust were to have and to hold real estate for the purpose of receiving and collecting the rents, issues, and profits, and after paying taxes and necessary expenses of repairing the same, to pay certain mortgages and judgments designated in the deed of trust. The trustee having sold the property for the purpose of realizing moneys with which to pay the indebtedness described in the deed of trust, the validity of the sale was affirmed, and the opinion of the supreme court expressing its views upon the subject was stated as follows: "The language of the deed does not, in express words, create the power to sell for the payment of the debts, but it is manifestly implied from the fact that the debts were charged upon the land, and the trustee was directed to pay them out of the rents and profits. As the rents and profits were wholly insufficient for that purpose, they must be looked upon only as one means of payment, and not as the only means. The property itself being bound for the debts, an implied power exists in the trustee to make the sale for that purpose, without resorting to the tedious and expensive process of a suit in chancery."

In the United States, the rule generally prevailing is, that the mere charge of the debts of a testator upon his lands by his will does not vest his executors with an implied power of sale. The only effect of this charge is to designate the portion of his property out of which his debts are to be paid. The remedy of his creditors remains, however, to be sought in the courts having jurisdiction of his estate, to which application must be made for the orders of sale requisite to carry out the intentions of the testator: *Hill v. Den*, 54 Cal. 21; *Will of Fox*, 52 N. Y. 530; 11 Am. Rep. 751; *Dunne v. Keeley*, 2 Dev. 484; *Wells v. Child*, 12 Allen, 333; *Harris v. Douglas*, 64 Ill. 466; *Cornish v. Wilson*, 6 Gill, 315; *Clark v. Riddle*, 11 Serg. & R. 311.

Though the instrument creating the trust does not authorize the sale of the trust property, courts of equity may, upon proper cause shown, and after bringing all of the parties in interest before them, decree a sale. And if the trust is brought before the court by a bill filed for its execution, it is said that the power of the trustee to make a sale is thereby suspended, and that he cannot thereafter sell without the sanction of the court: *Perry on Trusts*, secs. 764, 770, citing *Bush v. Bush*, 2 Duvall, 269; *Walker v. Smallwood*, Amb. 676; *Raymond v. Webb*, Loft. 66; *Drayson v. Pocock*, 4 Sim. 283; *Culpepper v. Aston*, 2 Ch. Cas. 116; *Reeside v. Peter*, 35 Md. 222.

Though the instrument creating the trust may not have authorized the trustee to sell the trust property, such authorization may have been attempted by the legislature. There is a very great difference between the authority of the legislature over the estate of a trustee and its authority over that of the *cestui que trust*. The title of the former is not a beneficial or vested interest. He holds it merely that he may perform duties imposed by the trust, and he can therefore be divested of it without being divested of any valuable or vested right of property. The legislature may therefore authorize a new trustee to be appointed, and to be invested with the legal title, subject to the trust upon which it was held by the original trustee: *Williamson v. Suydam*, 6 Wall. 723; *Cochran v. Van Surlay*, 20 Wend. 365; 32 Am. Dec.

570. *Cestuis que trust*, on the other hand, have a beneficial interest in the subject-matter of the trust, which is, in general, no more subject to legislative control than if the legal estate were added to their equitable title, and the two estates united in one person. If the *cestuis que trust* are minors, or persons otherwise not competent to act for themselves, the legislature may, even by a special statute, authorize the sale of the trust property, and the application of the proceeds to their use and benefit: *Clarke v. Van Surlay*, 15 Wend. 436; *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surlay*, 20 Wend. 365; 32 Am. Dec. 570; *Williamson v. Berry*, 8 How. 495. Ordinarily, the legislature has no power to authorize one person to act for another who is competent to act for himself; and a special statute is void if it undertakes to authorize a sale of the property of one person by another, where no necessity is shown for such sale, and its object is merely to promote the supposed interest of the owners of the property by changing the form of investment: *Shoenberger v. School Directors*, 32 Pa. St. 34; *Brevoort v. Grace*, 53 N. Y. 245; *Brenham v. Story*, 39 Cal. 179. It has been determined, in at least one state, that a special statute authorizing a trustee to sell land for the purpose of converting into money and dividing the proceeds among the *cestuis que trust* is valid: *Kerr v. Kitchen*, 17 Pa. St. 433. We think this decision to be unsound in principle, and that the proper rule is, that the legislature has no power, as against the wish of the beneficiaries of a trust, to authorize the trustee to sell the subject-matter of the trust, where such sale is not necessary to accomplish the purpose of the trust: *Powers v. Bergen*, 6 N. Y. 358.

A power of sale does not authorize a trustee to transfer the title for some other purpose. If his estate is in severalty, it will not justify him in exchanging the subject of the trust for other lands or property: *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250; *Mauser v. Dix*, 8 De Gex, M. & G. 703; *Fluke v. Fluke*, 16 N. J. Eq. 478; and though he is a tenant in common, his power of sale does not empower him to convert his estate into an estate in severalty by a voluntary partition: *Brassey v. Chalmers*, 4 De Gex, M. & G. 528; 16 Beav. 223; *Bradshaw v. Fane*, 3 Drew, 536. Even if he holds property which the instrument creating the trust directs to be divided among certain beneficiaries, the trustee is without power to make the division: *Naglee's Estate*, 52 Pa. St. 154.

Though a trustee was originally invested with a power to sell, that power may have terminated, and if so, a sale by him is inoperative. We have already stated that the estate of a trustee is to be measured by the purposes and necessities of his trust. "The doctrine is well settled, that whatever the language by which a trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If it requires a fee-simple estate in the trustee, that will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest": *Young v. Bradley*, 101 U. S. 782. It therefore follows that if the purposes of a trust have already been fully accomplished, the trustee can make no further sales or conveyances, because his estate is terminated and he has nothing to sell or convey. In the case last cited, land had been devised to trustees to hold, — 1. For the benefit of testator's widow during her life; 2. To divide the property among certain of his heirs, specified in the will; 3. To hold the shares of his daughters as a protection against their husbands, and for the children of these daughters, until the youngest of such children should attain the age of twenty-one years. After the testator's widow, and all other persons who could possibly

acquire any interest under this will, except the children of his son, had died, the trustee made a conveyance of the trust property, and such conveyance was declared void, because the estate of the trustee had terminated before the conveyance was made. This termination resulted from the fact that the trustee no longer had any duties to perform. He could not hold the property for the widow, for she was dead, nor to protect it against the daughters husbands, nor for the benefit of the daughters' children, for both the daughters and their children were also dead, nor for the purposes of partition, for all the property had become vested in the children of the testator's son, over whose interest the will gave the trustees no control.

If a trust has been created merely for the purpose of securing the payment of a debt, and the power of sale is to be exercised in default of such payment, the weight of authority favors the rule that the continued existence of the debt is essential to the continuation of the power of sale, and that a sale is void if made after the debt has been paid: *Penny v. Cook*, 19 Iowa, 538; *Mills v. Traylor*, 30 Tex. 7; *Murdock v. Johnson*, 7 Cold. 605; or after a tender of payment has been made: *Welch v. Greenidge*, 2 Heisk. 209; It is impossible for an intending purchaser to know with certainty whether or not a debt, to secure the payment of which a trust deed has been given, is fully paid. The application of this rule is attended with occasional hardships, but it is difficult to deny that the rule itself follows as an inevitable result of the other rule, that when the purposes of a trust have been fully accomplished the estate of the trustee ceases. The rule is also, in many instances, the logical and necessary result of another rule, to the effect that a power to sell upon default in the payment of a debt or other obligation makes such default a condition precedent to the existence of the power, and that the power can never precede the existence of such condition. Nevertheless, there are cases maintaining that a purchaser in good faith cannot be deprived of his purchase by showing that an accounting between the trustee and the debtor would result in the establishment of the fact that the debt had been fully paid: *Thompson v. McKay*, 41 Cal. 221.

The extinction of a debt by payment differs very substantially from the loss, through the operation of the statute of limitations, of legal remedies to enforce it. In the former case the debt no longer remains, while in the latter it continues, though resort to the courts to coerce its payment may be unavailing. If, however, real or personal property has been conveyed to a trustee, and he has been given power to sell it, and to apply the proceeds of the sale to the payment of a debt, the debt is not obliterated, nor are the trust and its attendant power terminated by the debt becoming barred by lapse of the time within which, under the statute, an action can be maintained thereon. The trustee may therefore proceed to sell, and no court will restrain the exercise of his power on the ground that the debt is barred: *Whitmore v. San Francisco S. U.*, 50 Cal. 145; *Grant v. Burr*, 54 Cal. 298.

Trust deeds, the sole purpose of which is to secure the payment of a debt due either to the trustee or to some other person designated therein, and which, therefore, are in most respects substitutes for mortgages, except that they are more harsh and summary in their operation, are sometimes viewed with both legislative and judicial aversion. In a few of the states, sales by trustees acting under powers conferred in deeds are not permitted, and a foreclosure in the courts is necessary: *Ingle v. Culbertson*, 43 Iowa, 265; *Campbell v. Johnston*, 4 Dana, 178; *Samuel v. Holliday*, 1 Woolw. 400. But in the absence of any controlling statute, a trust deed differs from a

mortgage in three essential particulars: 1. It vests the legal title in the trustee, while in many of the states a mortgage is a mere lien, the legal title remaining in the mortgagor: *Bateman v. Burr*, 57 Cal. 481; 2. After a sale under and pursuant to a trust deed, the purchaser is immediately vested with a complete title, and the debtor has no opportunity to redeem: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; and 3. There is not only no necessity for a foreclosure, but the remedy by foreclosure does not exist, and therefore cannot be resorted to by the creditor or trustee: *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 481.

If trustees are directed to sell within a time specified, the lapse of that time without their making any sale, where the necessity for the sale continues, appears not to terminate their power of sale. The designation of the time will, in most cases, be treated as directory merely, and a sale after the time named will be held valid: *Smith v. Kinney*, 33 Tex. 283; *Shatter's Appeal*, 4 Pa. St. 83; *Pearce v. Gardiner*, 10 Hare, 287; 1 Week. Rep. 98. If, on the other hand, a trustee is directed to sell after a specified time, or upon the happening of a designated event, the power to sell is not in being until the arrival of such time or the happening of such event, and a sale made by its authority is without support: *Booraem v. Wells*, 19 N. J. Eq. 87; *Isham v. Delaware etc. R. R. Co.*, 11 N. J. Eq. 227. So a power to sell may be made contingent on other facts than the mere lapse of time, as where a trustee is authorized to sell only when it becomes necessary to do so to pay certain debts or charges, or to supply certain deficiencies, should such exist. The existence of the debts or charges, or the deficiency to be supplied, is regarded as a condition precedent to the existence of the power of sale: *Perry on Trusts*, sec. 785.

If there are two or more trustees, all must concur in the execution of the trust: *Sloo v. Law*, 3 Blatchf. 459; *Lipse v. Spear*, 4 Hughes, 535; *Naylor v. Goodall*, 47 L. J. Ch. 53; 37 L. T. 422; 26 Week. Rep. 162. If one, or any less number than all, undertake to make a conveyance, it is void, and does not even pass the legal title: *Ridjeley v. Johnson*, 11 Barb. 527; *Ham v. Ham*, 58 N. H. 70; *Learned v. Welton*, 40 Cal. 349; *Van Rensselaer v. Akin*, 22 Wend. 54; *Sinclair v. Jackson*, 8 Cow. 553; *Willbur v. Albany*, 12 How. 180. *Contra*, *Perry on Trusts*, sec. 334; *Boursot v. Savage*, L. R. 2 Eq. 134. The fact that the deed creating the trust names two or more persons as trustees does not necessarily make them such. Some of them may renounce or disclaim the trust. "The person or persons thus renouncing thereafter stand in the same relation to the estate as though they had never been named as trustees, while those accepting are entitled to the estate in the same manner and to the same extent as though they only had been named in the grant or devise": *Freeman on Cotenancy and Partition*, sec. 45; *Zelbach's Lessee v. Smith*, 3 Binn. 69; 5 Am. Dec. 352; *Niles v. Stevens*, 4 Denio, 402; *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694; *Flanders v. Clark*, 1 Ves. 435; *Adams v. Taunton*, 5 Madd. 435; *Worthington v. Evans*, 1 Sim. & S. 165.

Where an estate is granted or devised to two or more, to hold in trust, there is no doubt that, at the common law, they take as joint tenants with the benefit of survivorship, and when one of them dies, that those surviving take the whole estate, and with it the power to execute the trust: *Freeman on Cotenancy*, sec. 44; *Osgood v. Franklin*, 2 Johns. Ch. 20; 7 Am. Dec. 513; *Peter v. Beverly*, 10 Pet. 564; *Burr v. Sim*, 1 Whart. 266; 29 Am. Dec. 48; *Jones v. Price*, 11 Sim. 557; 10 L. J., N. S., Ch. 195; 5 Jur. 719.

In the United States, various statutes have been enacted with the design

either of destroying estates in joint tenancy, or of limiting them to grants or devises in which it is expressly stated that the grantees or devisees shall hold as joint tenants. Some of these statutes except from their operation the estates of trustees. Independently of any express exception, it has been generally, though not universally, decided that they did not apply to estates held in trust, and therefore that the trustees surviving are always competent to execute the trust: *Freeman on Cotenancy*, sec. 43; *Parsons v. Boyd*, 20 Ala. 118; *Gray v. Lynch*, 8 Gill, 423; *Philadelphia & R. R. Co. v. Lehigh C. & N. Co.*, 36 Pa. St. 204; *Shortz v. Unangst*, 3 Watts & S. 45; *Stewart v. Pettus*, 10 Mo. 755. *Contra*, *Boston F. Co. v. Comdit*, 19 N. J. Eq. 398; *Sanders's Heirs v. Morrison's Executors*, 7 Mon. 54; 18 Am. Dec. 161. Of course, the general rule that those who accept a trust or that the survivors of several trustees may execute it as all those originally named might have done, had all qualified or all survived, is inapplicable when the instrument creating the trust shows that in the event of death, resignation, or refusal to act, the vacancy thus occasioned must be filled before any further action is taken; but it has been decided that where surviving trustees have power to fill a vacancy, a sale made by them, without first supplying such vacancy, is valid: *Belmont v. O'Brien*, 12 N. Y. 394; *Golder v. Bressler*, 105 Ill. 419.

Ordinarily, the death of the person who created the trust cannot affect it in any way. In Virginia, however, where the object of a trust deed is merely to secure the payment of a debt owing from the grantor, it is thought improper for the trustee to proceed to sell after the death of the grantor, unless pursuant to an order of court: *Spencer v. Lee*, 19 W. Va. 179. If a person is styled a trustee, and authorized to sell, but is not vested with the legal title, his power is not coupled with an interest, and does not survive the death of the person for whom he was authorized to act: *Garland v. Dunn*, 11 Ark. 720.

Where a conveyance, whether in contravention of the trust or not, is deemed valid as a transfer of the legal title, a trustee may doubtless convey by his attorney in fact: *May v. Frazee*, 4 Litt. 391; 14 Am. Dec. 159; *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Connolly v. Belt*, 5 Cranch C. C. 405. There is nothing in the mere execution of such a conveyance which requires the exercise of any personal trust or special judgment or discretion, and we see no reason why a conveyance may not be executed by a trustee, acting by his duly authorized agent, as well as in person, provided the grantee has at the time an absolute right to the conveyance, which the trustee has no discretion to refuse: *Hawley v. James*, 5 Paige, 489. If trustees have sold property pursuant to the terms of a trust, and have received the purchase price, they have no further right or discretion in the matter, but are under the duty of executing a conveyance sufficient to vest the title in their vendee, and if they fail to do so, a court of equity may compel the performance of their duty in this respect: *Saunders v. Schmaetzel*, 49 Cal. 59.

Whenever a power is given, whether over real or personal estate, and whether coupled with an interest or not, so far as it reposes a personal trust or confidence in the donee of it to exercise his own judgment or discretion, he cannot execute it by another: Note to *May v. Frazee*, 14 Am. Dec. 170; *Saunders v. Webber*, 39 Cal. 287.

A trustee authorized to sell property under an instrument which does not contain any special directions as to the mode or time of sale must exercise his own judgment in determining the time and mode of sale, the notice to be given, the manner of conducting the sale, and whether the amount offered shall be accepted or not, or whether or not the sale shall be continued to

some other time or place. He cannot, with respect to any of these matters, delegate the exercise of his judgment or discretion to another: *Graham v. King*, 50 Mo. 22; *Howard v. Thornton*, 50 Mo. 291; *St. Louis v. Priest*, 83 Mo. 612. While he may employ agents to a limited extent, their employment should only be in the carrying out of what he has already determined upon. The judgment or discretion used must be his, though in accomplishing what his judgment has previously approved he may call others to his aid.

If a personal trust or confidence is reposed in two or more as trustees, neither can delegate his part or share of it to the other. Therefore, if one trustee executes a power of attorney, purporting to authorize his co-trustee to sell lands which are subjects of the trust, upon such terms and conditions as he should deem expedient, and the trustee so authorized makes an agreement to sell, signed by himself as trustee, and by him as attorney in fact of the other trustee, such agreement is not a due execution of the power to sell vested in the trustees, and cannot be enforced: *Berger v. Duff*, 4 Johns. Ch. 367; *Crewe v. Dicken*, 4 Ves. 97.

The mere mechanical duties connected with making a sale, such as posting the notices, receiving the bids, and acting as auctioneer, may be performed by agents of the trustee: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Kennedy v. Dunn*, 58 Cal. 339; *Johns v. Sergeant*, 45 Miss. 332; and his agents may make contingent sales, subject to his subsequent ratification: *Hawley v. James*, 5 Paige, 487. So if the instrument prescribing the duties of the trustees contains directions concerning any act or acts to be done at or before the sale, which are so specific that the trustee has no discretion to exercise with reference to them, but must simply comply with such directions, he may have them complied with by his agent, with like effect as if done by himself: *Singleton v. Scott*, 11 Iowa, 589; *Pearson v. Jamison*, 3 McLean, 197.

There are authorities which support the conclusion that even though the acts done by an agent are such as the trustee had no right to delegate the doing of to another, yet that the trustee may subsequently ratify them by executing conveyances or otherwise, and that thereafter no sufficient cause of complaint against the sale exists. Thus where a trustee had a discretion to exercise in the selection of the day of sale and the paper in which the notice of sale should be published, and another exercised this discretion for him, but he attended and conducted the sale, it was decided that he thereby "adopted the selection made and time fixed, and the case must stand as if he had acted from the beginning by himself, instead of through another": *Singleton v. Scott*, 11 Iowa, 589. The correctness of this decision is questionable. The better view is one that requires the trustee to exercise in advance this discretion or judgment in the performance of the trust confided to him, and does not leave him at liberty to delegate the exercise of such judgment and discretion to an agent, with the power to make the acts of the agent valid merely by executing a deed, or otherwise manifesting his assent to what the agent has previously done. Thus it has been held that where a trustee was not present at a sale, he could not know whether or not it was fairly or fraudulently made, and the sale in his absence was therefore set aside: *Taylor v. Hopkins*, 40 Ill. 442. In several other cases a like conclusion was reached, that the trustee must be present during the entire sale: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59; *Spurlock v. Sproutle*, 72 Mo. 503. In declaring invalid a sale made by an auctioneer, when the trustee was present just before the sale, and also just after it was completed,

but was on the opposite side of the street when it was actually made, the supreme court of Missouri said: "The counsel for the plaintiff contends, however, that such absence from the place of sale as that testified to by the trustee will not avoid the sale; that he was present at its conclusion to do all that he could have done had he been present at the actual crying of the sale. In this, we think, the learned counsel for the plaintiff is in error. It was the duty of the trustee to be present during the crying of the sale, to observe the progress thereof, protect the interests of the parties concerned, to reject fraudulent bids made to frustrate the sale, and, if necessary, to adjourn the sale: *Graham v. King*, 50 Mo. 22; *Bales v. Perry*, 51 Mo. 452; *Vail v. Jacobs*, 62 Mo. 130; *Perry on Trusts*, secs. 779, 780; *Gray v. Veirs*, 33 Md. 18. If, however, the auctioneer may lawfully make a sale in the absence of the trustee, and should, during his absence, accept a bid, declare the person making the same to be the purchaser, and by a proper memorandum in writing complete the sale, it would be out of the power of the trustee to set such sale aside: *White v. Watkins*, 23 Mo. 427. And in this way the trustee might substitute the auctioneer for himself in the exercise of that very discretion which the law declares is a personal trust and cannot be delegated by him. The trustee himself should be present to sanction the acceptance of the bid by the auctioneer before any binding memorandum of the sale is made": *Brickenkamp v. Rees*, 69 Mo. 426. In New York, under a statute which provided that upon default in the payment of certain loans the title to property should vest in the loan commissioners, who should advertise and sell, it was decided that both of the commissioners must be present, and that a sale made by one of them, in the absence of the other, though after due notice, was not a valid execution of their power of sale; that one of the commissioners could not authorize the other to represent or act for him; and that the fact that both commissioners united in a conveyance purporting to be made in pursuance of the sale could not endow it with validity: *Powell v. Tuttle*, 3 N. Y. 396.

Whoever acquires title from a trustee when the instrument creating the trust shows the purpose for which the trustee holds the title, and the terms and conditions upon which he is authorized to sell and convey, must take notice of such terms and conditions, and can never maintain a claim of title, the maintenance of which is based upon his ignorance thereof. In other words, he is not an innocent purchaser, and his title must fail if it is shown that the contingency upon which the trustee was entitled to sell and convey has never occurred: *Hill v. Den*, 54 Cal. 21; *Huse v. Den*, 55 Cal. 399.

The creator of a trust, the trustee of which is to have a power of sale, may impose any restraint upon such power which he may consider proper, and unless it is in contravention of law, its observance is essential to the valid execution of the power. The restraint may be in regard either to the cause of sale or the proceedings to be pursued when a cause of sale exists. The power to sell may be in abeyance until the happening of some contingency, upon which, and not before, the grantor of the trust has declared it may or shall be exercised. In the absence of the contingency, there is no existing power of sale. Thus a trustee may be given power to sell, subject to the approval of the person who created the trust, or with the assent of the beneficiary, or of the tenant for life, or of some other person. If so, the power is not in being in the absence of such approval or assent, and any conveyance which the trustee may make is unwarranted: *Sprague v. Edwards*, 48 Cal. 239; *Mortlock v. Buller*, 10 Ves. 308; *Bateman v. Davis*, 3 Madd. 98; *Wright v. Wakeford*, 17 Ves. 454; *Rickett's Trust*, 1 Johns. & H. 70.

If the written consent of the beneficiary is required by the deed of trust, it must be obtained before making a sale: *Berrien v. Thomas*, 65 Ga. 61. But the fact that the *cestui que trust* joins in a conveyance of trust property will not validate a sale made by a trustee before the arrival of the time or the happening of the contingency on which he was authorized to sell: *Isham v. Delaware R. R. Co.*, 11 N. J. Eq. 227. Where the assent of the *cestui que trust* is necessary, it may be manifested by his joining in the deed made by the trustee: *Welton v. Palmer*, 39 Cal. 456; *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596.

If the person whose assent to a trustee's sale is required dies without giving such assent, the power of sale never can become operative, because the assent cannot be dispensed with: *Kissam v. Dierkes*, 49 N. Y. 602; *Alley v. Lawrence*, 12 Gray, 373. If, however, it is clear that a sale at some time is necessary to accomplish the purposes of the trust, as where the trustee is directed to sell the trust property and to distribute the proceeds among the testator's children, and the children of his deceased children, and all the persons have died whose assent to the sale was required, a sale by the trustee without such assent is within his power, because the purposes of the creator of the trust will not be permitted to be thwarted and the trust to become unavailing by the accident of the failure of the persons named by him, in their lifetime, to give their assent to the sale of the property: *Leeds v. Wakefield*, 10 Gray, 514; *Sohier v. Williams*, 1 Curt. 479.

If a time is designated, on the arrival of which the trustees are directed to sell, as where a sale is to be made when a certain beneficiary reaches the age of majority, or on the happening of some other event in his life, a sale in advance of that time is unauthorized: *Styer v. Freas*, 15 Pa. St. 339; *Davis v. Howcote*, 1 Dev. & B. 460; *Jackson v. Lignan*, 3 Leigh, 161; *Loomis v. McClutck*, 10 Watts, 274.

If trustees are directed to sell an estate situate a A, and if its proceeds prove insufficient to pay the testator's debts, then to sell his estate at B, it is impossible for them to give good title to the estate at B until the estate at A has been sold, and the fact established beyond doubt that its proceeds are insufficient to pay the testator's debts: *Pierce v. Scott*, 1 Younge & C. 257; 4 L. J., N. S., Ex. Eq. 36. A power to sell after redemption from certain taxes has been made cannot exist before such redemption: *Derinney v. Reynolds*, 1 Watts & S. 332. If trustees authorized to sell to raise moneys to discharge obligations of a testator are required, before selling, to make oath of the amount due, this requisition creates a condition precedent, and the power of sale cannot be exercised in its absence: *Mason v. Martin*, 4 Md. 125. It has been held, in Pennsylvania, that notwithstanding directions given to trustees to sell at a particular time, as at the death of a testator's widow, a sale made before that time may be sustained, where it is evident that the object of postponing the time of sale to the period designated was to benefit a particular person, and that person has assented to the sale: *Gast v. Porter*, 13 Pa. St. 535; *Styer v. Freas*, 15 Pa. St. 339.

With respect to conditions precedent imposed by the creator of a trust, and the happening of which gives rise to a cause of sale, the rule of *caveat emptor* applies, and the purchaser must therefore ascertain at his peril whether a cause of sale exists or not: *Gunnell v. Cockerill*, 79 Ill. 79; *Griswold v. Perry*, 7 Lans. 98; *Hunt v. Townsend*, 31 Md. 336; 100 Am. Dec. 63.

It may be that trustees are vested by the terms in which the power of sale is expressed with authority to determine whether or not a condition precedent has arisen. If so, their determination is conclusive, unless it can be

shown to have been made in bad faith. Thus if they are to sell when, in their opinion, it becomes necessary to raise funds for a specified purpose, or when they deem it advisable, and in all other cases where it is manifest that they have been given discretion and judgment to be exercised, the purchaser need not stop to inquire whether or not they may have erred in the conclusion which they have reached in exercising it; for the creator of the trust has not made its exercise subject to review: *Barksdale v. Finney*, 14 Gratt. 338; *Rendleshan v. Meuz*, 14 Sim. 249; *Bunner v. Storm*, 1 Sand. Ch. 357; *Champlin v. Champlin*, 3 Edw. Ch. 571; *Greer v. McBeth*, 12 Rich. Eq. 254.

A devise to trustees with full power and authority at any and all times to sell and dispose of the testator's estate or any part thereof, as they shall deem most expedient and for the best interests of all the legatees mentioned in the testator's last will and testament, does not authorize a conveyance to be made to one of the legatees of a portion of the real estate of the testator in payment of a debt due to him from such legatee, there being at the time sufficient personal property for the payment of the testator's debts, without calling upon his real estate for that purpose: *Russell v. Russell*, 36 N. Y. 581.

Unless it is clear that the trustees have been given power to determine the necessity of a sale, then a sale not needed to accomplish the purposes of a trust, or for a purpose for the accomplishment of which the trustees have not been given power to sell, is invalid. Thus where an estate was devised to the testator's wife for life, and if not sufficient to support her comfortably, then with power to sell any of his estate for that purpose, and she afterwards granted certain premises in fee, it was held that evidence was admissible for the purpose of avoiding this deed; that there was a sufficiency of personal estate for the support of the widow at the time the deed was executed: *Minot v. Prescott*, 14 Mass. 495.

Though a cause of sale exists, it may happen that the trustee, in proceedings looking to the making of the sale, fails to conform to the directions contained in the instrument creating the trust. Generally, these directions are also treated as conditions precedent to the proper and valid execution of the power of sale. "Public policy, as well as the stability of rules of property, demands that sales and titles founded thereon should not be avoided for slight and trivial reasons; but where a power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void, both at law and in equity": *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Eitelgeorge v. Mutual B. Ass'n*, 69 Mo. 55. "The authority to sell being derived from a power, it follows that a purchaser is bound to look for and to understand the extent of such power; or, as elsewhere expressed, 'taking under the power, he is bound to see that these terms are complied with.' And of course in this, as in all other contracts, the object and design of the parties should be kept strictly in view in ascertaining the nature and extent of the power. The authority and its exercise are matters of contract. In ascertaining whether the authority has been properly exercised or followed, it is not a question of jurisdiction, as in judicial sales, for it is not from the courts, but from the contract or agreement of the parties, that the power is derived": *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. Hence, in the case last cited, it was held that under a trust deed requiring the notice of sale to be posted on the front door of a certain hotel, a sale made under a notice posted not on, but near such door should be set aside, though it appeared that the proprietor of the hotel would not permit the notice to be posted on the door. If the trustor directed the property to

be sold at public auction, it is not competent for the trustee to establish any other mode, though by so doing he may promote the interests of those for whom he acts: *Greenleaf v. Queen*, 1 Pet. 138. If a trust deed gives directions concerning the notice of sale, of the mode, place, or length of time of its publication, these directions must be substantially complied with, or the sale will be unauthorized: *Thornburg v. Jones*, 36 Mo. 514; *Reeside v. Peter*, 33 Md. 129; *Young v. Van Benthuyssen*, 30 Tex. 762. If the deed authorizes a sale for cash, the trustee cannot sell upon credit; and if he does so, the sale may be set aside as void: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270. But a prohibition against sales on credit is not violated by a sale at which the vendee pays partly in cash and partly in notes given to the holders of liens, who accept such notes as cash: *Mead v. McLaughlin*, 42 Mo. 198.

The general statement, which we have frequently made herein, that a sale for a purpose not authorized by the instrument creating the trust is not within the power of sale vested in the trustee, and can therefore derive no support from such power, must not be understood as referring to a secret purpose of the trustee, existing either at the time of the sale or subsequently, to betray his trust, and to misapply or convert moneys in his hands, as the result of sales made pursuant to the trust. If the purchaser has notice of or participates in any misapplication of the proceeds of the sale, this fact certainly furnishes sufficient grounds for holding the purchaser personally liable to the beneficiaries or for the vacation of the sale, and perhaps for declaring it void: *Potter v. Gardner*, 12 Wheat. 498; *Grimsley v. Grimsley*, 79 Ga. 397; *Clyde v. Simpson*, 4 Ohio St. 445; and such notice may be inferred if the purchaser contracts to pay the purchase price in such mode that it may not be applied to the purposes of the trust: *Cardwell v. Cheatham*, 2 Head, 14; *Rabb v. Flenniken*, 29 S. C. 278.

Indeed, the English, and perhaps the American, decisions make it incumbent upon purchasers from trustees to see to the application of the purchase-money, if the instrument creating the trust shows that the money is to be paid immediately over to a certain person or persons, and no investigation or discretion is required upon the part either of the purchaser or of the trustee to ascertain who such person or persons are, or the amount which ought to be paid to each. In such a case, the persons so ascertainable and entitled to immediate payment are regarded as having an equitable title which cannot be divested by the trustee only, and it is the duty of the purchaser to call for their receipts, and failing to do so, their equitable title remains unimpaired until the actual payment to them of their share of the purchase-money, unless the settlor of the trust has in express terms declared that the receipts of the trustee shall be a sufficient discharge of the purchase-money, or used other words from which the power of the trustees to give receipts must be implied: *Forbes v. Peacock*, 12 Sim. 521; *Perry on Trusts*, sec. 790-793.

Where, on the other hand, a purchaser has no guilty knowledge, no notice of any intended wrong-doing on the part of the trustee, and the trustee is not under a duty to make immediate payment of the purchase-money to persons designated in the instrument creating the trust, or though, where under such duty, it is necessary for the trustee to make investigations, perhaps to take accounts, before he can determine to whom the money should be paid, then the purchaser is not affected by any misconduct of the trustee after receiving the purchase-money. This rule is equally applicable whether the duty of the trustee is to retain the proceeds of the sale for the use of the beneficiaries, or to reinvest them in other property, or to pay debts or other obligations not specifically enumerated or disclosed in the instrument creat-

ing the trust, or to improve other trust property: *Keister v. Scott*, 61 Md. 570; *Paulding v. Marvin*, 3 Redf. 365; *Hughes v. Tabb*, 78 Va. 313; *John v. Barnes*, 21 W. Va. 498; *Webb v. Chisolm*, 24 S. C. 487; *Conovor v. Stothoff*, 38 N. J. Eq. 55; *Guill v. Northern*, 68 Ga. 345; *Steele v. Livesay*, 11 Gratt. 454; *Carrington v. Gaden*, 13 Gratt. 587; *Roper v. Hullifax*, 8 Taunt. 845; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Pennsylvania etc. Ins. Co. v. Austin*, 42 Pa. St. 257; *Hunt v. State Bank*, 2 Dev. 60; *Redheimer v. Pyron*, 1 Speers Eq. 134; *Hauser v. Shore*, 5 Ired. Eq. 357; *Nicholls v. Peak*, 12 N. J. Eq. 69; *Gardner v. Armstrong*, 31 Mo. 535; *Wormley v. Wormley*, 8 Wheat. 421. The application of the purchase-money in these cases necessarily cannot be contemporaneous with the consummation of the sale, and therefore it is impossible for the purchaser to exercise any control over it. It becomes, therefore, a condition subsequent to the sale, and trustee's sales are not, as a general rule, avoidable for breaches of conditions subsequent on the part of the trustees of which the purchasers were innocent. "When the trust is defined in its object, and the purchase-money is to be reinvested upon trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase-money; for, as it is said, 'the trustee is clothed with discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence than those who have bought under an apparently authorized act':" *Norman v. Towne*, 130 Mass. 52.

As already suggested, if the trust, as expressed in the instrument creating it, shows that funds, when realized from sales, may or shall remain in the hands of the trustee, to be by him used or paid for purposes disclosed by the trust, the settler must be regarded as having confided to the trustee the duty of seeing to the proper application of such funds, and therefore to have exonerated the purchaser from exacting receipts from the beneficiaries, or from otherwise protecting their interests. If lands are devised to a trustee charged with the payment of an annuity, first to testator's son for life, and at his death then to and among his child or children during the life or lives of the survivor of them, and the trustee is also authorized to convey any part of the estate devised, the purchaser cannot be expected to see that such annuity shall be paid to the party or parties from time to time entitled thereto; and therefore his title cannot be impaired by the fact that, through subsequent investments by the trustee, or from unexpected depreciation in values, nothing remains in the hands of the trustee out of which to pay the annuity. In determining this question in *Hughes v. Tabb*, 78 Va. 313, the court made the following general summary of the law regarding the duty of purchasers in connection with the application of the proceeds of sales of trust property: "The rule is, that wherever the trust is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but wherever the trust is general, and of an unlimited nature, he need not see to it: 2 Story's Eq. Jur., sec. 1131; 1 Lomax's Digest, 302-304; *Potter v. Gardner*, 12 Wheat. 498. There is much reason in the doctrine that where the trust is defined in its object, and the purchase-money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase-money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should rather be those

who reposed confidence than those who have bought under an apparently authorized act: Opinion of Justice Story in *Wormley v. Wormley*, 8 Wheat. 442; Sugden on Vendors, c. 11, sec. 1. So when a sale is made by trustees under a power to sell and reinvest upon the same trusts, it has been held in America that the purchaser is not bound to see to the application of the purchase-money: 2 Story's Eq. Jur., sec. 1134, and authorities there cited. If the form of the bequest implies a confidence reposed in the trustee in regard to the application of the purchase-money, in all such cases it is unreasonable to require the purchaser to look to the application of the purchase-money; and this is a principle which will ultimately mark an intelligible distinction among the cases in regard to the question: 2 Story's Eq. Jur., sec. 1134. When the time has arrived for the sale of the real estate, and the persons entitled to the money are infants or unborn, then the purchaser is not bound to see to the application of the purchase-money, because he might thus be implicated by a trust of long duration: 13 Pick. 392; 5 Ir. Eq. 357; 10 Pa. St. 267. But if an estate is charged with a sum of money, payable to an infant at his majority, then the purchaser is bound to see the money duly paid; there the person is named, is *in esse*, and the day is fixed and designated, the trust is defined and limited; while if a sum of money is to be paid to persons yet unborn, and from year to year, to require the purchaser to see to it, at his personal peril, that the said sum of money is paid to the proper person or persons *in esse*, and that may be hereafter born, and be entitled during the lifetime of each and all until all are dead, would be to defeat the sale in such a case altogether, and defeat the purposes of the will. What purchaser would buy land if he had to guard the safety of the investment of the proceeds for, it might be, a hundred years, when he, and possibly his children, should be dead? And if he did so buy, and such were his duties, it would be practically to substitute him to the duties, cares, and responsibilities of the trustee, and that without compensation. These are some of the most important and nice distinctions which have been adopted by courts of equity upon this interesting topic; and as a distinguished author has observed, they lead strongly to the conclusion to which eminent jurists and also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase-money, without any further responsibility on the part of the purchaser as to its application: 2 Story's Eq. Jur., sec. 1135."

"If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the application of the purchase-money; or if the trust is to pay debts and legacies, or to pay a particular debt and all other debts, or to pay legacies, or to pay debts, and to apply the balance to the support of some one, there can be no obligation to see to the payment of debts and legacies. Such a trust must necessarily require time, and the investigation of long accounts and vouchers; the purchaser could know neither the creditors nor the amounts. Where debts and legacies are to be paid, the debts must first be paid; and as the purchaser can be under no obligation to examine into the debts, so he cannot be required to take any action in regard to the legacies; and if one debt is named, but is coupled with others not named, the same considerations apply. In such trusts, the testator must be presumed to have intended that his trustee should have the full power to give receipts for the purchase-money, in order to apply it to the purposes pointed out": Perry on Trusts, sec. 795.

From the authorities already considered, it follows that the duty of the purchaser of property sold by virtue of a power of sale invested in a trustee

to see to the proper application of the purchase-money is limited to those cases in which it is the duty of the trustee to at once pay a specified debt or debts, legacy or legacies, or to distribute such proceeds among specified beneficiaries, who are ascertainable from an inspection of the instrument creating the trust, and who are themselves competent to receive and receipt for the sums to which they are respectively entitled: *Andrews v. Sparhawk*, 13 Pick. 393; *Elliott v. Merryman*, 1 Lead. Cas. Eq., 4th Am. ed., 74. While there are cases assuming that the English rule upon this subject prevails in the United States: *Hughes v. Tabb*, 78 Va. 313; *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520; *Wagner v. Blanchet*, 27 N. J. Eq. 356; *Clyde v. Simpson*, 4 Ohio St. 445; yet there are grave doubts of its applicability, under our laws regulating the settlement of the estates of decedents, to executors to whom lands have been devised in trust, with power to sell: *Perry on Trusts*, sec. 798; and we have been unable to discover any American case in which a purchaser from a trustee, whether an executor or not, having power to sell, has either lost the benefit of his purchase, or been held liable to any beneficiary under the trust, where the purchaser has been himself free from all notice of and all complicity in the trustee's misapplication of the proceeds of the sale; and we feel that when a case shall arise in which the question is necessarily involved, and the purchaser has acted in entire good faith, that the courts will hesitate to apply the English rule. The vice of that rule is, that it makes the purchaser either exercise the functions of the trustee or become answerable for the manner in which the latter exercises them. In many instances, trust deeds are made to perform the functions of mortgages. Persons, both natural and artificial, having moneys to loan, select other persons to act as trustees, cause the legal title to be conveyed to them, by conveyances in which they are given power to sell, whenever default shall be made in payment of the debt. These trustees have, through these powers of sale, means to coerce the debtor into the payment to them of the debt mentioned in the trust deed, and in the absence of such payment, to cause a sacrifice of the property, if intending purchasers are not encouraged to rely upon the authority of the trustees without investigating the relations between the creditors and their trustees. The trustees are selected by the creditors, and ought to be treated as their agents, and payments made to them either by the purchaser after or by the debtor before a sale ought to be treated as exonerating the purchaser or debtor from all further liability to the creditor.

If the instrument creating a trust has not given special directions as to the manner in which the trustee is to act, or the mode or means by which or the time when he is to bring about a sale, he must exercise his best judgment for the promotion of the interests of the beneficiaries under the trust. Anything which tends to sacrifice their interests is manifestly in derogation of the trust, and a sale resulting from it will undoubtedly be set aside on an appropriate complaint preferred by the parties prejudiced thereby. The trustee must obtain the best price he can, and any contract by which he seeks to dispose of the trust property, or any part thereof, for less than he has been offered by other parties, will be set aside: *Harper v. Hayes*, 2 Giff. 210; 6 Jur., N. S., 645; 8 Week. Rep. 600.

In order to secure the best price obtainable, the trustee may defer the time of sale, and he is not bound to proceed at once when to do so would probably result in his realizing a price substantially less than could be procured by waiting until a more opportune time: *Hawkins v. Alston*, 4 Ired. Eq. 137. Only in a case of absolute necessity should the trustee proceed to sell when it is apparent that a sacrifice of the property must ensue: *Hunt v. Bass*, 2 Dev.

Eq. 291; 24 Am. Dec. 274. A trustee must always act impartially, and as far as possible for the advantage of all the parties interested in the sale, and use reasonable efforts to obtain the best price he can: *Lirey v. Winston*, 30 W. Va. 555; *Muller's Adm'r v. Stone*, 84 Va. 834; 10 Am. St. Rep. 889. Where the mode and time of his action are not regulated by the instrument creating the trust, all that can be said in the way of prescribing a rule for his government is, that he shall act in good faith, and adopt those modes of proceeding which will render the sale most beneficial to the debtor, or other persons whose interests are to be affected thereby: *Tatum v. Holliday*, 59 Mo. 422; *Chesley v. Chesley*, 49 Mo. 540.

The duty of a trustee to act impartially between all the parties interested in the execution of the trust, and not to needlessly sacrifice those interests, may often require him to take some affirmative action before proceeding with the sale. If there is any cloud upon the title, or any other existing cause, the operation of which might be such as to prevent competition at the sale, it is his duty, where he can, to proceed to remove such cause, as by application to a court of equity to clear away the cloud from the title, or to remove any other impediment which may exist to a fair and reasonable sale of the property. "That a trustee is considered as the agent of both parties, and bound to act impartially between them, that it is his duty to use every reasonable effort to sell the estate to the best advantage, and that it is his duty to apply to a court of equity where there is a cloud upon the title, or where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of his trust, are propositions which none will deny, and which have been repeatedly affirmed by this court: 1 Lomax's Digest, 323; *Lane v. Tidball*, Gilman. 130; *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle's Ex'r*, 5 Leigh, 460; *Wilkins v. Gordon*, 11 Leigh, 547; *Miller v. Trevilian*, 2 Rob. (Va.) 1; *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 139; *Rosett v. Fisher*, 11 Gratt. 492; *White v. Mechanics' Building Fund Ass'n*, 22 Gratt. 233; *Shurtz v. Johnson*, 28 Gratt. 657; 2 Minor's Institutes, 286; 1 Barb. Ch. Pr. 447. And it is equally well settled that if the trustee fails in any such case to apply to a court of equity, the party injured by his default may do so. The rule is well stated by Judge Burks in *Shultz v. Hansbrough*, 33 Gratt. 567, as follows: 'If a trustee *in pais*, with power to make sale of real estate for the payment of debts, attempts to make such sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by the debtor, secured creditor, subsequent encumbrancer, or other person having an interest, will restrain the trustee until these impediments to a fair sale have, by its aid, been removed as far as it is practicable to do so': *Muller's Adm'r v. Stone*, 84 Va. 834; 10 Am. St. Rep. 889; *Ryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 140.

Though it is the duty of the trustee not to sacrifice the property, it does not follow that a sale is either necessarily void or voidable because of the inadequacy of the price realized. When the trustee is under no immediate necessity of selling, and there is no other object in the sale than to exercise his discretion of changing the form of the investment from real estate to personal, the fact that he sold it at a palpably inadequate price would, no doubt, be very persuasive evidence of fraud, such as would induce a court of equity to vacate the sale on prompt application by the parties interested. But there

are many cases in which it is the duty of the trustee to make sales for the purpose of discharging the claims of creditors and others who are entitled to immediate payment, and where it may be the duty of the trustee to proceed, either at once or with reasonable celerity, although the times and circumstances are not propitious for the sale of the subject-matter of the trust. In such cases, mere inadequacy of price, standing alone, is not a sufficient ground to authorize the vacation of the sale: *Carter v. Abshire*, 48 Mo. 300; *Clark v. St. Louis, Alton, etc. R. R. Co.*, 58 How. Pr. 21. The rule with respect to vacating trustee's sales for inadequacy of price is very similar to that which the courts apply to judicial sales, and is substantially as follows: that mere inadequacy alone, unless so gross as to indicate unfairness on the part of the purchaser, or misconduct or fraud on the part of the trustee, does not warrant the vacating of the sale; but where there is a serious inadequacy in the price realized, the court will seize upon any incident of surprise, undue advantage, irregularity, or other equitable circumstance to grant relief: *Warefield v. Ross*, 38 Md. 85; *Horsey v. Hough*, 38 Md. 130; *Meath v. Porter*, 9 Heisk. 224.

If the property to be sold consists of two or more lots, or if not already divided into lots it can be so divided, then the trustee must exercise his discretion to sell either in bulk or in subdivisions, as may best promote the interests to be subserved by the sale: *Gray v. Shaw*, 14 Mo. 341; *Stall v. Macalester*, 9 Ohio, 19. Under ordinary circumstances, there can be no doubt that such interests will be best promoted by a sale in parcels; and where it appears probable that they have been sacrificed by a sale *en masse*, it will be vacated: *Chesley v. Chesley*, 54 Mo. 347; *Goode v. Comfort*, 39 Mo. 313; but a sale of property in gross is not necessarily, nor even presumptively, invalid. "While it is true that sales of this character will be narrowly watched, and every possible safeguard thrown around the interest of him who has been truly called 'a servant to the lender,' yet the mere fact that the property conveyed by deed of trust is sold in gross is not, *per se*, sufficient to avoid the sale, and no case that I am aware of has gone to that length. There must be some attendant fraud, unfair dealing, or abuse by the trustee of the confidence reposed in him, or some resulting injury from a sale made in this way, in order to obtain the aid of a court of equity to divest a title thus acquired": *Bankendorf v. Vincenz*, 52 Mo. 441. A sale *en masse* is neither void nor voidable unless its operation is prejudicial to some one. "It is only upon the ground of fraud, or that some one may have been prejudiced by a sale of real estate *en masse*, that the sale would be set aside in equity because the property was not sold in separate parcels": *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328.

To prevent the sacrifice of property, a trustee may fix a reserve price, and refuse to accept any bid of a less sum: *In re Peyton*, 8 Jur., N. S., 453; 31 L. J. Ch. 440; 10 Week. Rep. 515; 6 L. T., N. S., 883; 30 Beav. 252. If a bid has been made under a misapprehension of the terms of the sale, as where the bidder supposed his bid to be payable in currency, and the trustee was not willing nor under any duty to receive anything but gold, the trustee may permit such bid to be withdrawn, and may subsequently proceed to sell to another bidder: *Waterman v. Spaulding*, 51 Ill. 425. Nor is the trustee, though the sale is at public auction, bound to accept every bid which may be offered. He has the discretion to refuse any bid the acceptance of which would frustrate the purposes of the sale: *Gray v. Veirs*, 33 Md. 18.

If the discretion of a trustee has not been limited by the instrument creating the trust, he is not bound to give any notice of his intention to sell, but

may dispose of the property at private sale, and without notice, as though he were selling his own private property: *Burr v. McEwen*, Baldw. 154; *Minuse v. Cox*, 5 Johns. Ch. 441; 9 Am. Dec. 313; *Huger v. Huger*, 9 Rich. Eq. 217; *Mattox v. Eberhart*, 38 Ga. 581; *Crane v. Reeder*, 22 Mich. 322; provided that, in adopting the means of sale, he acts in good faith, and not in a manner obviously prejudicial to the beneficiaries of the trust. If, on the other hand, the instrument creating the trust has given directions concerning the mode of sale, they must be substantially pursued. Any direction regarding the notice of sale is material, and the trustee is not at liberty to disobey it. His sale, made without complying with it, will, in most jurisdictions, be regarded as either absolutely void, or as liable to be vacated upon complaint of any person interested in the execution of the trust. Conditions as to the time or mode of publication must be followed, and in some courts, at least, no excuse will be received for not observing them: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. If a trust deed exacts thirty days' notice of a sale, and the sale does not take place at the time specified in the notice, it has been held that if it is adjourned to another time, thirty days' notice must also be given of such adjourned sale: *Thornton v. Boyden*, 31 Ill. 200. If notice to a grantor of the time and place of a sale is stipulated for in the trust deed, the giving of such notice is a condition precedent to the validity of the exercise of the power of sale: *Henderson v. Galloway*, 8 Humph. 692.

The requirement of twenty days' previous notice of the time and place of sale is not satisfied by a single publication made twenty days before such sale: *Stine v. Wilkson*, 10 Mo. 75. Publication of a notice of sale in a weekly newspaper on the 8th, 15th, 22d, and 29th of April, and on the 6th of May, the sale being on the 8th of May, complies with the directions in a trust deed that the trustees may sell after "first giving thirty days' notice of the time, place, and terms of the sale, and of the property to be sold, by advertisement in some newspaper in Burlington, Iowa territory," there being no paper published in Burlington oftener than once a week: *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672. In this case, it will be observed that there were less than thirty days between the first and the last publication, though there were more than thirty days between the first publication and the time of sale. In a similar case it was held that publication in a weekly newspaper was sufficient, though there was a daily edition of the same paper, in which no publication was made: *Campbell v. Tagge*, 30 Iowa, 307; and the rule seems to be well settled that publication in a weekly newspaper is always sufficient, unless the trust deed has expressly required a publication at more frequent intervals: *Johnson v. Dorsey*, 7 Gill, 269. Notices of sale are not required to be published on Sunday. Therefore, if notice is directed to be given ten days before the sale, the publication may be sufficient, though owing to an intervening Sunday it was published only nine times: *Cushman v. Stone*, 69 Ill. 516. When a notice of sale is required to be posted, it is no objection to the posting that it was in a place where the notice could not be seen on Sundays. The law does not contemplate that notices of sale shall be exposed on those days: *Graham v. Fitts*, 53 Miss. 307. If thirty days' notice of the time and place of sale is directed to be given by posting, and the original posting is correctly made, the direction is fully satisfied, though it appears that the notice, owing to no fault of the trustee or purchaser, did not remain up for the full time: *Graham v. Fitts*, 53 Miss. 307.

If a trust deed, while it directs notice of sale to be given, is silent with respect to the newspaper in which it is to be published, the trustee has

unlimited discretion in the selection of such paper, except that he must not yield to the influence of fraud, nor of any other improper motive: *Singleton v. Scott*, 11 Iowa, 589.

Every notice of sale "should contain such facts as are reasonably to apprise the public of the place, time, and terms of the sale, and of the property to be sold. But mere omissions or inaccuracies in these respects, not calculated to mislead and work prejudice, will not be regarded": *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Chesley v. Chesley*, 49 Mo. 540; *Stephenson v. January*, 49 Mo. 465; *Beatty v. Butler*, 21 Mo. 313; 64 Am. Dec. 234. Though a statute prescribes the form of a notice, failure to use the precise language of such statute will not invalidate a notice: *Boston Safe Deposit and Trust Co. v. Micter*, 146 Mass. 100. Misrecitals in a notice of acts on which the power of sale does not depend, and which are not required to be recited, are immaterial: *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638. It is not necessary to follow any prescribed or stereotyped form in giving a notice of sale: *Newman v. Jackson*, 12 Wheat. 570. There is no reason why the amount of the debt should be stated, when the object of the sale is to raise moneys to discharge it: *Wiswall v. Ross*, 4 Port. 321. A notice stating that a sale will be held at the court-house door of a designated town, but not naming the county, nor stating that the sale will be at public auction, is sufficient, where the notice also states the time of sale and describes the property to be sold: *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281. A notice which does not state by nor to whom a deed of trust was executed, nor describe the land with sufficient particularity to enable one not familiar with it to know what land was to be sold, is insufficient, and a sale made thereunder will be vacated: *Reedsides v. Peter*, 33 Md. 120.

Manifestly the objects to be accomplished by a notice of sale are to advise the public of what is to be sold, and the time when, the place where, and the terms upon which it may be bought; and the essentials of a notice of sale under a trust deed are therefore a statement of the time, place, and terms of sale, and such a description of the property to be sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought, and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold. It is generally advisable to state the authority under which the sale is to be made, that intending purchasers may know whose property is to be sold, and by what right the trustees claim to act, so that such purchasers may have opportunity to investigate the title and authority of the trustee, and determine for themselves whether the sale is one at which they can safely purchase. If the terms of the sale are different from those implied by law, or from those which are usual in like sales in the neighborhood, as where they are especially advantageous or especially onerous to purchasers, they should be stated also; but we doubt whether, under ordinary circumstances, it is indispensable in a notice of sale to set forth anything except the time and place of sale and a correct description of the property to be sold.

If a trustee is left entirely to his discretion regarding a sale, he may sell for cash or upon credit, as to his own judgment may seem best: *Rogers v. De Forest*, 7 Paige, 273; *Hoffman v. Muckall*, 5 Ohio, 124; 64 Am. Dec. 637; but if the instrument describing his duties and powers gives explicit directions upon this subject, he must not disregard them, and if he sells upon credit, when he is commanded to sell for cash, the sale may be set aside: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270.

The trustee himself and those who are acting in his interests are the only persons who are incompetent to purchase property at a trustee's sale. A beneficiary under the trust may be a purchaser at the sale of the trust property as freely as if he were a stranger to the trust, and is under no obligation to hold the property so purchased for the benefit of his fellow-beneficiaries, if any there be: *Walker v. Brungard*, 13 Smedes & M. 723. If a power of sale is to be exercised only with the assent of the tenant for life, this does not disqualify him from becoming a purchaser at a sale made by the trustee: *Disconson v. Tulbot*, 19 Week. Rep. 138; Com. L. Ch. 32; 24 L. T. 49.

The decisions concerning the purchase of trust property by or in the interest of the trustee, whose duty it was to sell it, are very numerous, and not altogether free from conflict. The vast majority of them, however, sustain the following propositions: 1. That a purchase by a trustee, or in his interest, is not necessarily or absolutely void: *Stephens v. Beall*, 22 Wall. 329; *Union State Property v. Tilton*, 69 Me. 244; *Veasey v. Graham*, 17 Ga. 99; third persons cannot question it: *McNish v. Pope*, 8 Rich. Eq. 112; nor has the trustee a right to treat it as void; it is binding upon him until the *cestui que trust* chooses to avoid it: *McClure v. Miller*, 1 Bail. Ch. 107; 21 Am. Dec. 522; 2. That a trustee has no right to purchase trust property either directly or by the agency of a third person acting at his instigation and intending to hold the purchase for his benefit: *Michoud v. Girod*, 4 How. 503; *Campbell v. Johnston*, 1 Sand. Ch. 145; *Boyl v. Hawkins*, 2 Ired. Eq. 304; *Mathews v. Dragaud*, 3 Desaus. Ch. 25; *Thorp v. McCullum*, 6 Ill. 614; *Davis v. Simpson*, 5 Har. & J. 147; 9 Am. Dec. 500; *Saltmarsh v. Beene*, 4 Port. 283; 30 Am. Dec. 525; *Renew v. Butler*, 30 Ga. 954; *Remick v. Butterfield*, 31 N. H. 70; 64 Am. Dec. 316; *Den v. Wright*, 31 N. H. 175; 11 Am. Dec. 546; *Sheldon v. Sheldon*, 13 Johns. 220; *Obert v. Hammel*, 18 N. J. L. 73; *Bank of Orleans v. Torrey*, 7 Hill, 260; and 3. That a *cestui que trust* may within a reasonable time after discovering that trust property was sold to a trustee, or to some one acting in his interest, or in the interest of his wife, or to a corporation or association in which he is largely interested, elect either to treat the sale as void and the property as still subject to the trust, or to have an accounting and payment of the profits realized by the trustee and his agents: *Bussett v. Shoemaker*, 46 N. J. Eq. 538; *post*, p. 435; *Robbins v. Butler*, 24 Ill. 387; *Hunt v. Biss*, 2 Dev. Eq. 292; 24 Am. Dec. 274; *Jennison v. Hapgood*, 7 Pick. 1; 19 Am. Dec. 258; *Herr's Estate*, 1 Grant Cas. 272; *Rosenberger's Appeal*, 26 Pa. St. 67; *Smith v. Frost*, 70 N. Y. 65; *McNeil v. Gates*, 41 Ark. 264. Only when a sale is made under the authority of the court, or with the concurrence of a *cestui que trust*, and the purchase by or in the interest of the trustee is known to the court confirming or the beneficiary approving the sale, or when the trustee is one of the persons for whose debt the trust deed was given, will such purchase be permitted to stand as against an objecting beneficiary: *Kennedy v. Dunn*, 58 Cal. 339; *Fancett v. Fancett*, 1 Bush, 511; 89 Am. Dec. 639; *Cumberland etc. Co. v. Sherman*, 20 Md. 117; *Ames v. Port Huron etc. Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Roberts v. Roberts*, 65 N. C. 27. It has also been held that a trustee cannot as an agent of a third person purchase the trust property, for the obvious reason that if he did so he would undertake to discharge conflicting duties, and probably sacrifice the interests of one or the other of his principals: *Hawley v. Cramer*, 4 Cow. 717; *Gould v. Gould*, 36 Barb. 270. Where there are two or more trustees, each is as much prohibited from purchasing the trust property as if he were sole trustee: *Ringgold v. Ringgold*, 1 Har. & G. 11; 27 Am. Dec. 250.

If a *cestui que trust*, with full knowledge of a purchase by or in the inter-

est of his trustee, and of his right to disaffirm it, elects to ratify such purchase, he is irrevocably concluded by such ratification, and the sale is thereafter not subject to successful assault at law or in equity: *Boerum v. Schenck*, 41 N. Y. 182; *Van Dyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76.

If when a trustee made a sale he had no interest therein, and no intention of becoming the owner of the property in his own right, his trust relation to it ceases, and he may subsequently deal with it as discharged from the trust, and may therefore purchase it from its owner without incurring any obligation to hold it subject to the original trust: *Creveling v. Fritts*, 34 N. J. Eq. 134; *Rammelsberg v. Mitchell*, 29 Ohio St. 22. If, on the other hand, the original sale was in the interest of the trustee, and he, after selling the property to innocent purchasers, who might have held it discharged from the trust, acquires their title, he may be compelled to hold it for the benefit of the beneficiaries of the trust: *Church v. Church*, 25 Pa. St. 278.

While the authorities often state, in general terms, that a sale to the trustee by whom the power of sale was exercised is not void, but voidable only, they must be understood as referring only to sales in which he was the real, though not the nominal, purchaser. If a sale or conveyance appears on its face to be made by a trustee to himself, it must, we apprehend, be treated as absolutely void, for want of proper contracting parties. "The deed would be simply void, and would pass nothing or make no change in the situation and relations of the parties, on the ground that no man can contract with himself, or make a deed to himself, or from himself in one capacity to himself in another": *Perry on Trusts*, sec. 602 w.

When an executor or other trustee purchases the trust property, or causes a purchase thereof to be made in his interest, and the *cestui que trust* elects to disaffirm the sale within a reasonable period after receiving notice of the trustee's interest therein, he need not make any proof of fraud or unfairness on the part of the trustee, or even that the sale, if it were permitted to stand, would be unjust to the complainant. A trustee cannot sustain a sale and hold the property free of the trust otherwise than by proving that the sale was made by the previous assent or the subsequent ratification of the *cestui que trust*, given with a full knowledge of his rights and of the circumstances of the sale, and of the trustee's interest therein. If the latter did not so assent to or ratify the sale, and he wishes it to be set aside, no inquiry will be made respecting its fairness or its unfairness. He has an absolute right to have the trustee discharge the duties of the trust impartially and without ever placing himself in a position where his interests and those of his beneficiary may come in conflict: Note to *Van Dyke v. Johns*, 12 Am. Dec. 85; *Scott v. Freeland*, 7 Smedes & M. 409; 45 Am. Dec. 310; *Michoud v. Girod*, 4 How. 503.

The sale must be made by the trustee, he having, as we have seen, no power to delegate his trust, but the trustee who makes the sale is not necessarily the one originally designated by the creator of the trust. A new trustee may have been appointed by some court of competent jurisdiction, in which case he may exercise the same power of sale possessed by the former trustee, though the order making the appointment is silent upon that subject: *Lahey v. Kortright*, 56 N. Y. Super. Ct. 527. One or more of the original trustees may have disclaimed, died, or resigned, in which event the survivor becomes the sole trustee, and competent to act as if no other trustee had ever been joined with him.

If the trust estate was limited to the trustee and his heirs, it will on his death vest in such heirs, but cannot vest in his devisees or other assigns: *Perry on Trusts*, sec. 494. If it was limited to the trustee, his

heirs or assigns, it may be devised, and the devisees may execute the trust: *Hall v. May*, 3 Kay & J. 585; 3 Jur., N. S., 907; 26 L. J. Ch. 791; 5 Week. Rep. 869; *Osborne v. Rowlett*, L. R. 13 Ch. Div. 774; 49 L. J. Ch 310; 42 L. T. 650; 28 Week. Rep. 365. Where the trust is a matter of personal confidence, while the estate may, on the death of the trustee, vest in his heirs or devisees, and be by them held subject to the trust, yet they are not regarded as competent to execute it: *Robson v. Flight*, 4 De Gex, J. & S. 608; 34 L. J. Ch. 226; 11 L. T., N. S., 725; *Perry on Trusts*, sec. 496. Resort to a court of equity, therefore, in such cases, becomes necessary to obtain the appointment of proper trustees to carry out the trust.

Though a trustee has given notice that he will sell the trust property at a designated time and place, he may reach the conclusion that a sale at such time or place is not for the best interests of the persons to be affected by the sale, or that from some other cause the sale ought not to take place as advertised. "The power of a trustee to sell at public auction, after a certain publication of the notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion, fairly exercised, it shall seem to him necessary to do so in order to obtain a fair auction price for the property": *Richards v. Holmes*, 18 How. 143; *Jackson v. Clark*, 7 Johns. 225; *Sayles v. Smith*, 12 Wend. 57; note to *Russell v. Richards*, 26 Am. Dec. 537. It is the duty of a trustee to exercise the power which he has to adjourn sales whenever, from the small attendance of bidders or from other circumstances, it seems apparent that a sale of the property is likely to result in its realizing a much less sum than if the sale were adjourned to another time or place: *Judge v. Booge*, 47 Mo. 544.

While the right and the duty of a trustee to adjourn a sale in certain contingencies are well established, it is impossible to state with confidence what notice, if any, he must give of such adjournment. Undoubtedly he must not postpone a sale in such a way that the persons interested do not know that it has been adjourned, nor at what time or place they must attend to protect their interests: *Dana v. Farrington*, 4 Minn. 433. Perhaps the better opinion is, that when a sale is adjourned, notice of the time and place to which it is adjourned must be given in the same manner and for the same length of time as if the sale were advertised for the first time. The result of this is, that if any adjournment is ordered, it must be for a time sufficient to allow notice to be given for the length of time stipulated in the trust deed or other instrument regulating the time and manner in which the trustee must give notice before he proceeds to sell any part of the trust estate: *Griffin v. Marine Co.*, 52 Ill. 130; *Thornton v. Boyden*, 31 Ill. 200; *Montgomery v. Barrow*, 19 La. Ann. 169; *Enloe v. Miles*, 12 Smedes & M. 147; *Patten v. Stewart*, 26 Ind. 395.

If the bidder to whom the trustee sells property at public auction does not comply with his bid, it may be again offered for sale, but under ordinary circumstances, the second sale must be preceded by notice given in the same manner and for the same time as required for the first: *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 425; *Judge v. Booge*, 47 Mo. 544; *Givan v. Doe*, 5 Blackf. 260; *Williams v. Barlow*, 49 Ga. 530. Certainly this must be so where the persons in attendance at the sale, or any considerable portion of them, have dispersed. For in such a case the benefit of the original notice is lost, and any sale of the property will almost surely be for a price disproportionate to its value.

Every conveyance by a trustee must possess the requisites of a conveyance by a grantor conveying in his own right. Therefore, it must name or de-

scribe the grantee; and if it merely purports to relinquish the interest of the trustee without stating to whom, it is inoperative: *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. While it is desirable that a conveyance executed by a trustee in the exercise of a power of disposition vested in him should contain recitals from which it is apparent that he executed it in his capacity of trustee, and for the purpose of exercising the power vested in him as such, and that the circumstances under which he is entitled to execute the power in fact exist, still it cannot be said that any of these recitals are absolutely necessary. It is sufficient for him to describe himself or affix his signature as trustee: *Porter v. Schofield*, 55 Mo. 303. He need not recite the trusts under which he holds the property, nor state that his conveyance is for the purpose of executing those trusts: *Bradstreet v. Clarke*, 12 Wend. 602; nor need he affirm the existence of debts or of any other cause making his sale or conveyance necessary or proper: *Flux v. Bert*, 31 L. T., N. S., 645; 23 Week. Rep. 228. If the only estate or interest which the trustee has in the property is one which he holds in trust, and he makes a conveyance which describes and purports to convey property which is subject to the trust, and the conveyance must either operate to convey the trust estate or not operate at all, then it will be construed as being executed in the exercise of the power vested in him as trustee, and will convey the trust property therein described, though it does not refer to the capacity in which he holds such property, nor to his intention to execute the power of sale vested in him as such trustee: *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596; 60 Am. Rep. 769; *Bishop v. Remple*, 11 Ohio St. 277; *Hall v. Preble*, 68 Me. 100; *Baird v. Boucher*, 60 Miss. 329; *South v. South*, 91 Ind. 221; *Campbell v. Johnson*, 65 Mo. 439; *Funk v. Eggleston*, 92 Ill. 515; *Orr v. O'Brien*, 55 Tex. 149. "The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear, — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and 3. Where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. Thus if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest; for there is a subject-matter for the deed to operate upon, excluding the power, and therefore as it does not conclusively appear that the deed was intended to be an execution of the power as well as a conveyance of the grantor's interest in the land, it will be held not to be an execution of the power; but if the grantor has no interest in the land, his deed will be insensible, and a mere absurdity, if not intended as an execution of the power; therefore it will be held to be an execution of the power if it refers to the subject-matter of the power, or describes the land over which his power extends. It will be seen that this last conclusion is a presumption of law; this presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power. If a man has several powers, and refers to some, and not to others, the execution

will exclude those not referred to": Perry on Trusts, sec. 511 c; *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420.

While a conveyance by a trustee may operate as a valid execution of a power of sale vested in him, though it contains no recitals, and does not disclose the capacity in which he conveys, yet a careful conveyancer, in draughting a conveyance for a trustee, will not only show the capacity in which he executes it, but will also recite the existing facts which make its execution proper. These recitals have a value beyond removing any doubt which might otherwise exist in reference to the object of the deed and the capacity in which its grantor is acting. They are, in many jurisdictions, at least *prima facie* evidence of the truth of the statements therein made, and therefore may be of great assistance to the grantee and his successors in interest in subsequent legal controversies assailing his or their title on the ground that the circumstances did not exist in which the trustee was authorized to make the conveyance in question: *Savings and Loan Society v. Deering*, 66 Cal. 281; *Beal v. Blair*, 33 Iowa, 318.

The effect of sales irregularly, improvidently, or fraudulently made by trustees has been incidentally considered in what we have already written, and therefore but little additional space will here be given to this topic. We showed, in the first part of this note, that, in absence of statutes modifying or abrogating the common law upon this subject, conveyances by trustees, whether authorized or not, operate upon the legal title and vest it in their grantees. Where this rule still prevails, one who wishes to avoid the effect of a trustee's conveyance must necessarily resort to a suit in equity to have such conveyance vacated and the property declared to be still subject to the trust. It is part of the peculiar jurisdiction of courts of equity to superintend the execution of trusts, and to prevent the violation by the trustee of the confidence reposed in him. A trustee's sale may be vacated in equity, either because of some circumstance or element of fraud, improvidence, or unfairness in it, whereby the interests of the *cestui que trust* have been sacrificed, or because of the failure of the trustee to comply with the directions of the trust deed, as where he has sold when not authorized to do so, or although authorized to sell, has not, in bringing about the sale, observed the directions of the trust deed regarding the time, place, or mode of sale.

Every device which a trustee may adopt to bring about a sale in the interest of himself, or in any way to stifle competition, or to prevent the realization of the full value of the property, is fraudulent, and therefore demands a decree setting aside the sale: *Saltmarsh v. Beene*, 4 Port. 283; 30 Am. Dec. 525; *Towle v. Amb's*, 123 Ill. 410; *Cassell v. Ross*, 33 Ill. 244. 85 Am. Dec. 270; *Hazeltine v. Fournrey*, 120 Ill. 493. Mere inadequacy of price, as we have seen, is not a sufficient reason for vacating a sale, unless it is so gross as to shock the conscience or create a presumption of fraud: *Clark v. Trust Co.*, 100 U. S. 149; *Basnett v. Higgins*, 2 W. Va. 485; *Booker v. Anderson*, 36 Ill. 66; or of want of reasonable judgment and discretion on the part of the trustee: *Hintze v. Stingal*, 1 Md. Ch. 283; *Johnson v. Dorsey*, 7 Gill, 269; *Gilbs v. Cunningham*, 1 Md. Ch. 44; but any circumstance of fraud or irregularity will be accepted by the court as sufficient ground for setting aside a sale for a clearly inadequate price: *Singleton v. Scott*, 11 Iowa, 589; *Franklin v. Osgood*, 14 Johns. 527; *Hoppes v. Check*, 21 Ark. 585. If the debtor, or other person interested in the sale, is, by any device or misrepresentation on the part of the trustee or purchaser, prevented from attending the sale, or taking other measures necessary for the protection of his interests, equity will grant him relief: *Clarkson v. Creely*, 35 Mo. 95;

Hoppes v. Cheek, 21 Ark. 585. While a sale of several parcels of trust property *en masse* is not, in the absence of fraud or prejudice to the *cestui que trust*, a sufficient cause for vacating the sale: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; yet it will not be permitted to stand if it is clearly shown that a sale in separate parcels would have brought a much higher sum: *Goode v. Comfort*, 39 Mo. 313.

As illustrations of cases in which a trustee's sales ought to be vacated, disregarded, or adjudged invalid in equity, either because he had no power to sell at the time when he undertook to do so, or because, in proceeding to bring about a sale, he disregarded the directions of the instrument creating the trust, or the mandates of the law regulating his duties and defining his powers, may be mentioned the following: A sale made by and in the presence of part only of the acting trustees: *Powell v. Tuttle*, 3 N. Y. 396; *Spurlock v. Sproule*, 72 Mo. 503; a sale made under a trust deed before default had been made in the payment of the debt, upon which default the trustee was authorized to sell: *Eitelgeorge v. Mutual H. B. Ass'n*, 69 Mo. 52; a sale conducted by an auctioneer at which the sole trustee was not present: *Bickenkamp v. Rees*, 69 Mo. 426; *Vail v. Jacobs*, 62 Mo. 130; a sale made without publishing the notice of sale for the period required by the trust deed: *Stine v. Wilkson*, 10 Mo. 75; a sale made without the consent of the *cestui que trust*, or other person whose assent was exacted by the trust deed: *Berrien v. Thomas*, 65 Ga. 61; *Kissam v. Dierkes*, 49 N. Y. 602; a credit sale, when the trustee was authorized to sell for cash only: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; a sale made without posting the notice thereof at the place designated in the trust deed: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564; a sale made under a deed of trust, after the debt to secure which such deed was given had been paid: *Penny v. Cook*, 19 Iowa, 533.

When suit is brought in equity for relief from a trustee's sale, the court will, of course, be governed by the general principles of equity jurisprudence, and will often, because of those principles, deny relief, though the sale may have been improper or unauthorized. Thus want of diligence on the part of the complainant is in equity frequently fatal to his cause. This is especially true when he is endeavoring to annul a trustee's sale. *Cestui que trust*, and other persons for whose benefit such sales are made, have the right to let them stand and to retain whatever advantage may result to them therefrom, though they are irregular, unauthorized, or fraudulent; and if such persons, after having knowledge of circumstances entitling them to avoid such sales, delay for an unreasonable period to take any action whatever, they thereby manifest their election to waive such fraud, irregularity, or want of authority, and once having elected to make such waiver, their election is irrevocable: *Landrum v. Union Bank*, 63 Mo. 48; *Connolly v. Hammond*, 51 Tex. 635; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691; *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638. If the cause urged for vacating a sale occurred through the act or procurement of the complainant, or if he, though not guilty of bringing about such cause, knew of its existence at or prior to the sale, and being present at the sale, neglected to disclose the cause of complaint or to make any objection to the sale, he is probably estopped from subsequently urging it as a ground for vacating the sale: *Spencer v. Hawkins*, 4 Ired. Eq. 288; *Beebe v. De Baun*, 8 Ark. 510.

It is a well-settled rule of equity that where the equities are equal, the legal title prevails. This rule, if applied in favor of the grantees of trustees, must protect them from all causes of complaint, of which they were innocently ignorant at the time of paying the purchase price and receiving their

conveyances; and we have no doubt that it should be applied in all cases where the vice in the trustee's proceedings is one which the purchaser had no reason to anticipate, and does not consist of an act or omission forbidden by the instrument creating the trust: *Booraen v. Wells*, 19 N. J. Eq. 87. Where a statute forbade the enforcement by a trustee of any claim purchased after his appointment, it was held that a trustee's sale could not be avoided on the ground that at the time of the sale he was the assignee of the debt for the payment of which the sale was made, there being no claim that the purchaser was aware of such assignment: *Carey v. Brown*, 62 Cal. 373. So where power is given a trustee to sell property to pay debts of the trustor, without specifying to whom he was indebted, a *bona fide* purchaser will be protected if the trust is abused by a sale when there were no debts remaining to be paid: *Williams v. Otey*, 8 Humph. 563; 47 Am. Rep. 632; *Loughmiller v. Harris*, 2 Heisk. 559. A purchaser at a trustee's sale cannot be prejudiced by a secret agreement between the trustee and the debtor that a part of the land described in the trust deed should be released therefrom on certain conditions which had been complied with by such debtor: *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281.

If, as already stated, an irregular or fraudulent trustee's sale, or one made without authority, is valid until the person injured thereby elects to disapprove it, then, in all actions or proceedings in which the title to the property is assailed, it must follow that no person who is a stranger to the trust can question such sale and the conveyance made in pursuance thereof. Hence, as a general rule, a stranger to a deed to trustees cannot complain of informalities, irregularities, or frauds in the execution of the power therein conferred: *Marston v. Rowe*, 43 Ala. 271; *Herbert v. Henrick*, 16 Ala. 581; *Gury v. Coljin*, 11 Ala. 514; *Larco v. Casaneuva*, 30 Cal. 560. These decisions can, however, be justified only by the assumption that the trustee's sale and conveyance were not void; for if void, he who claims under them is a stranger to the title, and certainly cannot be entitled to any right or remedy, even as against a third person, to which he would not be entitled had such sale or conveyance not been attempted to be made. In those states the statutes of which denounce conveyances in contravention of a trust as void, it may be that a conveyance executed by a trustee may be attacked collaterally, in any action and by any person, on the ground that it was in contravention of the trust, and is therefore without any effect, legal or equitable: See *ante*, p. 268. Except where a statute of this kind is invoked, we apprehend that the rule best supported by principle and authority is, that a trustee's deed is not subject to attack in an action at law, and that no evidence need be offered in its support, and that it must be received as a conveyance of the legal title, and that those who seek to controvert it must do so by alleging and establishing some equitable reason why, as against them, it should not prevail: *Rowan v. Lamb*, 4 G. Greene, 468; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336.

Statements made in various decisions, and in different parts of this note, that a conveyance made by a trustee having the legal title and the power to sell and convey is invalid or void, for designated defects, must generally be understood to mean void when assailed in equity by some appropriate proceedings, and under such circumstances that there is no equitable reason or impediment requiring the denial of relief to the complainant. There are, however, decisions proceeding upon the assumption that the conveyances there in question were void at law. Thus in *Thornbury v. Jones*, 36 Mo. 514, a complaint against a trustee to recover damages from him for selling the trust property without publishing the notice of sale in two counties, as

required by the trust deed, and for wrongful, oppressive, and fraudulent conduct, whereby bidders were deterred from bidding, was adjudged to state no cause of action, for the reason that a sale, as therein alleged, was void, both at law and in equity, and could therefore occasion no damages. In *Minot v. Prescott*, 14 Mass. 496, which was an action of ejectment, the defendants claimed under a conveyance from Mary Betton, to whom the income of the property in controversy had been devised for her life, with power to sell such property if the income was not sufficient to support her comfortably, it was decided that parol evidence was admissible to defeat her conveyance by proving that the income was sufficient for her support, and therefore that the condition precedent, giving her power to convey, had never happened. But it must be remembered that she was not a trustee; that the testator did not devise his realty to her, in trust or otherwise; and that when she made the conveyance, she had neither an estate to convey, nor a power to convey the estate of others.

Trust deeds made merely for the purpose of securing the payment of debts due, or to become due, from the trustee, may, with much reason, be regarded as exceptional in their character, and the power of the trustee to convey even the legal title as being dependent on his substantial compliance with the conditions imposed by the conveyance to him. Thus in Texas it has been settled that a grantor of a trust deed of this class "holds the title to the land, i. e., the full title, legal and equitable, subject to the lien created by the instrument for the payment of the debt"; that the grantor and those succeeding to his estate have a right to the possession, and for most purposes, the legal title; that a conveyance made by the trustee in a mode, at a time, or under circumstances not authorized by the trust deed is inoperative at law as well as in equity: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59; *Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534; *Mills v. Traylor*, 30 Tex. 11; *Young v. Van Benthuysen*, 30 Tex. 762.

The courts of some of the states have made a distinction between the original purchaser at a trustee's sale and persons subsequently acquiring title under him. Whatever may be the rules in those states as to the original purchaser, their courts hold that subsequent purchasers may rely upon the recitals in the trustee's deed, and if those recitals support the authority of the trustee to sell and convey, they are conclusive in favor of such subsequent purchasers, unless they acquired their title with notice of the frauds or defects complained of: *Gunnell v. Cockrill*, 79 Ill. 79; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 271; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Hamilton v. Lulukey*, 51 Ill. 415; *Streitz v. Hartman*, 26 Neb. 33. With respect to the original purchasers, the above cases assume that, as against them, the conveyances under consideration would have been set aside in equity, though such assumption was not necessary to the determination of any of the cases. There are other cases in which the general rule is stated to be that the original purchasers from trustees must ascertain, at their peril, the existence of the facts authorizing the trustees to sell and convey, and in which the statement is something more than a *dictum*: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. So far, however, as these cases have fallen within our observation, the original purchasers were parties for whose benefit, or in payment of whose debt, the sale was made, or who had notice at the time of their purchase of the irregularity complained of. Therefore we hesitate to accept the rule under consideration as applicable even as against the original purchasers when they were not interested in the sale and they purchased in good faith, while innocently ignorant of the act or omission

of the trustee which is urged to invalidate his conveyance. In favor of such purchasers we think the equitable maxim must be applied, that where the equities are equal, the legal title prevails.

Respecting the presumptions arising for or against one claiming under a conveyance from a trustee, the authorities are exceptionally meager. In all those jurisdictions in which the rule prevails that such a conveyance always operates upon the legal title, no question could arise in actions at law regarding these presumptions; for the conveyance, if sufficient in form, would vest the title in the grantee, and if insufficient, would not so vest it, and in either event there would be nothing for or against which any presumption could operate: *Kaester v. Burke*, 81 Ill. 436; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336. So far as the courts have spoken at all upon this topic, what they have said tends to sustain the rule "that a presumption is to be indulged that the trustee did those acts *in pais* which were conditions precedent to a valid sale by him, and that the burden of showing the contrary is on those who question the validity of the sale": *Graham v. Fitts*, 53 Miss. 307; and the principal case. The deed of trust may declare that if the trustee conveys, the recitals in his deed shall be evidence of the facts therein recited, in which event no doubt such recitals as he may make pertinent to the execution of his power are *prima facie* evidence in favor of the purchaser: *Carter v. Abshire*, 48 Mo. 300. In some cases it seems to have been taken for granted that because a deed of trust, by so stipulating, may make the recitals in any deed made by the trustee evidence of the facts therein recited, a deed without such a stipulation leaves the trustee without authority to make recitals which shall be competent evidence, and that his grantee must offer other evidence to show that such recitals are true: *Neilson v. County of Chariton*, 60 Mo. 386; *Vail v. Jacobs*, 62 Mo. 130; *Wood v. Lake*, 62 Ala. 489; *Gibson v. Jones*, 5 Leigh, 370. This is certainly a mistaken view. The recitals made by the trustee surely must be taken as at least *prima facie* evidence of the existence of the matters therein stated: *Savings and Loan Soc. v. Deering*, 66 Cal. 281; *Beal v. Blair*, 33 Iowa, 318.

EHRMAN v. HOSKINS.

[67 MISSISSIPPI, 192.]

WILLS. — PAROL EVIDENCE IS NOT ADMISSIBLE TO PROVE THAT A TESTATOR INTENDED to devise a different lot from that described in his will, and that his intention was not correctly expressed in the will, owing to a misapprehension of the draughtsman as to the lot intended to be described.

EJECTMENT to recover possession of a house and lot in Vicksburg. Both parties claimed title under H. L. Bond, the defendant as his devisee, and the plaintiffs as successors in interest of his heirs. The will, under which the defendant claimed, devised to her, for the period of her natural life, a lot of land in Vicksburg, described as "that part of lot 56 in square 11, on the original plat of Vicksburg, commencing at the southeast corner of said lot on Munroe Street, and running thence north along said street twenty feet and ten and one



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LADD *v.* CITY OF BOSTON.

[151 MASSACHUSETTS, 585.]

Covenants restricting use of land.



LADD v. CITY OF BOSTON.

[151 MASSACHUSETTS, 585.]

EASEMENTS. — RIGHT TO HAVE LAND BUILT UPON FOR THE BENEFIT OF LIGHT AND AIR to neighboring land may by deed be made an easement, and may be created by words of covenant as well as by words of grant.

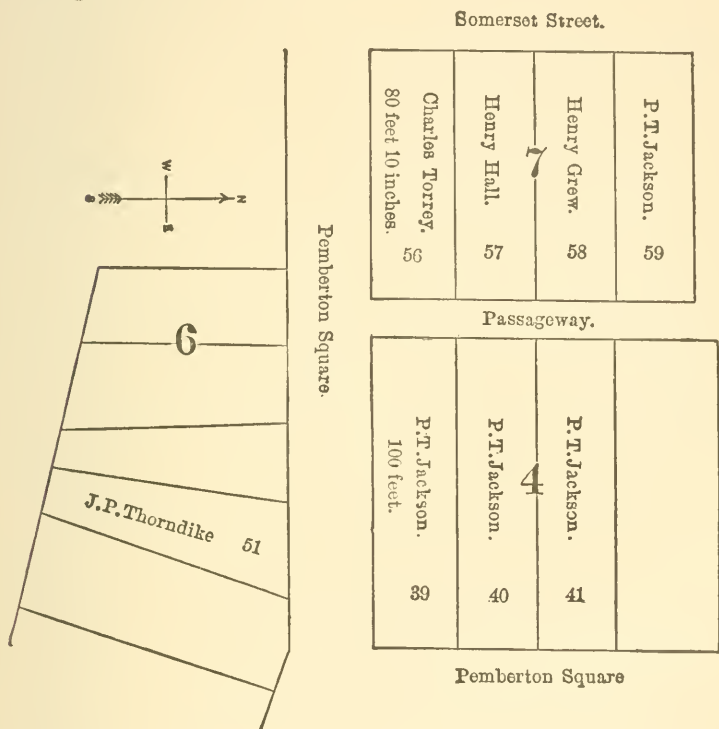
EASEMENTS. — IN ORDER TO ATTACH AN EASEMENT TO A DOMINANT ESTATE, it is not necessary that it shall be created at the moment when either the dominant or the servient estate is created, if the purport of the deed is to create an easement for the benefit of the dominant estate.

EASEMENTS RESTRICTING THE USE OF LANDS. — If the owners of lots fronting upon a square of land in a city mutually agree that certain places, avenues, and passage-ways, as laid out upon a plat, shall remain open as an appurtenant to several lots, and that no building shall be erected upon certain lots within ten feet of the front line thereof, unless a majority of the owners shall so elect, nor shall any building extend above a specified height, such agreement entitles each of the owners to an easement, and if a city, in the exercise of the right of eminent domain, takes a lot which is subject to such easement in favor of an owner of another lot, it must compensate him for the loss of his easement.

PETITION to superior court, claiming that petitioner, on April 20, 1886, was the owner of land known as lot 51, together with a dwelling thereon, which lot formerly belonged to J. P. Thorndyke, and was shown on a plan of lots, dated October 6, 1835, situate on Pemberton Square, formerly known as Phillips Place, in Boston, and that petitioner was also, as the owner of such lot, entitled to rights and easements in lots 39, 40, and 41 of division 4, and lots 56, 57, 58, and 59 of division 6, and a six-foot passage-way shown on the same plan; that by an indenture of the same date of the said plan, duly recorded, and by another indenture, dated November 7, 1837, also recorded, an agreement was made "between Patrick T. Jackson, his heirs and assigns, and the owners of the balance of said sixty-four lots, their heirs and assigns, by which it was mutually agreed, in the strongest and most unmistakable terms, that the place, avenues, and passage-ways as laid out on said plan shall forever remain open and unencumbered as appurtenant to the several lots, to be used for all purposes requisite for the usual full enjoyment of such dwelling and warehouses and their appurtenances as shall be erected thereon, conformably to the provisions therein contained, and that no building shall be erected upon lots comprised in the fourth division within ten feet from the line thereof on Phillips Place, unless a majority of the owners shall elect to have swelled or circular fronts, in which case the swelled or circu-

lar portions may extend to any distance within seven feet of said line; nor shall any building extend westerly beyond sixty-five feet from said line at a greater height than ten feet above the level of the six-foot passage-way in the rear of and against the said lots respectively; and the fact is, that said owners, by a majority or otherwise, did not elect to have swelled or circular fronts; and the indentures aforesaid further provide that no building shall be erected upon the lots comprised in division numbered 7 extending easterly beyond the distance of sixty-six feet from Somerset Street at such a height that the eaves shall be above the floor of the first or principal story, excepting upon lot numbered 65; provided, however, that if, at any time thereafter, the owners of the said lots, or a majority of three fourths parts of them, shall consent to the waiver or discharge of any or either of the conditions abovementioned, then the same shall cease and determine upon the execution of a sealed instrument declaring such assent, and the recording of the same in the registry of deeds, and the several lots shall thenceforth be held by their respective owners free and released from all the conditions so intended to be released and discharged; and further, that a breach of any of the conditions above specified shall not work a forfeiture of the estate, but shall give to the said Jackson, his heirs or assigns, or the owner of any lot interested in such breach, full power and authority to enter upon the lot, with servants and instruments, and take down and remove any building that may have been erected in violation of such condition." The petition also alleged that no release of the abovementioned conditions had been made by the owners of lots; that the commissioners for the erection of a new court-house in Boston had taken lots 39 to 41 inclusive, and lots 56 to 59 inclusive, and the six-foot passage-way, together with the easements and privileges of the petitioner; that the street commissioners had never allowed or paid petitioner any damages occasioned to him by such taking; that petitioner was aggrieved "that his easements and privileges of light and air, and especially his view into the open area of Pemberton Square, and also an easement reserved to him by said indenture, shall have been taken away and destroyed and no compensation allowed him therefor"; and he asked for a jury to assess his damages. The respondent moved to dismiss the petition, on the ground that the petition did not show any taking of any estate, property, or land of the petitioner for which he

was entitled to compensation from the city. The motion was granted, and the petitioner appealed. The following plan shows a portion of the plan referred to, so far as it is material to the present controversy: —



I. R. Clark, for the petitioner.

T. M. Babson, for the respondent.

HOLMES, J. The ground of the motion to dismiss the petition is, that the petition does not show any taking of any estate of the petitioner for which the city of Boston is liable, and that is the only question upon which we pass. It may be that a separate petition ought to have been filed for each estate taken, but upon that we express no opinion at this stage. Neither do we express any opinion on the question of parties, or upon the effect of a previous petition having been filed in respect of some of the same lots, if such be the fact.

It appears that the petitioner's predecessor in title and the then owners of the land taken by the city for the new court-

house were parties to an indenture whereby it was covenanted, among other things, that the land in front of the petitioner's lot and just across the street should not be built upon beyond a certain line on what is now Pemberton Square, and should be subject to some other similar negative restrictions. This land the city has taken free of these restrictions. If the plaintiff has an easement, the city must pay for it.

The right to have land not built upon, for the benefit of the light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed: *Brooks v. Reynolds*, 106 Mass. 31. And such an easement may be created by words of covenant, as well as by words of grant: *Hogan v. Barry*, 143 Mass. 538. In order to attach the easement to the dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate: *Louisville and Nashville R. R. Co. v. Koelle*, 104 Ill. 455; *Wetherell v. Brobst*, 23 Iowa, 586, 591; *Gale on Easements*, 6th ed., 59. Of course it does not matter that by the same deed numerous parties grant similar or reciprocal easements over, or in favor of, many parcels of land: *Tobey v. Moore*, 130 Mass. 448; *Beals v. Case*, 138 Mass. 138, 140. Neither is it material that the indenture provides that a majority of three fourths of the owners of the lots concerned may terminate the rights which it creates.

If, then, we are to assume that at the time of the indenture the owner of the petitioner's lot was a different person from the owner of the opposite lot taken by the city, we have a plain case of a grant of easements to have certain parts of the latter not built upon, or not built upon above a certain height. Such would seem to have been the fact from the plan, referred to in the petition, which was exhibited to us at the argument, and from the petition itself, which states that the petitioner's right acquired under the indenture was an easement.

It follows that we need not consider the argument for the city, that owners of purely equitable restrictions are not entitled to maintain a petition of this nature.

Motion overruled.

COVENANTS RESTRICTING THE USE OF LAND. — Among the numerous attempts at a comprehensive statement of the legal doctrine on this subject, we may quote that of Professor Washburn: "It is now generally held that when land is divided up by the owner into numerous lots, and sold, and in every deed

a condition or restriction is inserted, which is shown, either by its nature, or position of the property, or words of the deed, or other evidence, to be inserted for the benefit of the other lots, there is created a perpetual servitude upon the land in favor of the other lots": Washburn on Easements, 4th ed., 115. The following statement of the rule was made by Mr. Justice Soule, in a case in Massachusetts: "It often happens that owners of land, which they design to put into the market in lots for dwelling-houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restrictions at naught": *Sanborn v. Rice*, 129 Mass. 387, 396. "That such a purpose is a legitimate one, and may be carried out consistently with the rules of law, by reasonable and proper covenants, conditions, or restrictions cannot be doubted. Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade": *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. Nor can there be any doubt that in whatever form a restraint is placed on real estate by the terms of the grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding, as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both at law and equity: *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715.

The fact that the deed contains a condition of forfeiture of the estate and reverter of title for a violation of the covenant does not oust the remedy of the covenantee in equity. On the contrary, the remedy in equity, being less severe to the vendor, is more reasonable, and hence to be preferred: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. That the fact that a penalty or forfeiture is imposed for doing a prohibited act affords no objection to the interposition of equity to enjoin the doing of the act, see *Coles v. Sims*, Kay, 56; *Barrett v. Baggrave*, 5 Ves. 555; *Hardy v. Martin*, 1 Cox, 26. On analogous grounds, specific performance will be decreed, notwithstanding the contract liquidates the damages: *Fac v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 10 Jur., N. S., 1123. Equity will not enforce the condition of forfeiture, because equity does not decree forfeitures; that condition is enforceable only in the legal forum: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. That equity will not enforce forfeitures, see *Crane v. Dwyer*, 9 Mich. 350; 80 Am. Dec. 87; *White v. Port Huron etc. R. R. Co.*, 13 Mich. 356; *Wing v. Bailey*, 14 Mich. 83; *Horsbury v. Baker*, 1 Pet. 232; *Livingstone v. Tompkins*, 4 Johns. Ch. 415; 8 Am. Dec. 598; *Smith v. Jewett*, 40 N. H. 530; *Warner v. Bennett*, 31 Conn. 468.

If the covenant of reservation is one which the parties have the right to make, the original covenantee will be entitled to the aid of a court of equity to restrain its violation as long as he lives and remains the owner of

the property, although it may be a covenant personal to him and not running with the land: *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632; *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715; *Badger v. Boardman*, 16 Gray, 559; *Peck v. Conway*, 119 Mass. 546.

There is, of course, no doubt that as between the covenantor and the covenantee the latter may maintain an action for damages for a breach of the covenant; and it is equally clear that he may have an injunction to restrain its breach without showing actual damage: *German v. Chapman*, 7 Ch. Div. 271; *Richards v. Revitt*, 7 Ch. Div. 226; *Hall v. Wesster*, 7 Mo. App. 56, 62. And where there has been a sale of a large tract of land laid off into lots upon the condition of certain restrictions in the use of every one of the lots, which restrictions are inserted in every one of the deeds, one of the vendees, it has been held, is equally entitled to an injunction against another of the vendees to restrain him from violating the restrictions, irrespective of the question of actual damages: *Hall v. Wesster*, 7 Mo. App. 56, 62.

Where land is sold subject to such a restrictive covenant, and the language of the deed and the situation of the land with reference to other land of the grantor retained are such as to make it clear that the restriction in the deed upon the use of the land sold was intended for the benefit of the land retained, this is held to create a negative easement, or, as the courts sometimes say, an equity in the land sold for the benefit of the land retained, such as binds all the successors in title of the land subject to the easement, provided they have notice thereof, express or constructive: *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Whatman v. Gibson*, 9 Sim. 196, 207; *Mann v. Stephens*, 15 Sim. 377; *Coles v. Sims*, Kay, 56, 69; *Child v. Douglas*, Kay, 560, 571; *Jeffries v. Jeffries*, 117 Mass. 185; *Saunborn v. Rice*, 129 Mass. 396; *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632; *Peck v. Conway*, 119 Mass. 546, 549; *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715; *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129; affirmed, 11 Ch. Div. 866; *Clark v. Martin*, 49 Pa. St. 289; *Western v. McDermott*, L. R. 1 Eq., 499, 504; affirmed, L. R. 2 Ch. 72; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *Burrow v. Richard*, 8 Paige, 354; *Brouwer v. Jones*, 23 Barb. 153; *Linzee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. This doctrine is variously expressed in judicial opinions. Such a restriction has been held to be in the nature of a servitude, the benefit of which would become attached to the other estates retained or contemporaneously or subsequently conveyed by the grantor as a legal right or easement, and would pass with them as appurtenant: *Jeffries v. Jeffries*, 117 Mass. 185. To the same effect are *Peck v. Conway*, 119 Mass. 546, 549; *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715. The doctrine has been expressed with great clearness by Bigelow, J., in the case last cited, which may perhaps be regarded as the leading American case on the question. The doctrine was thus expressed by Vice-Chancellor Hall, after reviewing the previous decisions in the English courts of chancery on the subject: "Any one who has acquired land, being one of several lots laid out for sale or building plats, where the court is satisfied it was the intention that each one of the several purchasers should be bound by, and should as against the others have the benefit of, the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and this right, that is, the benefit of the covenant, inures to the assign of the first purchaser, — in other words, runs with the land of such purchaser. . . . This right," continued he, "exists not only where the several parties execute

a mutual covenant, but wherever the mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor, upon their heirs, where his vendor has contracted with him that he shall be the assign of it; that is, of the benefit of the covenant. And such a covenant need not be expressed, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important": *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129. This decision was affirmed on appeal, and one of the lords justices (Baggallay) went so far as to adopt entirely the language of Vice-Chancellor Hall, above quoted.

It is not to be supposed from the foregoing that it is at all necessary, in order to have such a covenant enforced for the benefit of adjoining or adjacent land, that it should be, in a technical sense, a covenant running with the land conveyed by the deed which contains the covenant. "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform": *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715, 718; opinion by Bigelow, J. In the leading English case in which the principle upon which courts of equity grant relief was formulated and applied by Lord-Chancellor Cottenham, that eminent judge said: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land in a particular way, is what I never knew disputed. Besides that, the covenant being one which does not run with the land, this court cannot enforce it. But the case is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendor, and with notice of which he purchased. Of course the price will be affected by the covenant." And again he said: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased": *Tulk v. Moxhay*, 1 Phill. Ch. 774, 777; quoted in *Keates v. Lyon*, L. R. 4 Ch. 222, and recognized in *Child v. Douglas*, Kay, 560. Quoting this language, it has been added by Lord Justice Selwyn: "The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical objections depending upon the covenants running or not running with

the land": *Keates v. Lyon*, L. R. 4 Ch. 223. So in a later case, it is said by Vice-Chancellor Hall: "It is now well settled that the burden of a covenant entered into by a grantee, in fee, for himself, his heirs and assigns, although not running with the land, at law, so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, he having notice thereof": *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129. It may be suggested, though not with absolute confidence, that the only distinction under this head is this: if the covenant is one which technically runs with the land, it may bind the successors in title of the original covenantor, irrespective of the question of notice; for they would be held to take the land subject to any burdens attaching to it under the strict rules of law, whether they had notice of such burdens or not; whereas if the covenant does not run with the land, they must have notice of it, actual or constructive; otherwise they occupy in respect of it the attitude of *bona fide* purchasers without notice, and it cannot be enforced against them in a court of equity.

Where the covenants are mutual, there is no difficulty whatever in dealing with this question. Thus where the owner of a particular piece of land, on which a row of houses was intended to be built, executed a deed reciting that it had been laid out, and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of that land that the several proprietors, for the time being, should observe and abide by the several restrictions and stipulations therein contained, and that he himself would at all times observe the like restrictions and stipulations, and these restrictions and stipulations were also enforced by mutual covenants, — although the question afterwards arose between subsequent purchasers of different portions of this piece of land, — it was held the owner was bound by, and that the other was entitled to enforce, the covenants: *Whitman v. Gibson*, 9 Sim. 196; decision by Vice-Chancellor Shadwell. But while, in the absence of special circumstances rendering the enforcement of such a covenant inequitable, which will be spoken of hereafter, the fact that the grantor entered into similar covenants on his part in respect of the land retained places the right of a successor in title of such land to equitable relief in the form of an enforcement of the covenant or of an injunction to restrain its violation, entirely beyond question, yet it is not to be inferred from this that it is at all necessary, in order to such equitable relief, that there should be a mutuality of covenants. This is made very clear by the opinion of Sir W. Page-Wood (afterwards Lord Hatherley). He ruled that the objection to a motion for a restraining order that there were no reciprocal covenants was "no real objection." "It only amounts to this," said he, "that the defendant, Douglas, has covenanted with the vendor not to perform certain acts, and has not thought fit to make the vendor enter into a covenant with him to take similar covenants from the future purchasers of the remaining land. The reciprocal advantage he reobtained by Douglas is really the conveyance of the land; and it cannot be said that for the want of a reciprocal benefit which he did not stipulate for he cannot be compelled to perform that which he has expressly covenanted to do." Further on, he said: "I have felt some difficulty throughout in seeing how reciprocity could have anything to do with the question. Where a part of the remaining property of the vendor has been sold to another person, who must be said to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be said to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant

was in fact inserted in the other purchaser's deeds, because he must be taken to have bought all the rights connected with this portion of the land": *Child v. Douglas*, Kay, 560, 569-571.

Where an owner of property divides it and sells a portion of it, and inserts in the deed of conveyance a restriction as to the use of the portion sold, it is very easy to insert in the deed a statement that this restriction is intended for the benefit of the land retained; for, as we shall see hereafter, this will not be presumed in all cases, and cases are found in the books where the absence of such a statement has been regarded as an important ingredient in a collection of circumstances influencing the court in its determination to refuse equitable relief. See, for instance, *Renals v. Cowlishaw*, 9 Ch. Div. 125; affirmed, 11 Ch. Div. 866. But it is not to be inferred that it is at all necessary to equitable relief that this purpose should be expressed in the deed. If from the situation of the land retained with reference to that conveyed, or from other attending circumstances, it becomes clear that it was the intention of the parties to grant a negative easement in the land sold for the benefit of the land retained, it does not make any difference whatever that this purpose is not expressed in the deed; and indeed in most of the cases where equitable relief has been granted the purpose was not so expressed: *Mann v. Stephens*, 15 Sim. 379; *Patching v. Dubbins*, Kay, 1; 2 Week. Rep. 2; *McLean v. McCoy*, 21 Week. Rep. 798; *Peck v. Conway*, 119 Mass. 546; *Green v. Creighton*, 7 R. I. 1; *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713; *St. Andrew's Church Appeal*, 67 Pa. St. 512; *Clark v. Martin*, 49 Pa. St. 289. The reason is, that there could be no object in so stipulating except for the benefit of the land affected beneficially by the stipulation. As was said by Sir Montague Smith, in giving the judgment of the privy council: "There could be no object in stipulating that it [the land] should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoin the plat. Therefore the implication is natural and irresistible, that when the parties speak of leaving this piece open for the common benefit of both, they mean for the common benefit of both as holders of the adjoining lands": *McLean v. McCoy*, 21 Week. Rep. 798.

According to a holding of the court of appeals of New York, it is not even necessary that the restrictive agreement should be put in any deed of conveyance, or that it should be shown by any writing. In that case, the owner of lots on both sides of a city street made a plan exhibiting a street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots which he had sold and should sell should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan, none of them being restricted by their conveyances or bound by any covenant in respect to the extent or the mode of their occupation. It was held that a subsequent purchaser of one of these lots, with constructive notice of the facts, was not entitled, as against another purchaser, to build upon the eight feet adjoining the street. After conceding that the conclusion of the court could not be supported upon the principle that the eight-foot strip had been dedicated to public use, Sutherland, J., in giving the opinion of the court, said: "From the facts found by the judge at special term, it appears that when the plaintiff Maxwell and others bought lots in St. Mark's Place of Davis they were shown the map or plan of St. Mark's Place, showing that the houses on both sides of the place were to be set back eight feet from the street, and that they bought on the assurance of Davis that that plan should be observed in building on the place; that the strips of eight feet in width on both sides

of the street should not be built upon, but kept open. It is to be presumed that they would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, they therefore bound Davis, in equity and good conscience, to use and dispose of all the remaining lots so that the assurances upon which Maxwell and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity": *Tallmadge v. East River Bank*, 26 N. Y. 105, 107. The meaning of this, of course, is, that such an equity or negative easement in land for the benefit of adjacent land may be created by a parol agreement or understanding between the original owner and purchasers of different parts of the land, and that notice of this agreement, actual or constructive, will bind a subsequent purchaser of one of the tracts in like manner as it would have bound the original owner, from whom he purchased. This case stretches the doctrine of preceding cases further than any case in the books known to the writer.

It has been held to be sufficient that the defendant buys with notice that it is claimed that there are restrictions which will prevent the defendant from acquiring a right, as purchaser of the lots, to build outside of a prescribed building line. It has been also said that the uniformity of the position of all the houses which have previously been built, namely, the fact that they all front upon one line, is probably sufficient alone to put a subsequent purchaser on inquiry as to the existence of an agreement for a building line: *Tallmadge v. East River Bank*, 26 N. Y. 105, 111. It is the settled law that in order to sustain a proceeding in equity to restrain the violation of such a restriction it must be shown that the defendant took the land with notice, either express or constructive, that the restriction existed, and that it was intended for the benefit of the plaintiff's estate. In declaring this principle, it has been added: "It is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff which in equity, by accepting the grant, the defendant would be bound to observe": *Badger v. Boardman*, 16 Gray, 559, 561; citing *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. In conformity with this view, the general rule has been stated to be, that if parties purchase land with notice of a covenant concerning it, but which does not run with the land, equity will not permit them to do anything contrary to the true meaning of that covenant: *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Patching v. Dubbins*, Kay, 1. But on this subject it has been ruled that the owner of the land charged with such servitude is bound by the covenants in the deed of his remote grantor by which it was created, although it is not mentioned at all in the deed under which he immediately takes, that is, in the deed to him, and although he has no knowledge of it in fact; for as he derives his title under a deed which contains the covenant, he is bound to take notice of its provisions: *Peck v. Conway*, 119 Mass. 546; citing to this point, *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. Upon the question, What will amount to evidence of notice in a particular case? it has been ruled that where land had been laid out for building a row of houses on a general plan, according to which no

building was to be erected within six feet from the projected road in front of the row, a purchaser of one of the plats, being aware of the general scheme, and buying subject to the terms of the printed form of contract relating to the whole estate, which restrained him from building within six feet from the road, and knowing that another plat had been previously sold and built upon according to the general scheme, must have been considered to have known that the previous purchaser had bought subject to a similar restriction: *Child v. Douglas*, Kay, 565. It is believed that in respect of this question of notice there is a distinction between notice of the fact of the covenant and notice of the effect of it. The distinction is believed to be that stated above, that the owner of land will be conclusively presumed to have notice of any covenant in a deed which constitutes his chain of title, and that in so far as that covenant necessarily burdens his land he takes subject to it, whether he has actual notice of it or not. This seems to be an unavoidable conclusion from the truism that a grantee takes only what his grantor conveys. On the other hand, although there may be a restrictive covenant in his chain of title, it does not follow that he will have notice from the words of the covenant themselves that the effect of the covenant is to impose a servitude upon his land for the benefit of adjoining or adjacent land belonging to some one else; the language of the deed may be equally consistent with a purpose on the part of the covenantor to impose the restriction for his own personal benefit to effect some present or collateral purpose of his own. It is upon this distinction that nearly all the cases separate.

It must be constantly kept in mind that in every case of this kind the paramount and controlling question to be determined by the chancellor upon an interpretation of the deed containing the covenant, in connection with the surrounding circumstances and other applicatory evidence, is, whether the covenant was really intended for the benefit of the land retained, or whether it was intended to subserve some purpose personal to the covenantor, so that after parting with the land retained he might be still at liberty to release the covenant at his pleasure. As a general rule, such a covenant will be regarded as having been intended for the benefit of other land retained by the covenantor, since, as a general rule, it could have no other purpose. This will be obvious if we consider the case of an owner of two adjoining city lots selling one of them and imposing upon it a restriction as to the manner in which it shall be used; prohibiting its use for a livery-stable, a dram-shop, or the like; or prescribing a building line within a given distance from the line of the street on which it fronts. In such a case it is difficult to understand that the covenant could have had any other purpose than to benefit the land retained by prohibiting uses of the land sold, which, though not unlawful, would work more or less annoyance to an occupier of the land retained, and further diminish its value. If after imposing such a restriction upon the use of the land sold for the benefit of the land retained the owner subsequently sells the land retained to another grantee, it is undeniably logical and obviously just that the negative easement or equity which he has created in the land first sold for the benefit of the land afterwards sold passes to the second grantee and to his successors indefinitely. At least, equity will so regard it; for this is the sense and substance of the engagement. In giving the opinion of the supreme court of Pennsylvania so holding, Lowrie, C. J., said: "In a proceeding in the common-law form, it would be necessary to inquire into the form in which the right is reserved, in order to decide whether it should be sued for as a condition or a covenant, or as a simple contract. But in the equity form of proceeding we inquire only into its sub-

stantial elements, — What does it assure, and to whom? Here the duty of the defendant is so plain that one may read it running; it is clearly inscribed on every link of the chain of his title to the lot. He took his title expressly on the terms already briefly mentioned. He was not to erect on the back part of his lot any building higher than ten feet, afterwards changed to eleven. To whom, then, does he owe the duty? No one doubts that it is to the grantor, who reserved or imposed the duty, and to his heirs and assigns. But did the grantor reserve this duty to himself, his heirs and assigns, as a mere personal duty, and thus retain in himself or them the vain right of saying: 'That lot is not mine, but the owner is subject to my pleasure in the mode of building on it'? Common sense forbids this, and the law would not allow itself to be troubled with such vain engagements. . . . Common sense cannot doubt its purpose, and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be. Very plainly, also, it is a duty that admits the right of the owner of the adjoining lot to have the privilege or appurtenance of light and air over the defendant's lot, and that admits this to be so far subject or servient to that, that the buildings on this must, for the benefit of that, be so limited in height, according to the condition of the deeds. So such stipulations are always regarded when the form of remedy is selected and allowed, which can admit of treating the case according to the very substance of the contract": *Clark v. Martin*, 49 Pa. St. 289, 297.

But in many cases the courts have found that such covenants were not intended by the covenantee for the benefit of any land retained by him. In one case, Sir C. J. Selwyn, L. J., answering an argument that such was necessarily the effect of such a covenant, said: "It is obvious that such a definition does not meet all cases, for cases may be put, in which a vendor might lawfully and reasonably insist upon such covenants, even when the covenants comprised the whole of the property to which he was entitled at the date of the covenant,—as in the case of the purchase and sale of a strip of land adjoining a large park by a person who had at the time no interest in the park, but who hoped to inherit or purchase it. Assuming the vendor of the strip of land to purchase or inherit the park, and to sue the purchaser for breach of the covenant, the purchaser of the strip of land would, in a court of equity, be unable to justify a violation of the covenant by reason of the injury sustained by the vendor having arisen only in consequence of his subsequent acquisition of the park": *Keates v. Lyon*, L. R. 4 Ch. 218, 227. The doctrine, then, is, that an owner or lessee of land cannot have relief in equity in the form of an enforcement of such a covenant, or have an injunction against its violation, unless the court can infer from the language of the deed in which the covenant is contained, when construed in reference to the surrounding circumstances, an intention, on the part of the parties to the deed, to insert the covenant therein for the benefit of the particular property acquired by the plaintiff. Affirming this principle, it has been said: "Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed": *Badger v. Boardman*, 16 Gray, 559, 560; opinion by Bigelow, C. J. In another case the doctrine was thus stated by the same learned judge: "It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial

and advantageous the occupation of the estate granted, when it should become divided into separate parcels; and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land, and no condition annexed to its possession and enjoyment, can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition, as such, imposed on its use or enjoyment by any prior grantor": *Jewell v. Lee*, 14 Allen, 145, 149; 92 Am. Dec. 744.

Where the covenant is by the vendor himself, the rule is, that the restriction is taken most strongly against him, modified by the necessity of giving effect to every portion of the instrument, so far as it can reasonably be done. A good illustration of this is found in a case where the vendor of a number of building lots in a terrace inserted in each deed a covenant, *on his part* unexplained by any recital in the deed, that no building should be erected on any part of the land of the vendor lying on the east side of the terrace, *and opposite to the plat of land thereby conveyed*. It was held by Sir W. Page-Wood, V. C. (afterwards Lord Hatherley), that the words above italicized were not merely descriptive of the position of the land, but that they restricted the general meaning of the former words; and that the covenant applied only to that part of the land which lay immediately opposite the lot of the covenantee in the particular deed. In the course of his opinion, he said: "There is no recital in this deed of an intention of any kind, and therefore the question is narrowed to the very words of the covenant itself. I had at first an inclination of opinion that if the words were doubtful, and it could be construed in favor of the defendants, the general rule would be this: that it being equivalent to a grant on the part of the vendor, the construction must be taken most strongly against the grantor. But, on the other hand, there is another rule of construction well established, namely, that it is right to give effect to every word, if it can reasonably and properly be done. I do not feel, therefore, at liberty to say that it is doubtful if in putting one construction upon this covenant I give complete effect to all the words, whereas I should be leaving a portion of the words without effect in giving to the covenant a contrary construction. If I take the construction of the plaintiff, I strike the words 'and opposite to the plat of land' out of the covenant; that is, the covenant would be just as intelligible in the sense of the plaintiff without those words as with them, or indeed much clearer. It would be effective if it were only 'any part of the land lying on the east side of the said terrace.' Those words alone would have given the plaintiff the right for which he now contends. Am I at liberty to say that the other words are superfluous, and wholly ineffective, and are merely thrown in as additional description? I do not think that would be a sound construction. The phraseology would be ill-selected. What I should have expected would have been 'lying on the east side of the

terrace,' or 'opposite to the terrace.' I do not see why the definition 'opposite' should be confined to opposite to the particular piece of land thereby conveyed, if the parties were stipulating to have the whole of the land unbuilt upon opposite the terrace. If that were the intention, it would have been clearly expressed on both sides, and there would not have been a distinct reference to the particular plat of land conveyed. The construction, therefore, which makes every word operative would be, that there should be no building on the piece of land lying to the east of the terrace and also opposite to the plat conveyed; and then the word 'opposite' becomes more definite, and the land must possess both the qualities of being on the east side and also opposite. The scheme was, that this gentleman, being minded to make a terrace, and to give every person some land opposite to his house, free from buildings, makes a particular covenant with each person in the terrace that the piece of land opposite his house should not be built upon; and if the terrace had been completed, each party would have had his house, and a piece of land opposite unbuilt upon; and in a certain sense, though very inadequately, there would have been a security that the whole land should not be built upon. But in that case every one would have had to rely upon his neighbor, as either of them might have released his covenant, and it might have been reduced to this, that one might be left with only a strip of land opposite unbuilt upon to enable him to look from his own windows to the distant country, and to obtain light and air. That would be a very improbable agreement; still, it is not a benefit to be altogether despised, or so utterly improbable a contract as to authorize me to give a more extended operation to the covenant. I am therefore compelled to come to the conclusion, looking to the absence of the recital of an intention that the whole of the land should not be built upon, and to the covenant alone, and the effect which I am bound to give to every word if it can have a distinct legal bearing and is not mere tautology, — I am reluctantly compelled to decide that the meaning is such as I have described, and that the plaintiff is not entitled to relief": *Patching v. Dubbins*, Kay, 1, 14.

Where the covenant is, not to build within a certain distance from the street on which the land is bounded, the erection of a bay-window, which has the effect of carrying the front line of the building forward beyond the building line so agreed upon, and to that extent obstructing the lateral view of other owners, is a violation of the covenant, and will be enjoined in equity; and this, although the structure does not rest upon the ground, but is extended out from the house at a distance of four feet above the ground, and from that point to the top of the building. In so holding, the court, speaking through Mr. Justice Soule, said: "We cannot regard this addition as an ordinary projection or variation in detail in the arrangement and ornamentation of the front of the house, which the parties to the deed from the city may have contemplated as being proper under the provisions of the deed. The addition is, in substance and effect, a removal of the front line of the house three feet and three inches nearer to the street than the deed permits. The effect on the adjoining estates is substantially the same as if the addition were supported by a wall rising from the ground perpendicularly to its front line instead of being supported, as it now is": *Sanborn v. Rice*, 129 Mass. 387, 397.

The deed of a lot of ground bounded on a street contained a condition that "no dwelling-house or other building shall be erected on the rear of said lot." The deed also recited that the building then on the land conformed to the condition. In view of this recital, it was held that the deed presented

no ambiguity, but that all that part of the lot described in the deed which lay behind the house was to be regarded as "the rear of said lot," within the meaning of the condition under consideration. It was accordingly held that the erection of an L in the rear of the house, which originally stood on the lot, about seventeen feet wide, and of a height equal to the height of the house, was a violation of the condition, such as warranted relief by injunction: *Sanborn v. Rice*, 129 Mass. 387, 397.

From this it follows that where the covenant is intended for the benefit of land retained by the covenantor, and he has afterwards parted with such land to another vendee, he cannot thereafter release the covenant, because he cannot do anything in derogation of the rights of his subsequent vendee. The covenant having passed with the land to the vendee, and inured to his benefit as an easement annexed to his land, and as there is a reasonable presumption that the existence of the easement was taken into consideration in fixing the purchase price of the land, the original vendor cannot release it, or otherwise deprive his vendee of the benefit of it, any more than he could arbitrarily reclaim the whole property from his vendee. The right is in the nature of property; it has been purchased and paid for; it is vested; it is therefore under the protection of the law, and cannot be divested by the mere act of the vendor. The rule is, that where the vendor sells a portion of his land, and retains a portion, and makes a covenant of this kind with his vendee, and requires the same covenant from his vendee, these covenants create reciprocal rights and obligations, which are handed down from successor to successor, indefinitely, so that a purchaser who receives a substantial injury from a breach of such a covenant is entitled to the aid of a court of equity for redress by injunction: *Western v. McDermot*, L. R. 1 Eq. 499, 504. And even where the second purchaser did not actually know that the previous purchaser had bought subject to a similar restriction, still, where he had purchased all the rights of his vendors relating to a particular plat of land, it became impossible for the vendors, from the time of his purchase, to release the former purchaser from his covenant not to build within six feet of the road, or to alter in any respect their rights against him: *Child v. Douglas, Kay*, 575. But it is obvious that the covenantor can at any time release the covenant, so far as his own personal rights are concerned; and where the covenants are not reciprocal, according to the observation of Lord Eldon, if the landlord releases some of the tenants from their covenants, this, as against the landlord himself, has the effect of releasing all. He said: "The landlord, in such a case, is stipulating not only for his own benefit, but for the benefit of all the tenants in that neighborhood. If, therefore, the landlord, in some particular instance, lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant, to whom he has not given such a license. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants. It is not a question of mere acquiescence; but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all. In such cases I have always understood this court will leave the parties to their remedy at law": *Roper v. Williams*, Turn. & R. 18, 22.

It is obvious that the original covenantor may by his conduct estop himself from enforcing the covenant, although he may never have formally released it. Such a case arises where the covenantor himself has allowed the cove-

nant to be violated by the owners of various lots in the scheme of improvement, until the character of the property has become so changed that to enforce against some of the lot-owners an obligation which has been released as to many of the others would be oppressive. This was the ground on which the two cases just cited were decided. In the former of them, the Duke of Bedford, being the owner of all the property in the neighborhood of the British Museum, for the protection of a large part of that property known as Southampton House, took a covenant from the persons to whom he sold or let other parts of the property, restricting them from building upon them otherwise than in a particular way. But he himself afterwards built upon a large part of the property which was originally intended not to be built upon, and having so built, he came to the court of chancery, asking it to restrain persons who wanted to build contrary to their covenant upon an adjoining part of the property. Lord Eldon held that this would not be done. Because the complainant had so altered the property since he compelled these persons to enter into the covenants, and had so completely changed the face of it by building houses which were against the covenant, and which the persons to whom he had granted building leases might have restrained him from building, it was held that it would be now inequitable to give him the benefit of the covenant which he himself had treated as absolutely void: *Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552. Another case, decided by a single judge, Mr. Justice Pearson, presents an application of the same principle. A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on the land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beer-shop, to restrain him from breaking his covenant, and for damages. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced. There was evidence that several other houses built on other of the lots (one of them immediately opposite the plaintiff's house) had been for some time used as shops, notwithstanding the covenants, and that many of the houses adjoining the plaintiff's house were occupied, not each by a single tenant, but each by two families at equal rents. It was held that the character of the property had become so changed that the original purpose — of keeping all the estate as a residence property — for which the covenant had been entered into had failed, and that it would, under the circumstances, be inequitable to enforce the specific performance of the covenant: *Sayers v. Collyer*, 24 Ch. Div. 180. This is in conformity to an observation of Lord Eldon in dealing with such a case, where the plaintiff was the vendor and original covenantor: "Every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant amounts *pro tanto* to a dispensation of the obligation intended to be contracted by the defendant. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exercised throughout the whole proceeding. . . . In every case of this sort, the party injured is bound to make immediate application to the court in the first instance, and cannot permit money to be expended by a person, even though he had notice of the covenant, and then apply for an injunction": *Roper v. Williams*, Turn. & R. 18, 22.

A good illustration of the doctrine that the original covenantor may lose the right to enforce such a covenant in respect of a particular lot is found in a decision of the court of appeals of Kentucky, in the case of *Duncan v. Central Passenger R'y Co.*, 85 Ky. 525, where a man owning certain unimproved city property laid it out on a plan by which it was intended to be sold for residences only. He sold and conveyed several of the lots to A, with the following clause in the deeds: "It is hereby agreed between the first and second parties that no business, manufacturing, or other than dwelling houses shall be built upon said property, and no alley shall run through said property, and no building of any kind shall be put thereon fronting any other way than on Highland Avenue or the said twenty-foot alley." He afterwards sold other lots to different persons without any restrictions whatever, and he made mortgages of the rest of the property without any restrictions therein. A conveyed the lots which he had thus purchased to a street-railway company, and they commenced the erection thereon of a stable for their horses. It was held that the original vendor was not entitled to have the railway company enjoined from erecting and maintaining their stable, since the evidence showed such an abandonment on his part of the original purposes in respect of the land which induced him to insert the above restriction, and since no other vendee of his was complaining. This decision really goes no further than to hold that the original vendee may by his conduct estop himself from insisting on the performance of such a covenant or agreement, but it does not touch the rights of his other vendees; though it would seem that under the circumstances of the Kentucky case the right to relief might well have been sustained on the theory that he represented them, being the person with whom the covenant had been made. The whole case shows that one of the purposes of the covenant was to keep out of the improvement the kind of a nuisance which was put there, — a horse-car stable, and it may be doubted whether the case was well decided.

The doctrine of the preceding paragraph can have no application to a case where the original vendor, having inserted such a covenant in his deed for the benefit of the land retained by him, has sold such land to another vendee; in such a case he may estop himself by his laches, but he cannot estop his subsequent vendee. Such was the qualification put upon this case, in a subsequent case, by Sir W. Page-Wood, V. C.: "The better view is, that a landlord in such a case having secured from the purchaser or lessee of part a particular benefit in respect of the land, if he afterwards sell the rest of the land, he must be taken to sell the benefit of that covenant also": *Child v. Douglas*, Kay, 560, 572. But it is equally clear that such subsequent vendee may estop himself by his laches or acquiescence from claiming equitable relief against a violation of the covenant. In a case where this principle was clearly recognized, it was held that the mere fact that the plaintiff in a suit in equity has acquiesced in other breaches of the same covenant by other assigns of the original vendor, or even that he has broken them himself in unimportant and harmless particulars, will not debar him from the right to relief in equity against a substantial and harmful violation of it. Thus where the covenant was against building in the garden attached to the house built on the ground originally conveyed, and also against allowing trees to grow in the garden above the height of eight feet, the plaintiff might restrain his neighbor from violating the covenant as to building, although he had permitted trees to grow in the gardens of others subject to the covenants, higher than eight feet, without making objection, and although he even

allowed such trees to grow in his own garden: *Western v. McDermot*, L. R. 1 Eq. 499, 507; affirmed, L. R. 2 Ch. 72.

A covenant, condition, or agreement in a deed of conveyance will not be enforced in equity, where such changes have taken place, since the deed was executed, as to render specific performance of the covenant inequitable. This is perhaps referable to the general maxim, *Lex non cogit ad vana seu impossibilia*. It is a branch of the general doctrine relating to relief in equity, in the form of the specific performance of agreements, that such relief will be withheld where, by reason of changes of circumstances, more injustice will be worked by decreeing than by refusing a specific performance; in which cases the parties are left to their remedies at law. This doctrine was well stated, with reference to the subject under consideration, by Danforth, J., in a case in the court of appeals of New York: "It certainly is not the doctrine of courts of equity to enforce by its peculiar mandate every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case; and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable (citing *Peters v. Delaplaine*, 49 N. Y. 362; *Margraff v. Muir*, 57 N. Y. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Radcliffe v. Warrington*, 12 Ves. 331). If for any reason, therefore, not referable to the defendant, an enforcement of the covenant would defeat either the ends contemplated by the parties, a court of equity might well refuse to inquire; or if in fact the condition of the property by which the premises are surrounded has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things (citing 1 Story's Eq. Jur., 10th ed., sec. 750); and so, though the contract was fair and just when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff": *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 317; 41 Am. Rep. 365; citing to the last proposition, *Thomson v. Harcourt*, 2 Brown Parl. Rep. 415; *Davis v. Hone*, 2 Schoales & L. 340; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Clarke v. Rochester etc. R. R. Co.*, 18 Barb. 350. When, therefore, the deed recited that the object which the parties to the covenant had in view was "to provide for the better improvement of the lands, and to secure their permanent value," and the parties mutually covenanted for themselves, their heirs and assigns, that only dwelling-houses should be erected upon their respective premises, and that neither would permit or carry on "any stable, school-house, engine-house, tenement, or community house, or any kind of manufactory, trade, or business," on any part of said lands, and it appeared that at the time of the hearing of the suit in equity to enforce the covenant the neighborhood had become so changed by the growth and extension of business houses, and by the erection of an elevated railroad running opposite the second-story windows of the houses, as to render it undesirable for residence purposes, but nevertheless valuable for business purposes, it was held that, the entire purpose for which the covenant was inserted in the deed having failed, equity would not decree enforcement of the covenant, but would leave the plaintiffs to their remedy at law: *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 47 Am. Rep. 365; on former appeal, *sub nom. Trustees of Columbia College v. Lynch*, 70 N. Y. 440; 26 Am. Rep. 615.

EVIDENCE OF THE INTENT. — The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate,

must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances: *Peck v. Conway*, 119 Mass. 546.

The importance of restraining the evidence which is heard upon the question of the intent of the parties to the language of the deed itself, at least when interpreted by the immediately surrounding circumstances, is shown by several cases, which lay stress upon the consideration that subsequent grantees who take with such restrictive covenants in their deeds have ordinarily no other means of knowing the purpose of the parties to the deed in which the covenant was first inserted, — whether or not it was intended to create a negative easement in favor of a particular piece of land which the original covenantee retained for himself, and perhaps subsequently sold. In a case where the action was at law to recover damages for the breach of such a covenant, the court, speaking through Morton, J., said: "The mere fact, which plaintiffs offered to prove, that Willis Buchnam, at the time when he conveyed to Monroe and others, was the owner of land separated from the estate granted by the Woburn Branch railroad, is not sufficient to show that the object of the restriction was to benefit the land. In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor, and for his personal convenience": *Skinner v. Shepard*, 130 Mass. 180, 181; citing *Jeffries v. Jeffries*, 117 Mass. 184; *Jewell v. Lee*, 14 Allen, 145; 92 Am. Dec. 744; *Badger v. Boardman*, 16 Gray, 559.

It is with reference to this principle that evidence that the restriction contained in a particular deed was a part of a general plan becomes of the greatest importance, and in many cases controlling. But it ought to be carefully added that the fact that there is no evidence that a particular restriction was a part of a general plan does not negative the conclusion that it was intended for the benefit of a particular adjacent estate. The situation of the two parcels of land in respect of each other may be such as to render such a conclusion unavoidable, as, for instance, where a vendor sells one adjoining parcel with an agreement not to build upon the other, in which case the conclusion is unavoidable that he annexes to the parcel sold an easement of light, air, and view in respect of the parcel retained; but where the restriction is no part of a general plan, and there is nothing in the language of the deed, when interpreted by surrounding circumstances, from which it can be fairly inferred that the restriction was intended for the benefit of any particular piece of land retained by the vendor, the covenant cannot be enforced by one who subsequently acquires from the vendor the particular piece of land, nor by the vendor for the exclusive benefit of such subsequent purchaser: *Dana v. Wentworth*, 111 Mass. 291.

In determining whether such a restriction was intended for the benefit of particular adjacent lots or parcels of ground, an important evidentiary circumstance is, that similar restrictions were inserted in other deeds conveying such other lots or parcels, or that the deeds conveying such other lots or parcels contained references to the restrictive clause in the particular deed: *Badger v. Boardman*, 16 Gray, 559.

It may be extracted from the decision of Vice-Chancellor Shadwell that in case of a reversion the vendor will take the land back free from the restrictive covenants: *Schreiber v. Creed*, 10 Sim. 9. This is illustrated by a later

case in that country, where A sold a part of an estate to B, who entered into restrictive covenants for himself, his heirs and assigns, with A, his heirs, executors, and administrators, as to buildings on the property so sold, but did not enter into any as to the land retained. After this transaction, A sold to other persons various lots of the land retained, but nothing appeared as to other conveyances, nor was there any evidence that they were informed of the covenants entered into by B. After this, A bought back from B what he had sold to him. It was held by the court of appeal that the benefits of B's covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A, and that A, after the repurchase, could make a title to the repurchased land discharged from the covenants: *Keeles v. Lyon*, L. R. 4 Ch. 218.

In one of the cases cited in the preceding paragraphs, where the covenant established a building line, and the prohibited distance had been by accident left blank in the former purchaser's covenant, without knowledge of the vendors, and they had a right to have the deed rectified, the second purchaser was held entitled to an injunction to restrain a breach of the covenant by the former purchaser; and it was held that as this right was entirely equitable, and might, if the covenant had been perfect, have been enforced in the absence of the original covenanting parties, an injunction might be granted without having the deed rectified, and without making the covenantee a party to the suit: *Child v. Douglas*, Kay, 575. Where the covenantor has built in violation of the covenant, the court will exercise its jurisdiction by a mandatory injunction to require him to tear it down in so far as it violates the covenant, without regard to the hardship of the case: *Manners v. Johnson*, 1 Ch. Div. 673. And such also was the relief adjudged in *Hall v. Wesster*, 7 Mo. App. 56.

The covenants in deeds usually run to the covenantee, "his heirs and assigns." Suppose, then, that the covenantee conveys some of the land and retains some of it. The covenant runs with the parcel conveyed, and passes to that "assign," so as to give him a right to file a bill in equity for an injunction against its violation: *Manners v. Johnson*, 1 Ch. Div. 673, 681. It also continues to inure to the benefit of the original covenantee, in respect of so much of the land as he retains: *Manners v. Johnson*, 1 Ch. Div. 673, 681. It follows that, under the practice in chancery where parties having a common though not a joint interest are allowed to join in the bill, both the original covenantee and his assign may join in the bill for such an injunction: *Manners v. Johnson*, 1 Ch. Div. 673, 681. But as the interest of the respective lot-owners is common, and not joint, and may be even different in degree, so that some may be willing to assist in defraying the expense of the litigation to vindicate their rights under it, while others may not, it is not necessary that all owners having a right to the same redress should join as plaintiffs in the action, or that failing to do so, they should be made defendants: *Western v. McDermot*, L. R. 1 Eq. 498; affirmed, L. R. 2 Ch. 72.

An adequate insight into this subject cannot be obtained without a careful examination of several illustrative cases in which relief was granted and refused. In one such case, A, the owner of a large tract of land, conveyed a triangular portion of it to B, who owned the next adjoining lot beyond, with the reservation in the deed, "that no building is to be erected by the said B, his heirs or assigns, upon the land herein conveyed." A retained the rest of the lot as his homestead, and owned no other land in the vicinity. He afterwards sold the homestead lot to C, by a deed describing the land by metes and bounds, but making no mention of the reservation in the deed to B, or

of privileges and appurtenances. B afterwards sold to D, by a deed making no reference to the reservation, and D had no knowledge of it. All the deeds were duly recorded. It was held that it was to be inferred that A and B intended to create an easement in the granted land for the benefit of the adjoining estate of A; that this easement passed as appurtenant to the land by the conveyance of C; and that he could maintain a suit in equity to prevent D from building on his land, though the proposed building would do no appreciable injury to the land of C: *Peck v. Conway*, 119 Mass. 546. In giving the opinion of the court, Morton, J., said: "In this case the triangular piece of land affected by the easement was a part of a large lot owned by Ensign [A]. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect. This is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is, that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff": *Peck v. Conway*, 119 Mass. 546; citing *Dennis v. Wilson*, 107 Mass. 591; *Stearns v. Mullen*, 4 Gray, 151. It should seem that this case might well have been decided the other way, on the ground that the enforcement of a covenant not to build at all, where to build would cause no appreciable injury to the adjoining lot, would be unreasonable. But the court disposed of this question in this way: "Nor can the fact found by the master, that the erection of the building contemplated by the defendants 'would be no appreciable damage or injury to the plaintiff's premises,' affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived because in the judgment of others it is of little or no damage": *Peck v. Conway*, 119 Mass. 546. In *Green v. Creighton*, 7 R. I. 1, 9, several tenants in common of a tract of land laid it off, and by a deed dedicated a strip of land to be used as a highway, so that their lots should front upon both sides thereof. In their deed by which they made this dedication, they inserted the following covenant: "It is hereby expressly understood, covenanted, and agreed by the grantors, for themselves and their heirs and assigns respectively forever, that no building of any description shall, at any time hereafter, be erected, placed, or put within eight feet of Halsey Street, on either side thereof." This covenant was construed "as a grant in fee to each of a negative easement in the land of all, and, as such, capable, upon the disturbance of the easement, of being enforced by the proper remedies at law and in equity." In *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713, there was a provision in the deed that the covenants should be void if there should be at any time erected certain offensive establishments on the land conveyed. The lot conveyed was one of thirty-nine building lots into which the grantor had subdivided a larger tract. All of the lots which he had sold out of this tract were conveyed by deeds containing the same covenant. It was held by Chancellor Walworth (affirming Vice-Chancellor McCoun) that the covenant of each of these deeds was intended for the benefit of the other lots, and to en-

hance their value; and that although the previous purchaser of one of the lots from the original owner could not sue at law a subsequent purchaser whose deed contained this covenant, yet equity would, at the suit of a previous purchaser, restrain the prior purchaser from violating the covenant. So an agreement between a vendor and a vendee, in a conveyance of land, "that any distance which may remain westwardly to J Street shall never be hereafter sold, but left for the common benefit of both parties and their successors," has been held to create an equity on the successor of the estate of the vendor; so that a person who had acquired the estate from the original vendee was entitled to come into a court of equity to obtain the removal of a structure placed upon the land: *McLean v. McCuy*, 21 Week. Rep. 798. On the sale of a number of contiguous lots, the grantor and grantees covenanted with each other that all the lots should be subject to a restriction that "no building shall be built upon either of the several lots of ground, to be used for purposes other than and as for a private dwelling-house, private or necessary house, coach-house, or stable." It was held that this covenant ran with the land and bound the successors of the parties, and that equity would enforce it by restraining its breach, unless some good ground be shown to the contrary. And the court accordingly restrained the building of a church upon one of the lots: *St. Andrew's Church Appeal*, 67 Pa. St. 512.

In a case where this principle was declared and applied, it appeared that D., being the owner of several parcels of land, which were described upon a plan which had been recorded in the registry of deeds, conveyed to the defendant in fee-simple a certain parcel numbered 3 on the plan, with the building thereon, by metes and bounds, and "subject to the following restriction: that no out-buildings or shed shall ever be erected westwardly of the main building of a greater height than those now standing thereon," and that thereafter D. conveyed the parcel or lot numbered 4 on the plan to R., with all the rights, easements, privileges, and appurtenances thereunto belonging, which afterwards came by mesne conveyances to the plaintiff. It was held that the plaintiff was not entitled to the aid of equity to enforce against the defendant the restriction contained in the deed of D. to the defendant. The court, speaking through Bigelow, C. J., said: "The infirmity of the plaintiff's case is, that there is nothing from which the court can infer that the restriction in the deed from Downing [from D. to the defendant] was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union R'y Co.*, 11 Gray, 359, 71 Am. Dec. 715, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claimed from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed; nor is there any language in the deeds under which the plaintiffs claim title which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate.

Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it may have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part": *Badger v. Boardman*, 16 Gray, 559.

In another such case it appeared that in 1834 the plaintiff conveyed to one Nudd a certain parcel of land, upon condition "that the grantee, nor his heirs or assigns, will not at any time build, or permit to be built, any building upon said lot, nearer to either of said streets [the boundary streets] than eight feet," etc. Afterwards this parcel was divided into three lots, each fronting on Auburn Street. Long afterwards, Mrs. Niles became owner by mesne conveyances of one of these lots, by a deed of release which contained the proviso "that no building shall ever be erected or suffered to stand upon the afore-described piece of land, or any parcel thereof, contrary to the provisions of said condition; but a breach of this prohibition shall in no case work a forfeiture, but shall be conclusively deemed a nuisance, for which I, my heirs or devisees, shall be entitled to enter and abate without process of law, and shall likewise be entitled to damages against the party or parties offending, but against no others, and also to any and all other remedies at law or in equity." This deed was recorded. Still later, Whitney became possessed by mesne conveyances of another of the three lots, and conveyed it to the defendant. At the time of the conveyance to Mrs. Niles, the then owner of the defendant's lot did not know of the first deed above spoken of, and neither he nor any of those succeeding him in the ownership of the lot had ever consented thereto. It was held that the plaintiff, the original covenantee, could not maintain a suit in equity to restrain the defendant from building on his lot within eight feet of Auburn Street. In giving the opinion of the court, Mr. Justice Gray said: "There is nothing in the case to show that the restriction in the deed from the plaintiff to Nudd was part of a general plan for the benefit of the land thereby granted, and other estates on the same street, or was inserted in the plaintiff's deed for the benefit of the grantee or his assigns, or was repeated in any grant or covenant executed by him or them, or either of them. Under these circumstances, a purchaser from Nudd of part of the land so granted to him has no more right in equity than at law to enforce the restriction against the purchaser of another lot of the same land": *Dana v. Wentworth*, 111 Mass. 291, 293. The court cite *Jewell v. Lee*, 14 Allen, 145; 92 Am. Dec. 744; *Keates v. Lyon*, L. R. 4 Ch. 218. They also say: "The judgment of the chancellor of New Jersey, in *Winfield v. Henning*, 21 N. J. Eq. 188, is inconsistent with the decisions in this commonwealth and in England."

In another case, it appeared that the owner of land lying on both sides of a street granted the portion on one side which bordered upon the ocean, subject to the condition that the same should be used only for bathing and boating from the beach, and that only low bathing-houses should be built thereon. It did not appear that he then intended that the land so granted should be subsequently divided, and held by different owners. This, how-

ever, was done, and deeds of conveyance were made subject to the condition. The purchaser of one end of the land also purchased from a stranger a lot opposite thereto, on the other side of the street. It was held that such purchaser could not maintain a bill in equity against the purchaser of another portion of the land to restrain the latter from violating the condition. The court proceeded upon the view stated in the preceding paragraph; and in the course of its opinion, given by Bigelow, C. J., it also said: "There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor or grantee in the original deed by which the condition was annexed to that grant that the land now owned by the parties to this suit to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the original grantor had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof. And this constitutes the precise distinction between the case at bar and that of *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, on which the plaintiff mainly relies in support of his case. There it was made to appear that a condition annexed to a grant of an estate was imposed in order to render the occupation of adjacent estates more convenient and advantageous, and that the existence of such condition entered into and formed part of the consideration of the grant of estates which were intended to be benefited thereby. So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever": *Jewell v. Lee*, 14 Allen, 145, 150; 92 Am. Dec. 744.

In another case in Massachusetts, J. S., the owner of a tract of land, laid it out in lots, and recorded in the registry of deeds a plan, showing the streets and lots, with their dimensions. On the north side of one of the streets were five lots, numbered consecutively from 6 to 10, and on the south side a large lot. J. S. conveyed this large lot without restriction, and built a house on lot 10, standing twenty feet back from the street. He then conveyed lot 8 and part of lot 7 to the plaintiff's grantor, by deeds containing a provision that for fifteen years no building should be placed on the granted premises within twenty feet of the street, and that no trade offensive to dwelling-houses in that neighborhood should be carried on, and that a violation of either of these restrictions should not work a forfeiture, but that J. S., his heirs or devisees, might enter upon the land and remove anything violating the restrictions. J. S. afterwards conveyed the rest of lot 7 and also lot 6 to the defendant, by deeds containing the same provision. The court held that the plaintiff could not maintain a bill in equity to restrain the defendant from erecting a building on lot 6 within twenty feet of the street. It was not claimed that in regard to any of the lots there was any written covenant by the grantor, and it did not appear that there was any express stipulation or direct assurance on his part that any person who should purchase a lot on the north side of the street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The court, speaking

through Ames, J., said: "The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact that in his transactions with two separate and independent purchasers the grantor conveyed a portion of the land in each case subject to the terms and conditions set forth in the bill of complaint. It is true that of these conditions the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery-stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and a provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house. It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as an inducement to the purchase to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees, may enforce it. Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained": *Sharp v. Ropes*, 110 Mass. 381, 385.

Another illustration of the foregoing principle is found in a case decided by Vice-Chancellor Shadwell in 1839, where a deed dated in 1827, made between J. Pitt, of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seised in fee of the lands delineated in the plan annexed (being a plan of a town called Pittville), and having in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure-grounds, roads, etc., had caused the plan to be drawn, whereby the mode in which the lands were intended to be laid out, and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole design might be forever thereafter preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased, or agreed to purchase, one or more of the pieces of land described in the plan, as set out for building. The deed then contained covenants by Pitt, his heirs and assigns, to build the pleasure-grounds, roads, etc., and to keep them in repair, and

other covenants prescribing the manner in which the pleasure-grounds, roads, etc., should be enjoyed and used by the occupiers of the houses to be erected on the building-ground, and that Pitt, his heirs or assigns, would, in every agreement which should be entered into by him or them for the sale of any part of the said ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage on any part of the ground which might lessen in value any other of the messuages erected or to be erected at Pittville. Thereafter, in 1833, Pitt agreed to sell lots 2, 3, 4, and 5 of the building-ground to Stokes, and Stokes agreed with Pitt to erect three houses on those lots, and agreed with him that each house should stand back twenty-five feet from the western boundary of the lots, and that he (Stokes), his heirs or assigns, would not do or suffer to be done on the lots, or in any building to be erected thereon, any act, deed, etc., which might be deemed a nuisance, injury, or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon. Stokes built two houses on lots 2 and 3, and in 1833 Pitt conveyed these lots to him, and Stokes, for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to these lots and the houses thereon, similar to the last-mentioned stipulation in the agreement. Stokes subsequently gave up to Pitt lots 4 and 5, of which he had the contract of purchase, as already stated, and abandoned his contract of purchase as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement between Pitt and Creed stipulated that the house to be erected on those lots should stand back, not twenty-five but ten feet at least from the western boundary thereof, and it also contained a stipulation for protecting the adjoining property from injury, etc., similar to that in the agreement with Stokes. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots thirteen feet distant from the western boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or an annoyance to him, and would lessen the value of his house, and consequently would be a violation of the covenant in the deed of 1827, and of the agreement of 1833. The vice-chancellor held that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but that its details might be varied by Pitt, and, with his sanction, by the purchasers from him, and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827 or of the agreement of 1833 for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt of the agreement with Creed. The foregoing statement is transcribed from the *syllabus* of the case. The report of the case, and also the opinion of the vice-chancellor, are long and tedious. The vice-chancellor placed his judgment substantially on the ground that in the agreement of 1833 the purchaser, Stokes, was not covenanting as to the mode of using lots 2 and 3 so as to affect lots 4 and 5, or as to the mode of using lots 4 and 5 so as to affect lots 2 and 3. He said: "If he was the purchaser of the whole, it would be absurd to say that he should be restricted in the use of a part, so as not to injure the remainder; for, being the owner of the whole, he would not, of course, use one part so as to injure the remainder. In my opinion, therefore, no part of this covenant in the agreement of April, 1833, is capable of being made to bear on the question." Secondly, he took the view that Stokes having failed to carry out his agreement of purchase as to lots 4 and 5, which Pitt afterwards sold to the defendant Creed, the covenants of 1833 in respect of those lots lapsed,

and fell back into the hands of Creed, and the case became exactly as though such covenants had never been entered into; and thirdly, that inasmuch as the plaintiff could claim only under Stokes, and as Stokes had not taken any stipulation from Pitt for enforcing against Pitt the stipulation which Pitt might have enforced against Stokes, the whole matter was left at large: *Schreiber v. Creed*, 10 Sim. 9.

A case was decided in the English court of appeal in 1876 on the following state of facts: The owner of an estate granted a lease of a plat of ground to A, who covenanted that he, his executors, administrators, and assigns, would not, during the term, do on the premises anything which should be an annoyance to the neighborhood or to the lessor or his tenants, or which should diminish the value of the adjoining property, and that he would not build, or allow to be built, on the ground any building or erection, without first submitting the plans to the lessor and obtaining his approval. Some years later, the landlord granted a lease of an adjoining plat to B, who entered into a similar restrictive covenant. Within twenty years, A commenced, with the approval of the lessor, to build upon his ground, so as to darken the windows of B's house. B thereupon brought the present bill in equity to restrain A from erecting, and also to restrain the lessor from approving, the building which A was about to erect. The court held that B was not entitled to relief, either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A's lease inured to the benefit of B. In giving his judgment, James, L. J., said: "The defendants, the Crystal Palace Hotel Company, are owners of a property under the demise of a term of years, and are erecting on it a building which may lawfully be erected, unless they have put themselves under an obligation not to do so. The plaintiff is the owner of an adjoining property under another demise for a term of years from the same lessors, of later date than that of the defendants. He therefore cannot have acquired any rights against them, except under some grant which could lawfully be made. Now, the lessors could not grant anything so as to derogate from the rights of their prior grantee. The respondent therefore was obliged to rest his case on the covenants entered into by the defendant's predecessor entitled with the grantor; and the question is, whether those covenants bring the case within the rule which says that the owner of two tenements who grants one of them cannot derogate from his own grant by anything he does on the property which he reserves, the property granted becoming entitled to easements known as easements derived by the disposition of the owner of two tenements. The plaintiff contends that though the grantor, when he made the grant under which plaintiff claims, had ceased to be the owner of the defendant's tenement, he had a right which he could have used in such a way as to prevent the plaintiff's enjoyment of his property being interfered with in any way in which the grantor would not have been allowed to interfere with it if he had retained the defendant's property, and that this interest brings the case within the rule as to the owner of two tenements. It would be a novel extension of that doctrine to hold that not only the grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing what he might not himself do. It cannot, in my opinion, be said that a right under a covenant is properly within the meaning of this rule. Then the plaintiff says: 'You, my lessor, could, under the covenants entered into with you by your other lessee, have prevented this erection; you had and have that right; you have granted me a piece of ground with a house on it, and you ought to enforce those

covenants for my benefit.' Now, when the plaintiff took his lease he had no knowledge of the nature of the title in the adjoining property; all he knew was, that the piece of property adjoining his had once been part of the same estate; he knew nothing of the covenant; the grant to him contains no notice of it; and it would be strange to say that a man who has taken a covenant for his own benefit can be prevented from dealing with it for his own benefit because he has granted parcels of land to other people. The covenant is not mentioned in the plaintiff's lease, and it cannot have been the intention of the parties thus to restrict the use of a covenant which was entered into, not for the benefit of the owner of the estate, that he might be able to make the most of it. It would be too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the plaintiff, and we cannot imply one": *Master v. Hansard*, 4 Ch. Div. 718. The other lords justices concurred, in separate opinions.

JEPSON v. KILLIAN.

[151 MASSACHUSETTS, 593.]

DECEASED CONTRACTOR — RIGHT TO SHARE IN PROFITS. — If several persons secure and enter into a contract for the doing of work, and commence its performance, and then one of them dies, and the others perform the contract, they must account to the representatives of their deceased fellow-contractor for his share of the profits.

J. H. Butler, for the defendants.

H. E. Ware, for the plaintiff.

HOLMES, J. This is a bill in equity for an account, brought by the administrator of one Putterill, seeking to recover a share of the profits arising from the performance of a contract by which the deceased and the defendants undertook to put in a brick conduit and to make certain excavations for the Boston Heating Company. The answer admits the contract, and the master finds that the deceased rendered some services in securing and in performing it. But he died very shortly after it was made, and the defendants went on and did nearly all the work without his aid.

The main contention of the defendants is, that Putterill's death put an end to his interest in the contract, and that his administrator is not entitled to any part of the profits. But nothing appears in the pleadings or in the master's report to take the contract with the heating company out of the general rule that the survivors must account with the representative of their deceased fellow-contractor for his interest. It does

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sibly is, an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the state within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmation of the interlocutory judgment.

The judgment should be affirmed, with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remittitur*, and upon payment of the costs of the action from the interposition of the demurrer to that date.

Judgment accordingly. —

ACTIONS IN ONE STATE TO ENFORCE CAUSES OF ACTION CREATED BY THE STATUTE OF ANOTHER: See note to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355; *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144; 20 Am. St. Rep. 461, and note; *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863, and note.

CHAMBERLAIN v. DUNLOP.

[1.6 NEW YORK, 45.]

NOTICE, WHEN SUFFICIENT TO EXTEND TERM OF LEASE. — Where a lease for a term of five years contains a provision for an extension thereof for two years, upon the lessee's giving written notice to the lessor three months before the expiration of the original term of his desire to so extend it, a written notice served by the lessee as prescribed, and stating, in addition, that if the lessor chooses they would regard the lease as extended two years and a half, to which the lessor replies acknowledging the lessee's right to an extension for two years, but refusing to grant the extension for the extra six months, is sufficient to extend the term for the two years.

SURRENDER OF LEASE, WHAT IS NOT. — An original lease is not surrendered by the delivery to the lessee of a new lease of the same premises, which does not give to him the interest for which he contracted and which he thought he was acquiring, and where no entry is ever made under the new lease, the property thereby demised having been destroyed by fire before the time arrived at which by its terms it was to become operative.

PARTY MAKING CONTRACT IS PRESUMED TO INTEND TO BIND HIS EXECUTORS AND ADMINISTRATORS, unless it is of such a nature as to call for some personal quality of the testator, or is so worded as to plainly negative such a presumption. Where, therefore, a testator covenants to rebuild premises leased by him, in case of their destruction by fire, his executor will have power to perform such covenant; and in an action against the executor to recover damages for the breach of such covenant, a motion for a nonsuit on the ground that the executor had no power to rebuild, and no control over the heirs at law to make them rebuild, is properly denied. In such a case, whether the land is devised or descends to the heir, the executor is liable upon the covenant, and must pay the damages, if he have assets.

LESSEE MAY TESTIFY AS TO VALUE OF LEASE WHEN. — A lessee suing to recover damages for the breach of a covenant to rebuild, contained in his lease, may testify as to the value of the lease for the time he would have been in possession after the premises were rebuilt and before the lease expired.

ARCHITECT MAY TESTIFY AS TO TIME IN WHICH BUILDING COULD BE REBUILT without dangerous haste.

ACTION to recover damages for an alleged breach of contract to rebuild, contained in a lease executed to the plaintiff by Robert Dunlop, the defendant's testator. The facts are sufficiently stated in the opinion.

E. H. Burdick, for the appellant.

Isaac Lawson, for the respondent.

PECKHAM, J. None of the grounds argued by the counsel for defendant is sufficient to call for a reversal of this judgment.

1. The lease was properly extended in the manner provided for by its terms, and was recognized as a valid and existing lease up to the death of the testator, at which time nearly one half of the extended period had expired. The lease provided for an extension of its term by two years, provided the lessee, three months before the expiration of the original five years, gave a written notice to the lessor of his desire to extend the lease for that further period. This the lessee did. Because he made a suggestion in that notice that if the lessor chose they would regard the lease as extended two years and a half had no bearing upon the sufficiency of the written notice, and

the refusal of the lessor to grant the extra six months' extension acknowledged the right of the lessee to the two years provided for by the lease itself.

2. The lessee of the original lease never, either in fact or in law, surrendered it by reason of what took place in regard to the execution of the lease by Wallace on the part of the heirs at law. The facts show there were a widow and several heirs at law, and that the widow had a right of dower in the premises, and that one of the heirs at law, at the time of the execution of the lease by Wallace as the agent of the heirs, was an infant. The lease purported to grant the interest of the heirs in the premises from the 1st of the coming May for five years. The evidence is uncontradicted that the agreement between plaintiff and Mr. Wallace was, that the plaintiff should have all the interest of all the parties in the premises for the five years, and that when the plaintiff executed the lease he had no personal knowledge as to who succeeded to the interest of Robert Dunlop, and he supposed that the lease covered the interest of all parties having an interest in the premises. It is also in proof and found by the referee that the widow had a right of dower in the premises. She did not sign the lease, and neither her interest nor the interest of the infant passed under it. The very day the lease was received, signed by Wallace as agent, the fire occurred. It is obvious that the plaintiff did not secure by the lease the interest which he had provided for by his agreement with Mr. Wallace. The dower of the widow was outstanding, and the interest of the infant was not affected by the lease. The original lease was not surrendered, for the reason that the new one did not give plaintiff the interest he contracted for, and which he thought he was acquiring. Under such facts, the cases hold there is no surrender: *Whitney v. Meyers*, 1 Duer, 271; *Schieffelin v. Carpenter*, 15 Wend. 405; *Coe v. Hobby*, 72 N. Y. 146; 28 Am. Rep. 120.

This is not the case of a lease by one tenant in common to a stranger, purporting to convey the whole interest in the land, and an entry by the lessee under it, and an acquiescence by all the other tenants in common. There was never a valid acceptance of the new lease. The agreement provided for the conveyance of the whole interest to the plaintiff, and the parties failed to convey all of such interest, and the plaintiff never accepted such lease with knowledge that it did not fulfill the terms of the agreement, and there was never any entry

under the lease, and before the time arrived at which the lease, by its terms, was to become operative, the property was not in existence, having been destroyed by fire. Hence the original lease remained in full force.

3. The defendant moved for a nonsuit upon the grounds, among others, that the executor had no power to rebuild, and no control over the heirs at law to make them rebuild; and also because on the death of the lessor the plaintiff paid rent to and held under the heirs at law, and not under the defendant executor. There is no finding by the referee as to the last alleged fact, and the evidence does not show that such is necessarily the fact. It rather shows the contrary. As to the first ground, that the executor had no power to rebuild, I think the authorities are clearly the other way.

The presumption is, that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in: *Tremeere v. Morison*, 1 Bing. N. C. 89; *Reid v. Tenterden*, 4 Tyrw. 111; *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744.

Where a party has entered into a contract to purchase real estate, and dies before it is conveyed to him, and before he has paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate: *Broome v. Monck*, 10 Ves. 596, 611; reargued, 619; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Wright v. Holbrook*, 32 N. Y. 587; 1 Sugden on Powers, 8th Am. ed., 293; 3 Redfield on Wills, 2d ed., 302, sec. 11.

The executor is not permitted to violate the contract of his testator after the latter's death: *Wentworth v. Cock*, 10 Ad. & E. 42; *Siboni v. Kirkman*, 1 Mees. & W. 419, remarks of Parke, B.

In *Quick v. Ludburrow*, 3 Bulst. 30, Lord Coke said that if a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this. To same effect, *Tilney v. Norris*, 1 Ld. Raym. 553; *Tremeere v. Morison*, 1 Bing. N. C. 89; and *Reid v. Tenterden*, 4 Tyrw. 111.

If the testator devise his land to other parties, the executor still remains liable on the covenant of his testator. If the devisees do not permit the executor to build, the covenant is

broken, and it is the act of the devisor in devising his property thus that prevents the executor from fulfilling.

If the land descended to the heir, then the covenant still remains in force; and if it should be that the executor could not force the heir to permit the building, still the estate is liable on the covenant, and the executor must pay the damages if he have assets. The judgment here is only against him as executor, and is fully warranted in law.

4. The exceptions to the rulings of the referee in the admission or rejection of evidence are not tenable. The value of the lease for the time the plaintiff would have been in possession after the premises were rebuilt, and before the lease had expired, was properly testified to by the plaintiff. It was a matter of opinion to some extent, based upon facts, all of which he had testified to, and his experience and knowledge were more than that of any other person in regard to the very question which was asked. The evidence of Fleischman was properly admitted. He was an architect, and to some extent, therefore, familiar with building and the time it should take to do certain work, and with the fact whether the work could be done in a certain time without dangerous haste.

We are unable to find any fair reason for disturbing this judgment, and it should be affirmed, with costs.

WHERE AND HOW CONTRACT CONTINUES OBLIGATORY AND ENFORCEABLE AFTER DEATH OF CONTRACTOR. — It is a general rule of law that contracts bind, not only the parties thereto, but also their executors or administrators. The law presumes that the parties to a contract intend to bind their personal representatives, even when they are not named in the contract. Contracts are therefore, generally speaking, enforceable against the personal representatives of deceased parties thereto, to the extent of the assets which have come to their hands: 2 Parsons on Contracts, 531; Chitty on Contracts, 101; 1 Addison on Contracts, sec. 451; 3 Redfield on Wills, 302; Rawle on Covenants, sec. 312; *Broome v. Monck*, 10 Ves. 596; *Tremeere v. Morison*, 1 Bing. N. C. 89; *Reid v. Tenterden*, 4 Tyrw. 111; *Wentworth v. Cock*, 10 Ad. & E. 42; *Siboni v. Kirkman*, 1 Mees. & W. 419; *Farrow v. Wilson*, L. R. 4 Com. P. 744; *Smith v. Wilmington etc. Co.*, 83 Ill. 498; *Taylor v. Taylor*, 3 Bradf. 54; *Ferrin v. Myrick*, 41 N. Y. 315; *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744; *McClure v. Gamble*, 27 Pa. St. 288; *Stumpf's Appeal*, 116 Pa. St. 33. A testator, by including his heirs, does not exclude his executors. The personal representatives are liable, even when the heirs are mentioned and when they are not mentioned: 1 Addison on Contracts, sec. 451; *McClure v. Gamble*, 27 Pa. St. 288. At common law, the heir was liable, in common with the personal representative, to the extent of the assets which had come to him by descent, upon all covenants under seal entered into by his ancestor, in which he was expressly named; but unless so named, he was not liable: 1 Addison on Contracts, sec. 447;

Rawle on Covenants, sec. 309; 2 Wait's Actions and Defenses, 398; *Ticknor v. Harris*, 14 N. H. 272; 40 Am. Dec. 186.

NO DISTINCTION BETWEEN LIABILITY FOR BREACHES OF DECEDENT'S CONTRACTS BEFORE AND AFTER HIS DEATH. — The personal representatives of a decedent are liable in damages for all breaches of his contracts occurring prior to his death, and for all such breaches that occur subsequent to his death, except in those cases where his personal skill or taste is required in the execution of the contract: 1 Addison on Contracts, sec. 451; Chitty on Contracts, 101; 2 Parsons on Contracts, 533; Rawle on Covenants, sec. 312; 2 Wait's Actions and Defenses, 398; *Wells v. Fyde*, 10 East, 315; *Siboni v. Kirkman*, 1 Mees. & W. 419; *Williams v. Burrell*, 1 Com. B. 402; *Smith v. Wilmington etc. Co.*, 83 Ill. 498; *Hovey v. Newton*, 11 Pick. 421; *McClure v. Gamble*, 27 Pa. St. 288; *Stumpf's Appeal*, 116 Pa. St. 33.

PERSONAL REPRESENTATIVE BOUND TO COMPLETE DECEDENT'S CONTRACTS. — If a purchaser who has ordered goods dies before the time for their delivery, the executor or administrator must receive and pay for the goods, or he will be liable, to the extent of the assets in his hands, for the damages that may be sustained by reason of his refusal to complete the contract of the deceased: 1 Addison on Contracts, sec. 453; *Wentworth v. Cock*, 10 Ad. & E. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98. And if a person contracts to build a house for another before a certain day, and dies before that day, his personal representatives must go on and finish the house, or they will be liable in damages for not completing the decedent's contract: *Quick v. Ludburrow*, 3 Bulst. 30; *Marshall v. Broadhurst*, 1 Crompt. & J. 405; *Collinson v. Lister*, 20 Beav. 356. And where a person contracts with a builder to erect a house on land belonging to him, and dies before the house is finished, his representative must have the house completed out of the personal estate of the deceased in the first instance: *Cooper v. Jarman*, L. R. 3 Eq. 98; *Riblett v. Wallis*, 1 Daly, 360; *Taylor v. Taylor*, 3 Bradf. 54. The personal representative of a deceased lessee is, in contemplation of law, the assignee of the term, and is liable as such upon all covenants running with the land, such as covenants to repair, to the extent of the assets in his hands; and it is no plea to an action on such a covenant that the premises yield no profit: 1 Addison on Contracts, sec. 448; *Tilney v. Norris*, 1 Ld. Raym. 553; *Tremeere v. Morison*, 1 Bing. N. C. 89; *Reid v. Tenterden*, 4 Tyrw. 111. But unless authorized by the will, a testator cannot carry on the trade of the testator, except to wind it up: *Collinson v. Lister*, 20 Beav. 356. The rights and liabilities of the heir and the personal representatives of a person deceased, in respect to any contracts entered into by him for the purchase or sale of real estate, are to be determined solely by the rights and liabilities of the contracting party as those questions stood at the time of his death: 3 Redfield on Wills, 302; *Broome v. Monk*, 10 Ves. 596.

CONTRACTS OF PERSONAL NATURE DETERMINED BY DEATH OF CONTRACTOR. — Where an executory contract is of a strictly personal nature, the death of the contractor absolutely determines the contract. In contracts of this kind it is an implied condition that the death of either party shall dissolve the contract. Examples of contracts of this class are: Contracts of authors to write books, of attorneys to render professional services, of physicians to cure particular diseases, of teachers to instruct pupils, and of masters to teach apprentices a trade or calling: 1 Parsons on Contracts, 131; 1 Addison on Contracts, sec. 396; *Marshall v. Broadhurst*, 1 Crompt. & J. 405; *Collinson v. Lister*, 20 Beav. 356; *Farrow v. Wilson*, L. R. 4 Com. P. 744; *Howe*

S. M. Co. v. Rosensteel, 24 Fed. Rep. 583; *Smith v. Wilmington etc. Co.*, 83 Ill. 498; *McGill v. McGill*, 2 Met. (Ky.) 258; *Blake v. Niles*, 13 N. H. 459; 38 Am. Dec. 506; *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744; *Dickinson v. Calahan*, 19 Pa. St. 227; *White v. Commonwealth*, 39 Pa. St. 167; *Stumpf's Appeal*, 116 Pa. St. 33.

But where the contract with the deceased is executory, and the personal representative can fairly and fully execute it as well as the deceased himself could have done, he may do so, and enforce the contract. And on the other hand, the personal representative is bound to complete such a contract, and if he fails to do so, he may be compelled to pay damages out of the assets in his hands: 1 Parsons on Contracts, 131; *Saboni v. Kirkman*, 1 Mees. & W. 418; *Wentworth v. Cock*, 10 Ad. & E. 42; *Janin v. Browne*, 59 Cal. 37; *Smith v. Wilmington etc. Co.*, 83 Ill. 498; *White v. Commonwealth*, 39 Pa. St. 167; *Billings's Appeal*, 106 Pa. St. 558. In the case of *Janin v. Browne*, 59 Cal. 45, the majority of the court said: "In construing contracts it is permissible for a court to place itself as near as may be in the position of the parties. The complaint alleges that the deceased was the owner of a large tract of land adjacent to and surrounding the land of plaintiff on which the house was erected, 'and was desirous of improving and building up said neighborhood, for the purpose of attracting purchasers for his said land.' With this inducement he agreed to improve the lands of plaintiff, to superintend the house erected by the expenditure of plaintiff's money, and to guarantee him a certain profit upon the investment. All that required any peculiar skill, taste, or judgment was done by deceased in his lifetime. We are of opinion that the contract and right of action upon it survived."

It must be confessed that the line of demarkation between the two kinds of contracts under consideration is not very clearly marked in some instances. And no doubt the facts and circumstances of each particular case will be taken into account in determining whether the contract was purely personal in its nature, and therefore determined by the death of the party, or one which the personal representative could complete as well as the deceased could have done. Thus in the case of *Dickinson v. Calahan*, 19 Pa. St. 227, one of the parties to the contract agreed to sell to the other all the lumber to be sawed at his mill during the next five years, to average three hundred thousand feet a year, but not stipulating for any particular quantity in any one year, the lumber to be paid for as delivered, the heirs or representatives of the parties not being mentioned, it was held that this contract was merely a personal relation, which was dissolved by the death of either party thereto, and that the administrator was not bound to complete it, nor for any breach thereof occurring after the contractor's death; while in the later case of *Billings's Appeal*, 106 Pa. St. 558, it was held that a contract for the cutting of timber, which does not necessarily involve the personal skill or expert knowledge of the contractor, which, by its terms, is extended to the heirs, executors, and administrators of the parties, and which can be completed within a reasonable time, survived the death of both parties, and bound their personal representatives. The fact that such a contract can be completed within a reasonable time is doubtless important in such cases. For an executor, unless expressly authorized by the will, cannot carry on the trade of the testator, except to wind it up: *Collinson v. Lister*, 20 Beav. 356.

CONTRACT TO MARRY EXTINGUISHED BY DEATH OF PROMISOR. — A contract to marry is regarded as personal in its nature, and is extinguished by the death of the promisor, and an action for the breach of such a contract cannot be maintained against his personal representative. Nor is the prom-

isee a creditor of the promisor to whom administration can be granted: 1 Parsons on Contracts, 130; 3 Wait's Actions and Defenses, 251; *Chamberlain v. Williamson*, 2 Maule & S. 408; *Stebbins v. Palmer*, 1 Pick. 71; 11 Am. Dec. 146; *Smith v. Sherman*, 4 Cush. 408. *Contra*, *Shuler v. Millsaps*, 71 N. C. 297, under a statute of that state. In delivering the opinion of the court in *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146, Wilde, J., said: "An action for the breach of a promise of marriage would not survive, for it is a contract merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling, in substance, deceit and fraud, than a mere common breach of promise."

But an agreement to support a bastard child survives the death of the promisor, and may be enforced against his personal representative: *Stumpf's Appeal*, 116 Pa. St. 33.

CONTRACT OF GUARANTY NOT TERMINATED BY DEATH OF GUARANTOR.—There are cases which hold that a continuing guaranty, where each new advance constitutes a fresh consideration, is, in the absence of any express provision to the contrary, revoked, as to subsequent advances, by the death of the guarantor: *Harriss v. Fawcett*, L. R. 15 Eq. Cas. 311; *Coulthart v. Clementson*, L. R. 5 Q. B. D. 42. But where a guaranty creates a continuing pecuniary obligation, the consideration for which is entire and given once for all, the contract is not terminated by the death of the guarantor, unless the intention that it shall so terminate is clearly expressed in the guaranty itself. And this is particularly the case where the guaranty is one which the guarantor could not have determined in his lifetime: *Lloyd's v. Harper*, L. R. 16 Ch. D. 290; *Estate of Rapp v. Phoenix Ins. Co.*, 113 Ill. 390; 55 Am. Rep. 427; *Menard v. Scudder*, 7 La. Ann. 385; 56 Am. Dec. 610; *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744. But see, *contra*, *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305, where it was held that a guaranty of the payment for goods to be sold to another, not founded upon any present consideration passing to the guarantor, and providing that it should continue until written notice should be given of its termination, is revoked by the death of the guarantor.

CONTRACT OF SURETYSHIP NOT TERMINATED BY DEATH OF SURETY.—The death of a surety on a bond conditioned to perform an act within a certain definite period, or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his personal representatives will be responsible, especially where the surety binds himself, his heirs, executors, and administrators: *Hecht v. Weaver*, 34 Fed. Rep. 111; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Royal Ins. Co. v. Davies*, 40 Iowa, 469; 20 Am. Rep. 581; *Green v. Young*, 8 Greenl. 14; 22 Am. Dec. 218.

In *Hunt's Appeal*, 105 Pa. St. 128, it was held that a covenant to be responsible for and guarantee payment of the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the debt survives the death of the covenantor. In *Browne v. McDonald*, 129 Mass. 66, it was decided that a contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition, and clothing of a person whom the promisor is not bound to support, terminates with the death of the promisor.

CONTRACT OF JOINT OBLIGOR TERMINATED BY HIS DEATH.—It is a well-settled rule of law that if one of two or more joint obligors dies, his personal representatives are, at law, discharged from liability, and the survivor or sur-

vivors alone can be sued on the obligation: *Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Pickersgill v. Lahens*, 15 Wall. 140; *Bradley v. Burwell*, 3 Denio, 61; *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood v. Fisk*, 63 N. Y. 245. And the same rule is applied in equity, unless the obligation was, by fraud or mistake, made joint, instead of being made joint and several: 1 Story's Eq. Jur., secs. 162-164; *Simpson v. Field*, 2 Cas. Ch. 22; *Sumner v. Powell*, 2 Mer. 355; 1 Turn. & R. 423; *Wilmer v. Currey*, 2 De Gex & S. 347; *Other v. Iveson*, 3 Drew. 177; *Jones v. Beach*, 2 De Gex, M. & G. 886; *Richardson v. Horton*, 6 Beav. 185; *Harrison v. Field*, 2 Wash. (Va.) 136; *Carpenter v. Provoost*, 2 Sand. 537; *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528. In *United States v. Price*, 9 How. 92, a joint and several bond had been given to the United States for certain duties, but the United States had recovered judgment against all the obligors jointly, and it was held that the plaintiff, having thus elected to hold them as joint debtors, could not proceed in equity against the estate of one of them who had died.

It is not a principle of equity that every joint contract is to be considered as if it were joint and several: *Sumner v. Powell*, 2 Mer. 30; 1 Turn. & R. 423; *Jones v. Beach*, 2 De Gex, M. & G. 886. When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant: *Sumner v. Powell*, 2 Mer. 30; 1 Turn. & R. 423. But where it is clearly shown that an obligation intended to be made joint and several has, by fraud or mistake, been made joint only, equity will grant relief against the fraud or mistake, and will hold the representatives of the deceased obligor responsible: 1 Story's Eq. Jur., sec. 162; *Simpson v. Vaughan*, 2 Atk. 31. Where two or more persons become sureties for another in a joint obligation, there is an implied agreement among the sureties, arising at the time when they execute the principal contract, that, as between themselves, they will contribute ratably towards discharging any liability which they may incur in consequence of becoming such sureties; and such agreement is binding upon the representatives of any of them who may die: *Bradley v. Burwell*, 3 Denio, 61.

PERSONAL REPRESENTATIVES NOT BOUND BY PROPOSALS OF DECEDENT. — A mere offer or proposal made by a person in his lifetime, but not accepted before his death, will not bind his personal representatives: *Grand Lodge I. O. G. T. v. Farnham*, 70 Cal. 158; *Pratt v. Trustees of Baptist Society of Elgin*, 93 Ill. 475; 34 Am. Rep. 187; *Wallace v. Townsend*, 43 Ohio St. 537; 54 Am. Rep. 829; *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708; *Helpenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449. An administrator has no right to make an invalid contract of his intestate binding upon his estate: *Smith v. Brennan*, 62 Mich. 349; 4 Am. St. Rep. 867.



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MORRILL *v.* MORRILL.

[20 OREGON, 96.]

Collateral attacks on judgments.



MORRILL v. MORRILL.

[20 OREGON, 96.]

JUDGMENT — WHAT IS COLLATERAL ATTACK. — A collateral attack on a judgment or decree is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying it. The fact that the parties are the same, and that plaintiff seeks to attack the decree by allegations in the reply to the answer, does not change the rule, or make the attack any the less a collateral one.

CO-TENANCY — POSSESSION OF ONE CO-TENANT IS POSSESSION OF THE OTHER. — The possession of land usually follows the legal title, where no adverse possession is shown, and the possession of one co-tenant, in the absence of an ouster, will inure to the benefit of his co-tenant.

JUDGMENT — CONCLUSIVENESS OF. — A judgment of a court having jurisdiction is binding on the parties, no matter how erroneous it may be, until reversed or annulled.

JUDGMENT CANNOT BE COLLATERALLY ATTACKED FOR ERRORS. — When a court has jurisdiction of the subject-matter and of the parties, its judgment cannot be impeached collaterally for errors of law or irregularities in practice.

PRACTICE — PLEADING. — A party cannot aid his complaint by departing from the cause of action stated therein, and alleging another and different one in his reply to the answer.

JUDGMENT — WHEN BINDING IN COLLATERAL PROCEEDINGS. — When a party has an opportunity to present his defense and neglects to do so, the judgment or decree against him is binding in a collateral proceeding.

JUDGMENT IN PARTITION — CONCLUSIVENESS OF. — A decree in partition is conclusive between the parties, as to the title to the land, and the fact that they are tenants in common. Each of them is thereby estopped from attempting to show in another proceeding that he was holding the premises adversely to his co-tenant, or that he had no interest therein at the date of the rendition of the decree in partition.

JUDGMENT CANNOT BE COLLATERALLY ATTACKED FOR FRAUD. — A domestic judgment of a court having jurisdiction of the subject-matter and of the parties cannot be questioned collaterally for fraud *aliunde* the record, by the parties or privies.

JUDGMENT IN PARTITION — COLLATERAL ATTACK. — When a decree in partition is made by one referee, instead of three as provided by statute, the irregularity cannot be inquired into in a collateral proceeding.

ACTION to quiet title to lot 3, block 116, in the city of Portland. Plaintiff claimed to own the land in fee, and to be in possession of said lot. The only fact necessary to an understanding of the opinion, and not given therein, is the following agreement: —

“In consequence of mutual agreement with Mrs. Ida Morrill, I declare under oath that I withdraw my individual right of the title of an individual one-third interest in lot 3, block

116, in the city of Portland, allowed to me by law of the court.

[Signed]

"ELI MORRILL.

"PORTLAND, OR., August 9, 1879."

Judgment for the plaintiff, and defendants appeal.

J. W. Whalley, for the appellant.

A. H. Tanner and R. R. Giltner, for the respondent.

BEAN, J. It is conceded by respondent that if the decree in the partition suit of *Morrill v. Morrill* is valid and binding on her, this case should be reversed. Briefly, the facts concerning the partition suit are these: In August, 1882, the defendant herein, Eli Morrill, commenced a suit for partition in the circuit court for Multnomah County, Oregon, against the plaintiff in this suit. The complaint was in the usual form, alleging that he and plaintiff were tenants in common and in possession of lot 3 in block 116 in the city of Portland, setting out the interests of the respective parties, and praying a partition thereof. A summons being duly issued and served, the plaintiff appeared by her counsel, and filed an answer, in which she denied the possession of the premises by herself and defendant, and alleged as a defense that she was then, and had been since the first day of March, 1878, in the actual and exclusive possession of all the property, and that her possession was not joint with that of plaintiff or any other person.

A reply being filed denying the new matter alleged in the answer, the cause was referred to a referee to report the facts and the law to the court. In January, 1883, the parties, by their respective attorneys, appeared before the referee for the purpose of taking testimony. The plaintiff offered in evidence a certified copy of the judgment roll in the divorce case of *Morrill v. Morrill*, and the following stipulation of the parties was entered into: "It is hereby stipulated by the parties, that up till the 4th of February, 1882, both plaintiff and defendant occupied the premises described in the complaint; that since that time the defendant has been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant nor any person for him has actually occupied said premises, or any part thereof, since February 4, 1882, as a home or otherwise; that both before and since February 4, 1882, and up to the present time, both plaintiff and defendant have paid taxes and street im-

provements according to their respective interests. It is understood that this stipulation shall not be so construed as to affect the rights of either party as a tenant in common. It is further agreed that the referee may make personal inspection and investigation of the premises in question, and from the facts thus obtained report to the court (if this suit can be maintained), — 1. Whether the property can be divided; 2. If it can, then how division shall be made; 3. If it cannot be divided, then recommend a sale."

On May 4, 1883, the referee filed his report, the findings of fact and conclusions of law being in favor of defendant; and he also reported that, pursuant to the stipulation of the parties, he had made personal inspection of the premises, and found that they could be divided without injury to the rights of either. The report recommended that the north nineteen feet of the lot be set off to defendant, and the south thirty-one feet to plaintiff, each portion being particularly described in the report. Motions were made to confirm and set aside this report by the respective parties to the suit.

On June 7, 1883, the court being fully advised, and the counsel of the respective parties consenting thereto in open court, a decree was entered confirming said report; and it was adjudged and decreed that plaintiff and defendant were tenants in common, and in possession of the property; that plaintiff was the owner of an undivided two thirds thereof, and defendant of the remaining one third; that the premises could be partitioned according to the respective interests of the parties, without prejudice to the rights of either, and confirming the partition as made by the referee, particularly describing in said decree the portion set off to the respective parties. It is argued on behalf of respondent here that the decree in the partition suit of *Morrill v. Morrill* is void, — 1. Because defendant was not in possession of the land sought to be partitioned at the commencement of the suit, and such fact, it is claimed, appears from the record thereof; 2. That the stipulation entered into by her attorney was without her knowledge and against her instructions, and was done for the purpose of defrauding her; 3. That no referees were appointed to partition the land as by law required.

It is first important to determine whether this is a direct or collateral attack on this decree. The contention of respondent is, that it is a direct attack, and therefore no presumptions are to be invoked in order to sustain it. The complaint contains

no allegations concerning this decree, but the first mention thereof is in the answer, where defendant pleads it as an estoppel. The plaintiff then seeks to avoid its effect by averring in the reply matters which she claims are sufficient to invalidate it. This is undoubtedly a collateral attack. It is an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree. A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree: 12 Am. & Eng. Ency. of Law, 147 j. The fact that the parties are the same, and that the plaintiff seeks to attack the decree by the allegation of the reply, cannot change the rule, or make the attack any the less a collateral one. The first objection to the validity of this decree is based upon the stipulations of the attorney, "that the defendant in the partition suit has, since February 4, 1882, been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant nor any person for him has actually occupied said premises or any part thereof since February 4, 1882, as a home or otherwise."

The contention is, that a plaintiff, in order to maintain a suit for partition, must not only be a tenant in common, but in the possession of the land sought to be partitioned. If he has been ousted or disseised, and his co-tenant is holding adversely to him, the suit cannot be maintained, and many authorities are cited to that effect. It is urged that this stipulation shows that defendant was not in possession of these premises at the time he commenced this suit, but had been ousted by the plaintiff long prior thereto. It may be doubted whether such a construction can be put upon the language of the stipulation, since possession usually follows the legal title, where no adverse possession is shown, and the possession of one tenant in common of the land, in the absence of an ouster, will inure to the benefit of his co-tenant: Freeman on Cotenancy and Partition, sec. 167. "Actual, exclusive occupancy" by the defendant in the partition suit may not have been inconsistent with the title of her co-tenant; but however that may be, it was a question for the court before whom the suit was pending, and its decision, however erroneous it may have been, is binding on the parties until reversed or annulled in some proper proceeding: *Atkins v. Kinnan*, 20 Wend. 241; 32 Am. Dec. 534; *Voorhees v. United States Bank*, 35 U. S. 449; *Dolph v. Barney*,

5 Or. 191; *Woodward v. Baker*, 10 Or. 491; *Norton v. Harding*, 3 Or. 361; *Hill v. Cooper*, 8 Or. 254. After a court has acquired jurisdiction, it has a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent court with admitted jurisdiction of the subject-matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because, forsooth, it was mistaken, either as to the law applicable to the facts before it or to the facts themselves. Baldwin, J., in the case of *Voorhees v. United States Bank*, 35 U.S. 449, speaking on this subject, says: "The error of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be made more reasonable than that the person who complains of an injury done him should avail himself of his legal remedy in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitations on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot directly do in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If after its rendition it is declared void for any matter which can be assigned for error, only on a writ of error or appeal, then said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceedings of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempt." We need not pursue the examination of this question any further, for the principle is so well settled that it is said to be an axiom of the law, that when a court has jurisdiction of the subject-matter and the parties, its judgments cannot be impeached collaterally for errors of law or irregularity in practice: *Cooper v. Reynolds*, 10 Wall. 308; *Sibley v. Waffle*, 16 N. Y. 180.

On the argument of this case much stress was laid upon

the effect of the alleged agreement of defendant concerning the property in dispute, made in August, 1879; and it was claimed that by virtue of that agreement plaintiff became the equitable owner of this property. There are two reasons, either of them sufficient, in our opinion, why plaintiff can claim nothing by virtue of this agreement in this suit. The first is, such agreement is not alleged in the complaint or in any way referred to therein. If plaintiff intended to rely upon this agreement, she should have so averred in her complaint; not having done so, she cannot aid the complaint by departing from the cause of suit stated therein, and alleging another and different one in her reply. In her complaint, plaintiff seeks to prevail by virtue of a purely legal title. This agreement, if executed by defendant, only gave her an equitable title at best. The other is, that this writing was executed, if at all, long prior to the commencement of the partition suit, and plaintiff should have availed herself of any rights it gave her in that suit: *Neil v. Tolman*, 12 Or. 289. If she neglected or failed, without some reasonable excuse, to produce all the evidence in her possession in that suit, it is now too late for her to be heard to complain. There must be an end to litigation, and where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences, when the judgment or decree is sought to be enforced against him in a collateral proceeding. The decree in the partition suit is conclusive between the parties as to the title to the land, and is a solemn adjudication that they were tenants in common therein: *Edson v. Munsell*, 12 Allen, 600; *Hancock v. Lopez*, 53 Cal. 362; *Freeman on Cotenancy and Partition*, sec. 530. The plaintiff is estopped by that decree from showing or attempting to show that she was holding the premises adversely to the defendant, or that he had no interest therein at the date of its rendition.

The next question in this case is, Can the decree in the partition suit be impeached for fraud? It is claimed by respondent that the evidence and findings of the referee show that the decree was obtained by fraud and collusion between her attorney in that suit and the defendant here. It is argued with much force and learning, that since defendants rely upon the particular decree as one of the muniments of their title, plaintiff should be permitted to show, if the facts are with her, that such decree was obtained by fraud and collusion between

her attorney and adversary; that since fraud vitiates every transaction, even a judgment, she ought to be permitted to treat this decree as invalid, when sought to be enforced or relied upon even in a collateral proceeding. This we believe is the first time this question has ever been before this court for decision. In the case of *Murray v. Murray*, 6 Or. 17, the court held that a judgment of a sister state could be attacked collaterally for fraud by a party when offered in evidence in the courts of this state, for the reason that the party sought to be affected thereby has no opportunity to attack it in our own courts by a direct proceeding, and should not be required to go into a foreign state to do so. As we have already said, this cannot be considered a direct attack upon this judgment. No reference is made to the judgment in the complaint. No facts are alleged upon which a court could base a decree annulling the decree or judgment. The plaintiff, in her complaint, claims title by good and sufficient mesne conveyances from the government of the United States, and by virtue of the statute of limitations. This is not sufficient to entitle her to attack this judgment: *United States v. Flint*, 4 Saw. 42; *Mayor v. Brady*, 115 N. Y. 599; *United States v. Throckmorton*, 98 U. S. 61.

It is a general rule at common law, that parties and privies to a judgment may not attack it collaterally for fraud. After a party has been duly served with process, it is his duty to see that such a judgment is not obtained against him, and if it is, he must take some proper proceedings to have it annulled. As long as it remains in full force and effect, the parties cannot treat it as invalid unless such invalidity appears upon the face of the judgment. It is true, fraud vitiates every transaction into which it enters, even a judgment; but such fraud must be made to appear in some appropriate proceeding known to the law. The statute points out ample methods by which a party may be relieved from such a judgment, — such as a new trial, review for error of law, an application to be relieved therefrom. And beyond the methods provided by statute, courts possess inherent powers, as has been said, “to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake.” These methods, however, must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored, and the rights of the parties again inquired into in a collateral proceeding: *Freeman on Judg-*

ments, sec. 334; *Davis v. Davis*, 61 Me. 395; *Murray v. White*, 58 Vt. 45; *Granger v. Clark*, 22 Me. 128; *Boston & W. Corp. v. Sparhawk*, 1 Allen, 448; 79 Am. Dec. 750; *Demerit v. Lyford*, 27 N. H. 541; *Krekeler v. Ritter*, 62 N. Y. 372; *Weiss v. Guerinneau*, 109 Ind. 438; *Callahan v. Griswold*, 9 Mo. 775; *Mason v. Messenger*, 17 Iowa, 261. From these and many other authorities that could be cited, we take the law to be, that a judgment of a court of this state, having jurisdiction over the subject-matter and the parties, cannot be questioned collaterally for fraud *aliunde* the record, by the parties or privies.

The case relied upon by the respondent as announcing a contrary doctrine is *Mandeville v. Reynolds*, 68 N. Y. 528. This was an action on a judgment, the defense to which was based upon a satisfaction of the judgment of record, and upon an order of court ratifying that satisfaction. The plaintiff offered to show that the entry upon the docket and the order was obtained by fraud and collusion. The court held that such evidence was competent, and in the opinion there are statements to the effect that a judgment obtained by fraud could be attacked collaterally. This decision was made under the reform code of procedure of the state of New York, which permits equitable defenses to be pleaded in actions at law, and the court says: "The court acts upon the matters involved in the action, now, in a double capacity: as a court of law and a court of equity. As a court of equity, it meets the questions of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the suit and trial, has become the main question, and legitimately before it for trial." In this state, the distinction between proceedings at law and in equity is still maintained: *Burrage v. Bonanza G. & Q. M. Co.*, 12 Or. 169. Authorities under the reform codes of procedure are therefore not applicable here.

We have so far treated this question on the theory that the evidence shows the decree to have been obtained by fraud, and our views as to the law render it unnecessary to examine the evidence; but in passing, we deem it proper to say that we cannot agree with counsel for respondent in their construction of the testimony. We think the evidence signally fails to show that the decree was obtained by fraud or collusion. It is also claimed that the stipulation in the partition suit was entered into by plaintiff's attorney without her knowledge

or consent. This claim is not sustained by the testimony. It is true, plaintiff says she knew nothing about the proceedings in the suit; but the attorney who appeared for her testifies that she was informed of and consented to every step taken therein, and the referee who made the partition says that she was present when he was examining the premises for the purpose of partitioning the same, that she knew what he was doing, and was consulted about the matter.

It is also claimed the decree is void because the partition was made by only one referee, and not three, as provided by statute. At most this was but an irregularity, and cannot be inquired into in this suit: *Cole v. Hall*, 2 Hill, 625; *Kinnier v. Kinnier*, 45 N. Y. 535; 6 Am. Rep. 132.

It follows, therefore, that the decree of the court below must be reversed, and a decree entered here in favor of defendants.

JUDGMENT—CONCLUSIVENESS OF.—A domestic judgment of a court of general jurisdiction, upon a subject-matter within the scope of its power, is so conclusive that evidence *aliunde* will not be admitted to contradict it: *Wilkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. A judgment of a court of general jurisdiction is conclusive upon every other court until reversed: *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785, and note; *Turner v. Staples*, 86 Va. 300; *National Bank v. Lester*, 73 Tex. 542; *Sabrinovs v. Chamberlain*, 76 Tex. 625.

JUDGMENT—COLLATERAL ATTACK FOR ERROR.—A judgment cannot be collaterally attacked because of error in issuing an execution thereon: *Estate of Hanika*, 138 Pa. St. 330; 21 Am. St. Rep. 907, and note. All irregularities in the exercise of a court of general jurisdiction are cured by final judgment, and it cannot be collaterally attacked: *Apel v. Kelsey*, 52 Ark. 341; 20 Am. St. Rep. 183, and note; *Fischer v. Holmes*, 123 Ind. 525.

JUDGMENT—WHEN CONCLUSIVE IN A COLLATERAL PROCEEDING.—A judgment is conclusive on all defenses which could have been presented by the exercise of due diligence: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note.

JUDGMENT—COLLATERAL ATTACK FOR FRAUD.—A sheriff's return, though false, cannot be impeached in a collateral proceeding to avoid a judgment authorized thereby: *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356, and note. In a collateral attack on a judgment, evidence of fraud not found on the judgment roll will not be received to avoid the judgment, though the fraud was in obtaining jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note. A sentence or decree is conclusive upon all parties, unless fraud or mistake be proved: *Tehan v. Maloy*, 45 N. J. Eq. 68.

CO-TENANCY—EFFECT OF POSSESSION BY ONE CO-TENANT.—The possession of one co-tenant is the possession of all: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note; *McGee v. Hall*, 26 S. C. 179; *Benefield v. Albert*, 132 Ill. 665; *McClure v. Colyear*, 80 Cal. 378. Entry of one co-tenant is entry of all: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and note.

COLLATERAL ATTACKS UPON JUDGMENTS. — The definition of a collateral attack given in the principal case, while it is not, so far as we are aware, supported by any authority, may, we think, be accepted as being as nearly correct as a general definition can be; but, like many other general definitions, it is of little or no aid in determining such special cases as are involved in doubt sufficient to require particular consideration. It seems too obvious to require mention, that a proceeding to annul, modify, or correct a judgment is a direct proceeding. It is pointed directly at a judgment, and if it is successfully maintained, the judgment, or some part of it, must succumb to the attack and cease to exist. But there have been many attempts to annul, modify, or correct judgments which have failed, and must again fail, if made under like circumstances, and many collateral attacks which have succeeded, and must again succeed, under similar conditions. Therefore, the question most worthy of attention is not, What is a collateral attack? but is, When may an attack, though collateral, be made with success?

When a judgment of a court of record is offered in evidence, it may appear, either from the judgment itself, or from the record of which it is a part, that the court did not have jurisdiction of the subject-matter of the action, or of the person of the defendant, or was without power to grant the relief which it undertook to grant, and therefore the judgment must either be denied all effect, or denied effect as to such portion of it as the court had no power to render: Freeman on Judgments, secs. 117, 120. The same result follows when a judgment of a court of special or limited jurisdiction is offered in evidence, and the subject-matter was not within the jurisdiction of the court, or it does not affirmatively appear that the court acquired jurisdiction over the parties against whom it rendered judgment: Freeman on Judgments, sec. 517; *Palmer v. Oakley*, 2 Doug. 433; 47 Am. Dec. 41; *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145; *Cooper v. Sunderland*, 3 Iowa, 114; 66 Am. Dec. 52; *People's S. B. v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894. In these cases there is no attack upon the judgment, either direct or collateral. That which was offered as a judgment appears, on inspection, not to be what it was claimed to be, and no necessity arises for attacking it in any manner.

A motion to set aside a judgment falls within the definition given in the principal case of a direct attack, but the rules by which it is to be determined are sometimes those applicable to direct, and other times those applicable to collateral, attacks. If the motion is made during the term at which the judgment was rendered, the judge may grant it for any reason and upon any evidence which to him seems sufficient, and his action will not be reviewed by the appellate court: Freeman on Judgments, sec. 90; *Bolton v. McKinley*, 22 Ill. 203; *In re Marquis*, 85 Mo. 615; *Underwood v. Sledge*, 27 Ark. 295; *Volland v. Wilcox*, 17 Neb. 46; *Fraley v. Feather*, 46 N. J. L. 429; *State v. Souders*, 42 Kan. 312; *Blum v. Wettermark*, 58 Tex. 125. If, on the other hand, the motion is made under a statute authorizing it to be granted, if made within a time and for a cause specified in such statute, it may well be regarded as a direct attack if made within such time and for one of such causes. Therefore the moving party is not bound by the record, and, notwithstanding its assertions to the contrary, may establish by competent extrinsic evidence the truth of the facts on which he bases his claim to relief: Freeman on Judgments, sec. 109; *McKinley v. Tuttle*, 34 Cal. 235; *Moscaux v. Brigham*, 19 Vt. 457; *Gay v. Grant*, 101 N. C. 206. With respect to mere errors and irregularities of proceeding or decision not specified in

the statute as grounds for relief, the motion is doubtless controlled by the rules applicable to collateral attacks, and such errors and irregularities should be regarded as no longer open to consideration.

If a motion to set aside a judgment is not made during the term at which it was rendered, nor within the time and upon a ground specified by statute, the attack is still direct, if it be true that all proceedings instituted for the express purpose of annulling a judgment are direct attacks upon it; but the authorities do not agree as to whether the moving party is subject to the rules governing direct attacks or not. If the motion is upon the ground that the judgment is void, it may be entertained irrespective of the lapse of time; and if, from an inspection of the judgment roll, it appears that the judgment is a nullity, all courts agree that it should be set aside on the ground that it is not, in contemplation of law, a judgment, and that to permit it to stand on the records of the court as a judgment is liable to result in an abuse of the process of the court, and to occasion innocent persons to place a delusive reliance upon it: *Freeman on Judgments*, sec. 98; *Winslow v. Anderson*, 3 Dev. & B. 9; 32 Am. Dec. 651; *Pantall v. Dickey*, 123 Pa. St. 431; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 530; *Ladd v. Mason*, 10 Or. 308; *Mills v. Dickson*, 6 Rich. 487; *Hanson v. Wolcott*, 19 Kan. 207; *Baker v. Barclift*, 76 Ala. 414. As to when a judgment is void in this extreme sense is a question upon which the courts cannot agree. The better rule, upon principle, is, we think, that the nullity of a judgment of a court of record, from whatever ground it may arise, should be apparent from an inspection of the judgment roll. If not confined to evidence found in such roll, the motion to vacate the judgment should at least not be granted upon oral or other testimony not upon file in the action, and of the evidence of which an examination of all the records, files, and official memoranda connected with the cause imparts no notice: *People v. Harrison*, 84 Cal. 607; *People v. Goodhue*, 80 Cal. 199; *Pettus v. McClannahan*, 52 Ark. 55. But the majority of the decisions, as we understand them, are in conflict with this rule, and permit a motion to vacate a judgment as void for want of jurisdiction to be entertained and granted at any time, if it appears to the court, from the evidence offered to it, though not found in the record, that the court did not acquire jurisdiction over the defendant, either because he was not served with process and did not appear in the action: *Shuford v. Cain*, 1 Abb. 302; *In re College Street*, 11 R. I. 472; *Cotton v. McGehee*, 54 Miss. 621; *Pettus v. McClannahan*, 52 Ala. 55; or, if his appearance was entered, that such entry was made by an attorney acting without authority: *Yates v. Horanson*, 7 Rob. (N. Y.) 12; *McKelway v. Jones*, 17 N. J. L. 345; *Kenyon v. Schreck*, 52 Ill. 382; *Latimer v. Latimer*, 22 S. C. 257; *Vilas v. Plattsburg*, 123 N. Y. 440; 20 Am. St. Rep. 771; *Bradley v. Welch*, 100 Mo. 258; *Winters v. Means*, 25 Neb. 274; 13 Am. St. Rep. 489; and it has been held that on such a motion the return of the proper officer showing the service of process on the defendant may be contradicted and disproved: *Hanson v. Wolcott*, 19 Kan. 208; *Carr v. Commercial Bank*, 16 Wis. 50; *Heffner v. Gunz*, 29 Minn. 108; *Stancill v. Gay*, 92 N. C. 455; *Parker v. Spencer*, 61 Tex. 155; *Vilas v. Plattsburgh*, 123 N. Y. 40; 20 Am. St. Rep. 771.

So far as the cases, or any of them, affirm that a motion to vacate a judgment interposed after the time specified by statute is a direct attack thereon, and may therefore be supported by evidence not admissible on a collateral attack, we think them erroneous. In some of the states there is no doubt that a judgment, whenever and wherever relied upon, may be met and over-

come by extrinsic evidence showing to the satisfaction of the court that the tribunal pronouncing such judgment was without jurisdiction so to do, and that the judgment must, therefore, be disregarded and void. Where such is the law, it may be that a motion to vacate a judgment as void for want of jurisdiction, made at any time, may be sustained by extrinsic evidence; but even in these states, it would seem to be safer to leave the question of jurisdiction, where it is to be determined upon such evidence, to be decided in some action or proceeding the trial of which may be more formal, and the means of ascertaining the truth more adequate, than upon the hearing of a motion. But where the general policy of the law is to protect judicial proceedings from collateral assault, and to assure innocent purchasers that they may rely thereon, unless jurisdictional vices and infirmities appear from an examination of the record, it seems strange that a party should, by a mere motion, without any formal pleadings and without a regular trial, be able, after failing to resort to the remedies provided by statute, to have a judgment against him vacated, and the titles resting thereupon left without support. Conceding that the case is one in which the judgment ought to have been set aside as between the parties upon a reasonably prompt application, and that the moving party ought still to be granted relief, the circumstances may be, and often are, such that equitable terms should be imposed upon him; and such terms can be better regulated and enforced by an independent equitable action than upon proceedings by motion. Notwithstanding these considerations, there are, as we have already stated, courts which deem their authority to vacate judgments on motion as being inexhaustible, and which treat such motion, whenever made, as a direct proceeding in the hearing and determining of which evidence outside of the record is received and acted upon.

Irregularity is always a ground upon which a judgment may be attacked by motion to set it aside, and it has been said that a judgment is irregular whenever it is not entered in accordance with the practice and course of proceeding where it was rendered: *Dick v. McLaurin*, 63 N. C. 185; *Davis v. Shaver*, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; *Graff v. M. & M. Trans. Co.*, 18 Md. 364; *Mailhouse v. Inloes*, 18 Md. 329; *Browning v. Roane*, 9 Ark. 354; 50 Am. Dec. 218; *Walters v. Walters*, 132 Ill. 467; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547; *Knox Co. Bank v. Doty*, 9 Ohio St. 506; 75 Am. Dec. 479; *Bowen v. Tory Mill Co.*, 31 Iowa, 460. But generally courts will not vacate their judgments on account of irregularities unless the application is promptly made, and the irregularity appears to have been prejudicial to the applicant: *Stancill v. Gay*, 92 N. C. 455; *Jones v. S. F. S. Co.*, 14 Nev. 172; *Roberts v. Allman*, 106 N. C. 391; Freeman on Judgments, sec. 97. In many of the states a judgment may be attacked upon motion to vacate it, for fraud in its procurement, though the application is made after the lapse of the term, and is based solely on extrinsic evidence: *McIntosh v. Commissioners*, 13 Kan. 171; *In re Fisher*, 15 Wis. 511; *Dial v. Farrow*, 1 McMull. 292; 36 Am. Dec. 267; *Taylor v. Sindall*, 34 Md. 38; *Pyett v. Hatfield*, 15 Lea, 473; *Olmstead v. Olmstead*, 41 Minn. 297; *Allen v. McClellan*, 12 Pa. St. 328; 51 Am. Dec. 608; *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393. But we judge the safer practice is to require relief to be sought by a suit in equity: *Syme v. Trice*, 96 N. C. 243; *Sharp v. Danville, M. & S. W. R. R.*, 106 N. C. 308; 19 Am. St. Rep. 533. In chancery the power of the court to discharge the enrollment and open the decree never terminated, unless there had been a regular trial on the merits. A decree may, therefore, where the chancery practice prevails, be, in effect, attacked and set aside, by showing by any competent evidence that it was not based on a trial on the merits, that it is

inequitable, and that the party was prevented from having such trial by some cause ordinarily regarded as sufficient to warrant the interposition of equity; such, for instance, as fraud, accident, mistake, or surprise: *Cawley v. Leonard*, 28 N. J. Eq. 467; *Herbert v. Rowles*, 30 Md. 271; Freeman on Judgments, 4th ed., sec. 100; *Hargrave v. Hargrave*, 9 El. & E. 14; *Kemp v. Squires*, 1 Ves. Sr. 205. The rules applicable to motions to vacate judgments, in England and in Maryland and Michigan, seem to be as liberal as those of the courts of chancery in like proceedings against decrees: *Hall v. Holmes*, 30 Md. 558; *Loree v. Reeves*, 2 Mich. 133; *Hurlburt v. Reed*, 5 Mich. 30; *Cannan v. Reynolds*, 5 El. & B. 301; 1 Jur., N. S., 873; 26 L. J. Q. B. 62. See also Freeman on Judgments, sec. 101 b. An error of court, whether at law or in equity, either in reaching an incorrect conclusion from the evidence offered, or in admitting or rejecting such evidence, or any other error of law, cannot, after the lapse of the term, sustain a motion to vacate a judgment or decree procured after a hearing on the merits: *Charman v. Charman*, 16 Ves. 115; *Green v. Hamilton*, 16 Md. 317; 77 Am. Dec. 295; *McBride v. Wright*, 75 Wis. 306; *Brett v. Myers*, 65 Iowa, 274; *State v. Horton*, 89 N. C. 581.

Writs of error *coram nobis* and *coram vobis* were formerly employed for the purpose of obtaining relief from judgments. They were not, however, available to correct or set aside any action or decision of the court, unless it had been taken and made upon facts presumed by the court to exist, such presumption not being in harmony with the truth, as where a court acted upon the presumption that a party was living, and competent to appear as a litigant and to protect his interest, when in fact such party was dead, or was an infant, a lunatic, or a married woman: Freeman on Judgments, sec. 94. The grounds upon which either of these writs was sustainable were such as rarely or never appeared by the record, and hence they must have been supported by extrinsic evidence. As these writs are generally superseded by the remedy by motion to set aside a judgment, it has been held that whenever the moving party would have been entitled to relief by them at the common law he should now be conceded relief upon motion, and therefore that a judgment may be set aside on motion, on the ground that the person against whom it was pronounced was an infant, and that fact was unknown to the court: *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153; *Townsend v. Cox*, 45 Mo. 401; *Levy v. Williams*, 4 S. C. 515.

The proceeding by writ of *audita querela* may also be regarded as a direct attack on a judgment in all cases to which it can be properly applied. The original purpose of the writ, and the one to which it is generally confined, is that of relieving a party from a wrongful act of his adversary, and of permitting him to show any matter of discharge which may have occurred since the rendition of the judgment, or where a defense, though existing prior to the judgment, was not brought to the attention of the court on account of the fraud or collusion of the prevailing party: Freeman on Judgments, sec. 95. It is in the nature of a bill in equity, and relief cannot be obtained under it on account of errors of the court in matters of law or of fact, which might have been corrected by a writ of error in some appellate proceeding: *Lamson v. Bradley*, 42 Vt. 165; *Spear v. Flint*, 17 Vt. 497; nor on account of injuries suffered by the applicant from a judgment rendered against him through his own negligence: *Thatcher v. Gammon*, 12 Mass. 270; *Griswold v. Rutland*, 23 Vt. 324; *Avery v. United States*, 12 Wall. 304; *Barker v. Walsh*, 14 Allen, 175; nor because his defense was equitable, and the court at law could not consider it: *Garfield v. University*, 10 Vt. 536. The attack by *audita querela* being direct, the party seeking relief may contradict the

record: *Folsom v. Conner*, 49 Vt. 4; *Paddleford v. Bancroft*, 22 Vt. 529; *Hill v. Warren*, 54 Vt. 73.

The proceeding by writ of *certiorari* is direct: *Linch v. Broad*, 70 Tex. 92. In some of the states, the writ, in the cases to which it is applicable, performs functions similar to those of a writ of error, and by it errors of law may be reviewed and set right, and the evidence may be examined for the purpose of ascertaining whether some finding of the court upon an essential fact was entirely unsupported by such evidence: *McAllilley v. Horton*, 75 Ala. 491; *Central P. R. R. Co. v. Placer Co.*, 43 Cal. 365; *Jackson v. People*, 9 Mich. 111; 77 Am. Dec. 491; *Rayner v. State*, 52 Md. 368; *Lapan v. Commissioners*, 65 Me. 160; *State v. Davis*, 48 N. J. L. 112; *Ex parte Madison T. Co.*, 62 Ala. 93; *Rawson v. McElwaine*, 49 Mich. 194; *State v. Whitford*, 54 Wis. 150; *Gerdes v. Champion*, 108 Ill. 137; *People v. Smith*, 45 N. Y. 776; *People v. Betts*, 55 N. Y. 600; note to *Duggen v. McGruder*, 12 Am. Dec. 529-537; while in other states its only office is to compel an inferior judicial tribunal to certify its proceedings to some superior court for the inspection of the latter, which, after such inspection, is required to set the proceedings aside only in so far as they are found to be beyond the jurisdiction of the subordinate tribunal: *Territory v. Dunbar*, 1 Ariz. 510; *State v. Le Blanc*, 42 La. Ann. 1190; *State v. Judge*, 42 La. Ann. 1089; *State v. Chandler*, 43 La. Ann.; *Barber v. Harris*, 6 Mackey, 586; 16 Wash. Law Rep. 796; *Brown v. Robertson*, 123 Ill. 631; *Sayers v. Superior Court*, 84 Cal. 642; *Alexander v. Municipal Court*, 66 Cal. 387; *Gibson v. Superior Court*, 83 Cal. 643; 85 Cal. 216. Whether the proceeding by *certiorari* is regarded as one merely to set aside proceedings in excess of the jurisdiction of the inferior tribunal, or as including the power to review errors committed in the exercise of existing jurisdiction, the attack thereby made must be supported solely by the record which is brought before the superior court, and the parties cannot go beyond it to show either the existence of alleged errors, or that the judgment sought to be annulled is in excess of the jurisdiction of the court, or was entered in a case in which it had no jurisdiction whatever over the subject-matter or of the parties against whom the judgment was rendered: *Fore v. Fore*, 44 Ala. 478; *Alexander v. Archer*, 24 Pac. Rep. 373 (Nev.); *Miller v. McCullough*, 21 Ark. 426; *North v. Joslin*, 59 Mich. 624; *Galloway v. Corbitt*, 52 Mich. 460; *Tewksbury v. Commissioners*, 117 Mass. 563; *Barclay v. Brabston*, 49 N. J. L. 629; *Emery v. Brann*, 67 Me. 39; *Lees v. Drainage Commissioners*, 125 Ill. 47; *People v. Talmage*, 46 Hun, 606; *State v. Kemen*, 61 Wis. 494; *People v. Fire Commissioners*, 73 N. Y. 437; *Hannibal & St. J. R. R. Co. v. State Board*, 64 Mo. 296.

When a judgment of conviction and sentence is attacked by *habeas corpus*, the attack must be treated as collateral: *Turney v. Barr*, 75 Iowa, 758; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; except when, as in the supreme court of the United States, the writ is issued in the exercise of appellate jurisdiction, and is accompanied by a writ of *certiorari* to bring up the records and proceedings of the inferior court; and even then the court disclaims the right to review mere errors or irregularities: *Ex parte Virginia*, 100 U. S. 341; *Ex parte Yerger*, 8 Wall. 385; *Ex parte Carll*, 106 U. S. 521; *Ex parte Curtis*, 106 U. S. 371. The writ of *habeas corpus* does not, ordinarily, lie to review errors of law or of fact, and a prisoner, when in custody under a commitment issued on a judgment of conviction and sentence, must be remanded, unless the judgment has been satisfied, set aside, or reversed, or is absolutely void: *Ex parte Marx*, 86 Va. 40; *Ex parte Rollins*, 80 Va. 314; *In re Coy*, 127 U. S. 757; *Ex parte Watkins*, 3 Pet. 202. It should not be

treated as void because the verdict on which it was based was defective: *Willis v. Bayles*, 105 Ind. 363; *Dorer v. State*, 75 Ala. 40; or the court, after the defendant pleaded guilty, failed to call a jury to say, in their discretion, whether he should suffer the penalty of death or should be imprisoned for life: *Loverly v. Howard*, 103 Ind. 440; or the evidence was insufficient to warrant a conviction: *In re Bion*, 59 Conn. 372; *In re Wight*, 136 U. S. 148; *Turney v. Barr*, 75 Iowa, 758; *Stevens v. Fuller*, 134 U. S. 468; or the judgment, though against the defendant, was upon an obligation executed by another person having the same name: *Gorman's Case*, 124 Mass. 190; or the prisoner did not commit the act for which he has been adjudged guilty of a contempt of court: *Ex parte Terry*, 128 U. S. 289; *State v. Woodfin*, 5 Ired. 199; 42 Am. Dec. 161; *Whittem v. State*, 36 Ind. 196; or his age was or was not such as to authorize his imprisonment in the place in which the judgment directs him to be confined: *Ex parte Williams*, 87 Cal. 78; *Ex parte Kaufman*, 73 Mo. 588; or, though the court had adjudged him able to comply with an order, and to be guilty of contempt in not complying with it, yet that he was not, in fact, able to yield such compliance: *In re Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266; *People v. Foster*, 104 Ill. 156. "As to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263. Any irregularity in the service of process, or in making the arrest, is immaterial: *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Kellogg*, 6 Vt. 511; *Owens v. Goltzain*, 4 Dill. 438. 'After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true even though the prisoner had been kidnaped and forcibly brought before the court from a foreign jurisdiction': *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *People v. Rowe*, 4 Park. Cr. 253; *United States v. Lawrence*, 13 Blatchf. 306; *State v. Ross*, 21 Iowa, 467; *Mahon v. Justice*, 127 U. S. 700. If it appears that the jurisdiction of the court depended upon a litigated fact which it adjudged to exist, this adjudication is conclusive upon *habeas corpus*, as well as in all other collateral proceedings": Freeman on Judgments, sec. 619; *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251.

As a general rule, all errors and irregularities which might have been grounds of appeal, or of motions for new trials or to set aside the judgment or conviction, or in arrest of judgment, are not available on *habeas corpus* for the purpose of securing the prisoner's discharge: Freeman on Judgments, secs. 620, 621. There are, however, some matters which, though they might have sustained an appeal, are not waived by the failure to prosecute it, and which are available on *habeas corpus*. These matters generally, and perhaps universally, are apparent from an inspection of the record, in connection with the existing laws, and can hardly be regarded as constituting subjects of an attack upon the judgment, but rather as establishing that, conceding the defendant to have been guilty of the acts of which he has been convicted, yet that the law does not sanction his imprisonment therefor. While the sufficiency of an indictment will not be considered if it is apparent therefrom that the defendant has been convicted of some crime under an imperfect, informal, or defective accusation (*Matter of Eaton*, 27 Mich. 1; *Emanuel v. State*, 36 Miss. 627; *Parker v. State*, 5 Tex. App. 579; *Petition of Semler*, 41 Wis. 517; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 20; *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 658; *Ex parte Fil Ki*,

79 Cal. 584), yet we think that if the act of which he is convicted is clearly not criminal, either because there is no law making it such, or because the enactment to make it criminal had been repealed or is unconstitutional and inoperative, he must be released: *In Matter of Corryell*, 22 Cal. 178; *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257; *Ex parte Kearney*, 55 Cal. 212; Freeman on Judgments, sec. 622, 624, 626; *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529; *Ex parte Siebold*, 100 U. S. 376; *Herrick v. Smith*, 1 Gray, 49; 61 Am. Dec. 381. His release must also be ordered if he is shown to have been previously convicted of the same crime: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901; *Ex parte Rollins*, 80 Va. 314; *Brown v. Duffus*, 66 Iowa, 193; *Whitcomb's Case*, 120 Mass. 118; 21 Am. Rep. 502; *Bushel's Case*, 6 How. St. Tr. 999; *In re Snow*, 120 U. S. 274; *In re Nielsen*, 131 U. S. 176.

In criminal as in civil cases, a judgment is void if rendered by a court having no jurisdiction either of the subject-matter of the proceeding or of the person of the defendant, and if this want of jurisdiction appears, he must be released upon *habeas corpus*: Freeman on Judgments, sec. 623; *Cropper v. Commonwealth*, 2 Rob. (Va.) 842; *Ex parte Milligan*, 4 Wall. 2; *Ex parte Schultz*, 6 Whart. 269. It is essential that the court not only have jurisdiction of the crime, but that its jurisdiction be invoked in the manner sanctioned by law. Therefore, if the crime of which the defendant has been convicted is one for which he could be held to answer only upon the presentment or indictment of a grand jury, and he has not been indicted nor presented, his conviction is void: *Ex parte Yarborough*, 110 U. S. 651; *State v. West*, 42 Minn. 147. If the jurisdiction of the court is dependent upon the existence of some fact which it was the duty of the prosecution to prove at the trial, and the proof of which was necessary to sustain the verdict of guilty, such verdict and the judgment entered thereon are conclusive against the defendant, and he cannot relitigate the same issue on *habeas corpus*: *People v. Liscomb*, 60 N. Y. 571; 19 Am. Rep. 211; *Matter of Newton*, 16 Com. B. 97; 24 L. J. Com. P. 148. It is not sufficient that a court have jurisdiction to try a cause and to enter judgment therein; it must also have had power to grant the relief or to impose the sentence contained in its judgment. Hence, if it appears that the court directed the defendant to do some act which it had no power to require of him, and then imprisoned him for contempt in not doing as directed (*Ex parte Gordan*, Sup. Ct. Cal., Dec., 1891; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Ayers*, 123 U. S. 443), or, after his conviction of some crime, sentenced him to suffer a punishment which it had no power to impose, the sentence, in so far as it is in excess of the jurisdiction of the court, is void, and will not justify the detention of the prisoner: *Ex parte Bond*, 9 S. C. 80; 30 Am. Rep. 20; *Ex parte Crandall*, 34 Wis. 177; *People v. Baker*, 89 N. Y. 460; *Ex parte Mooney*, 26 W. Va. 36; 53 Am. Rep. 59; *Rex v. Collyer*, Sayers, 44; *Ex parte Page*, 49 Mo. 291; *Ex parte Lange*, 18 Wall. 163; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211.

The national courts and judges may issue writs of *habeas corpus* for the release of prisoners in custody for acts done or omitted in pursuance of a law of the United States, or of an order, process, or decree of the court or judge thereof, or in custody in violation of the constitution, laws, or treaties of the United States, or for an act done or omitted by a subject or citizen of a foreign country, under a legal right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of such foreign state, or under the color thereof, the validity and effect of which depend upon the law of nations. It is perfectly obvious, therefore, that persons may

be discharged on *habeas corpus*, though convicted after a regular prosecution or trial, if the act or omission upon which the conviction was had was one of the class specified above. Generally, the record of conviction would disclose the act or omission for which the sentence was imposed, and it would not be necessary for the court or judge issuing the writ of *habeas corpus* to look beyond such record for the purpose of determining whether the defendant should be released: Freeman on Judgments, sec. 626. Whether, however, it would be competent for the court to receive extrinsic evidence for the purpose of showing whether or not the act or omission of which the defendant was convicted was one entitling him to release is a question which, so far as we are aware, has not been judicially determined.

There are various other special proceedings in which judgments may be relied upon by one of the litigants, such, for instance, as *mandamus* and *quo warranto*, and in which the judgment so relied upon may be sought to be avoided. Neither of these proceedings is to annul, vacate, or modify a judgment, and upon principle, a judgment, when pleaded or offered in evidence therein, is entitled to the same immunity from collateral attack as if offered in any other collateral action or proceeding. In *mandamus* to compel the payment or to aid the enforcement of a judgment, if it appears from the record before the court that the judgment was recovered upon certain bonds and coupons which were void for want of authority to issue them, the writ will be denied in the national courts, on account of such invalidity, notwithstanding the judgment recovered upon them: *Brownsville v. Loague*, 129 U. S. 493. The general rule, however, is, that judgments have the same effect as *res judicata* in proceedings by *mandamus* as elsewhere: *Supervisors v. United States*, 4 Wall. 435; *Mayor v. Lord*, 9 Wall. 409; High on Extraordinary Legal Remedies, sec. 396.

It may be that a corporation, officer, or other person, natural or artificial, proceeded against by *quo warranto* pleads or proves in justification that the exercise of the office or franchise in question is sanctioned by the judgment or decision of some court, or of some person or tribunal exercising judicial functions, and the effect of this judgment or decision may be sought to be avoided either by showing that it was erroneous, or was made by a court or tribunal not possessed of jurisdiction to make it. We are aware of no decision upon this subject, but, upon principle, the judgment should be treated precisely as if it were offered or pleaded in any other proceeding as a cause of action or of defense. If the judgment or decision was pronounced by a tribunal of special or limited jurisdiction, its authority to act must be established by the person relying upon it, and when so established, its decision must be respected, whether erroneous or not. If, on the other hand, the judgment was rendered by a court of general jurisdiction, jurisdictional presumptions in its favor should be regarded as incontrovertible, to the same extent as they are in other collateral proceedings.

There is, however, a class of proceedings similar in effect to proceedings by *quo warranto*, but which are essentially different in their nature, and which may properly be regarded as direct. Thus if the existence of a corporation or the authority of a board or other tribunal depends upon some pre-existing jurisdictional fact which has been determined to exist by some court or other tribunal possessing authority to determine it, but the proceedings of such court or tribunal are required to be submitted to a superior court to be examined for the purpose of ascertaining whether they are valid, and of approving them if found to be so, the proceeding in the latter court is direct, and before its approval can be given, it must be shown that the jurisdictional fact

did in truth exist as was affirmed by the subordinate court or tribunal: *In the Matter of Madeira Irrigation District*, Cal. Sup. Ct., Dec. 12, 1891; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594. In cases of this class it is evident that the proceeding stands on substantially the same footing as if an appeal had been authorized to be taken to the superior court upon the question both of law and of fact, and the party interested had availed himself of the remedy thus afforded.

If a debtor has been granted a discharge from his debts or other obligations by a court of bankruptcy or insolvency, the effect of the judgment or order granting such discharge may be avoided by showing any of the grounds of avoidance specified in the statute authorizing the discharge and declaring its effect. In all other respects, it is as impregnable to collateral assault as any other judgment of a court of competent jurisdiction: *Freeman on Judgments*, secs. 337 a, 607. If the judgment was entered during the pendency of the bankruptcy proceeding, and before the discharge was granted, the bankrupt, upon obtaining the discharge, is entitled to have the court in which the judgment was rendered enter a perpetual stay of proceedings therein: *Boynton v. Bell*, 121 U. S. 457. If, however, he secures his discharge before the judgment is rendered against him, he must, whether the action is then pending or is subsequently commenced, avail himself of such discharge by some appropriate pleading, motion, or other proceeding, and if he fails to do so, or though he does so if the court refuses to give the proper effect to the discharge, any judgment subsequently recovered against him cannot be avoided collaterally by showing his previous discharge, and that such judgment, because of the discharge, ought not to have been rendered: *Rahn v. Minis*, 40 Cal. 421; *Marsh v. Mandeville*, 28 Miss. 122; *Dimock v. Recere C. Co.*, 117 U. S. 559; *Woodbury v. Perkins*, 5 Cush. 86; 51 Am. Dec. 51; *Boun v. Morange*, 108 Pa. St. 69.

The effect of a judgment or order of a court of bankruptcy may, like the judgment of any other court, be collaterally avoided by showing that it did not have jurisdiction of the subject-matter, or that the person against whom the judgment is sought to be used was not subject to the jurisdiction of the court. A discharge granted to a bankrupt or insolvent is operative in his favor against every person over whom the court had jurisdiction. Over the creditors resident in the state or nation wherein the discharge is granted, it has undoubted jurisdiction, and the discharge is valid and operative against them, both there and elsewhere, unless its effect is annulled or limited by some constitutional inhibition or restriction: *Baker v. Wheaton*, 5 Mass. 509; 4 Am. Dec. 71, and note; *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342, and note; *Blanchard v. Russell*, 13 Mass. 1; 7 Am. Dec. 106, and note; *Peck v. Hibbard*, 26 Vt. 702; 62 Am. Dec. 605; and if both the creditor and debtor are residents of the state or nation, it is of no consequence that the contract was made and is to be performed elsewhere: *Marsh v. Putnam*, 3 Gray, 551. As against non-residents who have not appeared in the foreign court, nor in any way submitted either their claims or their persons to its jurisdiction, any discharge granted by it must generally be wholly ineffective in any other state or country: *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342; *Smith v. Buchanan*, 5 East, 6; *Munroe v. Guillaume*, 3 Keyes, 30; 3 Abb. App. 334; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410, and note; *White v. Canfield*, 7 Johns. 117; 5 Am. Dec. 249; *Mitchell v. McMillan*, 3 Mart. (La.) 676; 6 Am. Dec. 690; *Vanuxem v. Hazlehursts*, 4 N. J. L. 192; 7 Am. Dec. 582. But it may be, and has been insisted, that the place where a contract was made or is to be performed is of controlling importance in determining what

courts have jurisdiction to discharge it, and that though the creditor is a resident of another state or nation, his residence does not carry with it the debt due him, so that the courts where it was created may not discharge the debtor from all obligation to pay it. We apprehend there is no doubt that the courts of a country where an obligation arose or was created may grant a discharge therefrom which is there operative, whether the creditor is resident or non-resident, because, unless restrained by some constitutional limitation, laws may be enacted in any country withdrawing all aid for the enforcement of obligations by legal proceedings, and there are numerous decisions to the effect that when a contract is discharged by proceedings in the country where it was created or made payable, and where the debtor resides, it must be regarded as discharged everywhere, though the creditor was a non-resident and did not appear in the foreign court: *May v. Breed*, 7 Cush. 15; 54 Am. Dec. 700; *Ballantine v. Golding*, 1 Cooke, 487; *Potter v. Brown*, 5 East, 124; *Very v. McHenry*, 29 Me. 206; *In re Kinsley*, 1 Low. 221; *Long v. Hammond*, 40 Me. 204; *Gardiner v. Houghton*, 2 Best & S. 743. These decisions are, however, necessarily in conflict with the principles adopted and enforced by the supreme court of the United States, as well as by other courts, to the effect that a bankruptcy or insolvency statute can have no extraterritorial operation, and that a citizen of one state cannot be required to appear in the courts of another, and to submit to their exercise of jurisdiction over him, or to their discharge of an obligation due him, though it was created or is to be performed in the state where such courts have jurisdiction: *Baldwin v. Hale*, 1 Wall. 223; *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Anderson v. Wheeler*, 25 Conn. 613; *Whitney v. Whiting*, 35 N. H. 457; *Murphy v. Manning*, 134 Mass. 488. It is true that these principles were, in the cases cited, applied only to discharges granted by the courts of one state, when sought to be asserted against the citizens of another; but it seems unreasonable to concede to the courts of foreign nations an authority over the citizens of a state which is denied to the courts of sister states.

It only remains for us to consider, as briefly as possible, the rules applicable to ordinary actions, the object of which is not to annul, vacate, or modify a judgment. We need not cite authorities to show that a judgment, whenever properly pleaded or offered in evidence in another action, cannot be avoided, as between the parties to it, for any mere error or irregularity of the court by which it was pronounced, and that whatever has been thereby decided and determined must be regarded as conclusively and irrevocably established, as between the parties thereto and persons in privity with them, until the judgment shall have been set aside, either upon appeal or upon some other appropriate proceeding directed against the judgment, for the purpose either of annulling, vacating, or modifying it. Therefore, in a collateral action, the force of a judgment can be destroyed only by showing that the court did not have jurisdiction over the subject-matter or the person against whom it was rendered, or, though having jurisdiction both of the subject-matter and of the person, did not have power to give the relief which it awarded.

If the judgment relied upon was pronounced by a court of limited jurisdiction, there is no presumption in favor of its authority to act, and such authority must, therefore, be shown by the party who relies upon it: *Freeman on Judgments*, sec. 517; *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488; *People's Savings Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894; *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556; *Smith v. Finley*, 52 Ark. 373. The jurisdiction of the court would ordinarily affirmatively appear from its judg-

ment and the papers on file in the action. If it does not so appear, there is some doubt whether it may be shown by extrinsic evidence or not, the better opinion being, in our judgment, that unless the jurisdictional facts are by statute required to appear from the papers and files in the action, they may be established by competent extrinsic evidence: Freeman on Judgments, sec. 518; *Jolley v. Foltz*, 34 Cal. 321; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *Liss v. Wilcozen*, 2 Col. 85; *Van Duesen v. Sweet*, 51 N. Y. 385; *Behymer v. Nordloh*, 12 Col. 352. Though the jurisdiction of the court appears affirmatively from the papers and files, they are not entitled to the verity of records, and their assertions may be disproved by extrinsic evidence, and the judgment thereby be shown to be void: *Sanborn v. Fellows*, 22 N. H. 489; *Salladay v. Bainhill*, 29 Iowa, 555; *Sears v. Terry*, 26 Conn. 273; *Culver's Appeal*, 48 Conn. 165; *People's Savings Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894. In some of the states this rule does not prevail where the evidence of the service of process consists of the return of an officer, and the party affected thereby has a remedy against him by an action for a false return: *Lightsey v. Harris*, 20 Ala. 409. Though the court is one of inferior jurisdiction, if it has authority to inquire concerning the existence of some jurisdictional fact and to determine whether it existed or not, its determination on this subject is as conclusive as upon any other, and cannot be assailed collaterally, and such determination need not appear in express terms, but will be implied, if the tribunal proceeded to take such action as could properly be taken only after it had made the requisite inquiry and found that the jurisdictional fact existed: Freeman on Judgments, sec. 523; *Ela v. Smith*, 5 Gray, 135; 66 Am. Dec. 359; *Spaulding v. Homestead Ass'n*, 87 Cal. 40; *Stoddard v. Johnson*, 75 Ind. 31; *Coloma v. Eaves*, 92 U. S. 484; *Commissioners v. Aspinwall*, 21 How. 539.

If the judgment is one pronounced by a court of record, its jurisdiction will be presumed, and if it is also a court of the state in which the judgment is offered in evidence, the presumption is, in most states, indisputable in a collateral action: Freeman on Judgments, secs. 130-132. It is, however, always essential that the court should have had jurisdiction over the subject-matter of the action or proceeding, and authority to award the relief granted: Freeman on Judgments, secs. 120, 120 c; and while, if such jurisdiction did not exist, its absence will generally appear from the record taken in connection with the existing laws, there is at least one instance in which it may be established by extrinsic evidence, to wit: it may be shown by such evidence that the person upon whose estate letters testamentary or of administration were granted was at the time still living, and that the court, therefore, had no jurisdiction over him and his estate: Freeman on Judgments, sec. 120; *Duncan v. Stewart*, 25 Ala. 408; 60 Am. Dec. 527; *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128; *Withers v. Patterson*, 27 Tex. 496; 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237; *contra*, *Roderigas v. East River S. I.*, 63 N. Y. 460; 20 Am. Rep. 555.

It is a condition precedent to the existence of jurisdiction over a person who does not voluntarily appear, that the court rendering the judgment against him have authority to require him to appear before it. Therefore, every personal judgment which a court may render against one who does not voluntarily submit to its authority, and who was not a citizen of the state, nor served with process within its borders, no matter what the mode of service was, is void: Freeman on Judgments, sec. 120 a. A person or corporation against whom a judgment is offered must, therefore, be permitted to show that he or it was not a citizen of the state when served with process,

and that such process was not served within the borders of the state: *Free-man on Judgments*, secs. 120 a, 120 b.

There is a class of persons who are in fact within a state, but, in contemplation of law, are not so within it as to be subject to the jurisdiction of its courts, because their presence is as the representatives of some other sovereignty, such as ambassadors and other public ministers and consuls and vice-consuls of foreign nations. Persons of this class, whether served with process or not, and whether they appear in court in response to such process or not, may, at any time, avoid a judgment against them, though entered after a trial upon the merits, by showing their official capacity: *Miller v. Van Loben Sels*, 66 Cal. 341; *Bors v. Preston*, 111 U. S. 256; *United States v. Benner*, 1 Bald. 234; *United States v. Lafontaine*, 4 Cranch C. C. 173.

While, as we have stated, persons not within the jurisdiction of a court cannot be required to appear before it and to submit to its exercise of authority over them, yet if they have property within the state, its courts have jurisdiction over such property, and may, by the service of process beyond the state, actual or constructive, obtain jurisdiction over non-residents to the extent of rendering judgments against them which may affect the title to their property within the state, as where the object of the action is to enforce a lien, make partition, set aside a transfer, determine conflicting claims of title, compel specific performance of contracts, condemn lands in the exercise of the power of eminent domain, or to enforce a pecuniary liability for the satisfaction of which property has been attached: *Freeman on Judgments*, sec. 120 a; *Arndt v. Griggs*, 134 U. S. 316; *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Eastman v. Wadleigh*, 65 Me. 251; 20 Am. Rep. 695; *Loaiza v. Superior Court*, 85 Cal. 11; 20 Am. St. Rep. 197; *Young v. Upshur*, 42 La. Ann. 362; 21 Am. St. Rep. 381; *Venable v. Dutch*, 37 Kan. 515; 1 Am. St. Rep. 260.

There are, doubtless, judgments entered in cases over which the court had undoubted jurisdiction, which are wholly or partly void because the court either decided some question which it had no power to decide, or granted some relief which it had no power to grant; but it is very difficult to formulate any test by which to unerringly determine whether the action of the court in cases of this class is void or erroneous only. The fact that the court did something in excess of its jurisdiction, if it exists at all, must undoubtedly appear by the record, and such attack as is made must appear from and be established by the record taken in connection with the constitution and laws of the state. If a court should grant relief which under no circumstances it has authority to grant, its judgment is to that extent void; as where it orders a donation out of the public treasury: *Bridges v. Clay Co. Supervisors*, 57 Miss. 252; enters judgment for an amount greater than it is authorized to give: *Feillett v. Engler*, 8 Cal. 76; sentences a defendant to undergo a punishment different from or in excess of that which it is authorized to impose: *Ex parte Lange*, 18 Wall. 163; fines the prosecuting witness for costs, when there is no finding that the prosecution was instituted without probable cause and from malicious motives: *Little v. Evans*, 41 Kan. 578; annuls conveyances which are not the subject-matter of the action, nor sought to be annulled therein: *Munday v. Vail*, 34 N. J. L. 418; *Seamster v. Blackstock*, 83 Va. 232; 5 Am. St. Rep. 262; *Anthony v. Kasey*, 83 Va. 338; 5 Am. St. Rep. 277; *Wade v. Hancock*, 76 Va. 620; directs the sale of property in a proceeding not instituted for the purpose of obtaining such sale, or enters personal judgment against the vendee of a mortgagor in a statutory

proceeding to foreclose a mortgage in which such judgment is entirely unauthorized: *Fithian v. Monks*, 43 Mo. 502.

Though a court had jurisdiction both of the subject-matter and of the parties to the action, it may lose such jurisdiction at some subsequent stage of the proceeding, as where an appeal is prosecuted to some appellate tribunal: *McKinney v. Jones*, 57 Wis. 301; *Ex parte Sibbald v. United States*, 12 Pet. 488; *McClanahan's Heirs v. Henderson*, 1 T. B. Mon. 261; *McArthur v. Dane*, 61 Ala. 539; *Boynton v. Foster*, 7 Met. 415; or the cause is removed to the national courts by proper proceedings taken therefor: *Steamship Co. v. Tugman*, 106 U. S. 118; *Railroad Co. v. Koonz*, 104 U. S. 14; or the term of the court has expired, and for that reason the authority to act is suspended until the commencement of the next term: *State Nat. Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185; *Garlick v. Dunn*, 42 Ala. 404; *Kimports v. Rawson*, 29 W. Va. 487; *Brunley v. State*, 20 Ark. 77; *Galusha v. Butterfield*, 2 Seam. 227; *Ex parte Osborn*, 24 Ark. 479; *Hernandez v. James*, 23 La. Ann. 483; *Dodge v. Coffin*, 15 Kan. 277; *Dixon v. Judge Fifth Dist.*, 26 La. Ann. 119; *Earls v. Earls*, 27 Kan. 538; *Filley v. Cody*, 4 Col. 109; *Francis v. Wells*, 4 Col. 274; *Bruce v. Doolittle*, 81 Ill. 103; *Laughlin v. Peckham*, 66 Iowa, 121; *Marshall v. Rarities*, 22 Fla. 583; *Balm v. Nunn*, 63 Iowa, 641; *King v. Green*, 2 Stew. 133; 19 Am. Dec. 46; *Davis v. Fish*, 1 G. Greene, 406; 48 Am. Dec. 387; *Wicks v. Ludwig*, 9 Cal. 175; *Norwood v. Kenfield*, 34 Cal. 333; *Doss v. Waggoner*, 3 Tex. 515; *Leclair v. Globenski*, 4 L. C. Rep. 139; or the jurisdiction of the court has been exhausted by the entry of a final judgment or order in the action or proceeding: *State v. Railroad Co.*, 16 Fla. 708; *Fossett v. McMahan*, 74 Tex. 546; or the court, when the party appeared before it, ordered his answer to be stricken out, and refused to hear him in his defense, in a case where it had no authority to strike out such answer and refuse such hearing: *Henry v. Carson*, 96 Ind. 412; *Windsor v. McVeigh*, 93 U. S. 274. If, in proceedings to settle the estate of a deceased person, an order is made appointing an executor or administrator, the court's jurisdiction to make such appointment is exhausted, and cannot again be exercised while the person so appointed continues in office, and any further grant of letters testamentary or of administration made by it is void: *Griffith v. Frazier*, 8 Cranch, 9; *Flinn v. Chase*, 4 Denio, 90. So if an estate is fully administered upon, and the property thereof distributed to the heirs: *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128; or if, in the due course of administration, the property of the decedent is sold and the title vested in the purchaser thereof, any further proceeding for the readministration or distribution of the property so distributed, or for the sale of the property so sold, whether taking place in the same or in another court, is without jurisdiction and void: *Lindsay v. Jaffray*, 55 Tex. 626; *Smith v. Woolfolk*, 115 U. S. 143.

A *scire facias* or an action at law upon a domestic judgment is a collateral proceeding so far as any attack upon the judgment is concerned. The effect of the judgment cannot be avoided for error or irregularity, nor can any defense be made which must involve a re-examination of the issues presented in the original action, and either determined by the court or confessed by the defendant, nor can any attack upon the jurisdiction of the court be entertained which would not be proper if it were attempted in any other action, if the judgment were offered therein as part of a chain of title or otherwise, Freeman on Judgments, sec. 435. If, however, the court in which the action is pending is competent to receive and act upon an equitable defense, such defense may be asserted by way of answer or cross-complaint, and relief given under the same circumstances as if such relief were sought in an independent

suit: *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; *Keeler v. Elston*, 22 Neb. 310; *Drinkard v. Ingram*, 21 Tex. 650; *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495. If the action is upon the judgment of a court of another state, or of a foreign nation, it cannot be resisted by showing mere errors or irregularities; but the jurisdiction of the court by which the judgment was pronounced is always open to question, and the defendant is at liberty to controvert jurisdictional statements and recitals, and to show by any competent evidence, extrinsic or otherwise, that the court was not entitled to exercise jurisdiction over him: *Freeman on Judgments*, secs. 562-564, 588-590.

A suit in equity to obtain relief from a judgment is a collateral attack within the definition given in the principal case, because it is not within the power of a court of equity to annul, vacate, or modify a judgment at law. The judgment complained of is permitted to stand, and the court of equity merely inquires whether there are any equitable circumstances requiring it to prevent the person in whose favor the judgment was recovered from enforcing or taking advantage of it: *Freeman on Judgments*, sec. 485. Among the grounds inducing a court of equity to act, error of a court at law in matters of law or of fact is not included: *Freeman on Judgments*, sec. 487. It must appear that the complainant could not present his cause of action or of defense to the court of law, either because it was incompetent to hear it and to grant relief therein, or because he was prevented from presenting it and from having it properly considered, through fraud, accident, mistake, surprise, or some other sufficient cause for the interposition of a court of equity: *Freeman on Judgments*, sec. 486. He may, if he can, show the existence of any of these causes, and that it operated to his prejudice, though his evidence tends to contradict the record. He may, therefore, prove that process was not served upon him, though the record declares that it was so served: *Freeman on Judgments*, sec. 495; *Wilson v. Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290; *Armstrong v. Cheshire*, 2 Dev. Eq. 234; 34 Am. Dec. 273; *Crafts v. Dexter*, 8 Ala. 767; 42 Am. Dec. 666; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Bridgeport S. B. v. Eldredge*, 28 Conn. 556; 73 Am. Dec. 688; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Lapham v. Campbell*, 61 Cal. 296. If the evidence of the service of process is contained in the return of a sheriff or other officer whose duty it was to serve such process and make return thereof, some of the courts deny relief, unless it appears that the false return was induced by the plaintiff in the action: *Walker v. Robbins*, 14 How. 584; *Knox Co. v. Harshman*, 133 U. S. 152; *Johnson v. Jones*, 2 Neb. 133; *Krug v. Davis*, 85 Ind. 309; *Taylor v. Lewis*, 2 J. J. Marsh. 400; 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356; while other courts grant relief whether the plaintiff was instrumental in procuring the false return or not: *Ridgeway v. Bank of Tenn.*, 11 Humph. 523; *Ryan v. Boyd*, 33 Ark. 778; *Dunklin v. Wilson*, 64 Ala. 162; *Hauswirth v. Sullivan*, 6 Mont. 203.

Where the appearance of the defendant was entered in an action by an attorney, it was formerly thought that such appearance was binding on him, and that, except in an action against the attorney, the defendant would not be permitted to show that the appearance was not authorized, unless, perhaps, where the attorney was irresponsible or the appearance was entered through the procurement of the plaintiff: *Freeman on Judgments*, sec. 499. But the rule now generally prevailing is, that a judgment resting upon the unauthorized appearance of an attorney will not be allowed to be enforced, irrespective of the question whether the attorney is responsible or irresponsi-

ble: *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Marvel v. Manouvrier*, 14 La. Ann. 3; 74 Am. Dec. 424; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Jones v. Williamson*, 5 Cold. 370; *Boro v. Harris*, 13 Lea, 36; *Newcomb v. Dewey*, 27 Iowa, 381.

Where the relief sought in equity must, if granted, affect rights acquired by strangers to the judgment who are purchasers for value in good faith, and without there being anything in the record, or elsewhere, to give them any notice of any vice or other infirmity in the proceedings, it is manifest that their equities are, at least, equal to those of the complainant, and that relief cannot be granted against them without violating the legal maxim, that where the equities are equal, the legal title must prevail: Freeman on Judgments, sec. 510. We think no court will hesitate to apply this maxim, unless in cases where there was no service of process, and the court of law therefore did not have jurisdiction over the defendant, and had no notice of the action, and has been guilty of no laches. In the latter class of cases some of the courts have denied relief: *Reeve v. Kennedy*, 43 Cal. 649; *Stokes v. Geddes*, 46 Cal. 17; while others have granted it: *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; and the rule upon the subject cannot be regarded as settled by any decided preponderance of authority.

If a party to a judgment which is not void does not procure its vacation by some motion, or prosecute some appellate proceeding, or seek relief in equity, he cannot avoid it when offered in evidence against him by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury, or collusion, or through some agreement entered into by the prevailing party which he had neglected or refused to perform: Freeman on Judgments, sec. 334. The judgment is, however, ordinarily obligatory only upon the parties thereto, and persons in privity with them. It may be that at the time the judgment is entered there are persons neither parties nor privies thereto, but whose interests may be injuriously affected if it is enforced as against them. Not being parties to the action, they are, in most instances, not entitled to move to vacate the judgment, nor to prosecute an appeal therefrom, nor to institute and maintain proceedings in equity to enjoin its enforcement. Their position would be sad, if they were not, therefore, permitted to a certain extent to impeach the judgment collaterally, when it is offered in evidence against them, or for the purpose of affecting their rights and interests. They are permitted to attack the judgment on the ground that they are creditors of the defendant, and that the judgment was suffered for the purpose of hindering, delaying, and defrauding them: *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; Freeman on Executions, sec. 136. Whenever a judgment or decree is procured through the fraud of either of the parties or by the collusion of both, for the purpose of defrauding a third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained: Freeman on Judgments, sec. 336; *Atkins v. Allen*, 12 Vt. 619; 36 Am. Dec. 361; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Robinson v. Davis*, 11 N. J. Eq. 302; 69 Am. Dec. 591; *Bunn v. Ahl*, 29 Pa. St. 387; 72 Am. Dec. 639; *Morrill v. Morrill*, 20 Or. 96; *ante*, p. 95. A stranger to a judgment, prejudiced by it when entered, may not avoid it collaterally for mere error or irregularity, though he may doubtless show by extrinsic evidence that the court did not have jurisdiction to enter it, and may further show that it

is erroneous, and also collusive, and if not collusive, that the nominal defendant made no defense therein, because he had no interest to be protected; but when a real defense is made in good faith, we think a stranger affected by the judgment will not be permitted to impeach it by retrying the case before another court, for the purpose of convincing it that a different judgment ought to have been entered in the former action: *Freeman on Judgments*, sec. 337.

STATE v. WHEELER.

[20 OREGON, 192.]

CRIMINAL LAW—FORGERY OF NOTE.—One who signs a promissory note under a false, fictitious, or assumed name, with intent to defraud another, is guilty of forgery.

CRIMINAL LAW—FORGERY—INTENT.—The essential element of forgery consists in the intent, when making the signature or procuring it to be made, even though the name affixed is that actually borne by the person affixing it, to pass it fraudulently as the signature of another than the one who actually makes it.

Lydell Baker, for the appellant.

T. A. Stevens, district attorney, and *W. T. Hume*, for the respondent.

BEAN, J. The defendant was indicted, tried, and convicted of the crime of forgery, from which judgment he appeals. The indictment charges that on June 28, 1890, the defendant made and forged a promissory note for \$85.50, payable to John P. Fidock or order, due thirty days after date, by then and there signing the name of John Williams to said note, with an intent to defraud and injure J. T. Milner.

At the trial in the court below, after the evidence for the state was closed, defendant's counsel moved the court that the jury be instructed to render a verdict of not guilty, upon the ground that the evidence failed to prove the crime charged. The refusal of the court to give this instruction is the only error claimed on this appeal. An examination of this question renders it necessary to briefly state the evidence as given on the trial, which was as follows: On June 28, 1890, the defendant called at the office of J. T. Milner, in Mulkey's block, in the city of Portland, and represented to Mr. Milner that his name was John Williams, and applied for a loan of \$85.50, offering to secure the same by a chattel mortgage on a team of horses. He drove the team up in front of the office, and Mr. Milner looked at them and agreed to make the loan. The note was drawn up by Milner, and the defendant signed



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BOLLING *v.* KIRBY.

[90 ALABAMA, 215.]

Conversion.



BOLLING v. KIRBY.

[90 ALABAMA, 215.]

CONDITIONAL SALE — PAYMENT AND RESCISSION THEREOF. — Where a note is given in payment for a sewing-machine, the title to which is to be held by the seller until the payment of the note, which is left with a third party authorized to receive cattle in payment and to surrender the note, and after such surrender the cattle are claimed by the execution creditors of the maker of the note, who thereupon redelivers the note to the third person, under agreement that it shall be considered that no payment has been made, the title to the machine is thereby reinvested in the seller upon his ratification of the transaction, although the third party had no authority except to receive payment of the note and to surrender it.

CONVERSION — WHAT CONSTITUTES. — An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion. It is not essential to conversion sufficient to support the action of trover that the defendant should have the complete manucaption of the property.

CONVERSION — WHAT CONSTITUTES. — Where, under a conditional sale of a sewing-machine, the seller, upon default in payment, demands the machine from the purchaser's wife, the purchaser himself having left the state, and her father unconditionally refuses to allow the seller to take possession of the machine, this will amount to a conversion; but if such refusal is based on a disputed question of payment, and upon an agreement that the father is to have time to ascertain if payment has been made, and if it has not, to surrender the machine, then he is not guilty of conversion, although in the mean time the original purchaser returns and removes the machine without his knowledge or consent.

CONVERSION CANNOT BE BASED ON POSSESSION RETAINED BY AGREEMENT until demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed.

CONVERSION, TO SUSTAIN TROVER, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right, or a withholding of possession under a claim of title inconsistent with the title of the owner.

CONVERSION UPON WHICH TROVER MAY BE BASED must be a positive tortious act. Non-feasance or neglect of legal duty, or mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action.

CONVERSION. — BAILEE UNDERTAKING TO CARRY PROPERTY TO THE OWNER, but failing to do so, whereby it is subsequently lost while in his possession, through no positive misconduct of his, is not liable for conversion. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him.

CONVERSION. — ONE HAVING NOTICE of the claim of the true owner, and who delivers the property to another person, or permits him to take it out of his possession, whereby it is lost to the owner, is liable for its value in trover.

CONVERSION. — BARE POSSESSION OF PROPERTY, without some wrongful act in the acquisition of possession, or in its detention, and without any illegal assumption of ownership, or illegal user or misuser, is not a conversion for which trover will lie.

TROVER by Kirby and Brother, a partnership, against W. Bolling to recover for the conversion of a sewing-machine. On the trial, it appeared from the testimony of Kirby that on September 7, 1885, the plaintiffs sold to T. Bishop and his wife a sewing-machine, taking their joint note for the price, payable on November 15, 1885, and retaining the legal title in themselves until payment was made; that when the machine was delivered, it was agreed between the parties that young cattle would be taken in payment, and this was indorsed on the note; that about the time that the note became due he went to Bishop's house, and upon being told by Mrs. Bishop that Mr. Bishop had the cattle, he left word for him to bring them to a place called Guntersville, at which place he authorized one A. R. Hooper to receive the cattle, and left the note with him to be delivered to Bishop. Hooper testified that Bishop came to him in Guntersville a few days after he was given the note, and said that he had brought the cattle to pay it; that they then went to where the cattle were standing in the street; that he agreed to take the cattle, and handed Bishop the note; that two of the latter's creditors immediately claimed the cattle under a mortgage lien; that Bishop then gave them the cattle, handing the note back to the witness, saying that he had more cattle, and would bring them and pay the note; that witness had not taken charge of the cattle, tried to drive them away, nor taken any control over them. Kirby then testified that during the fall of 1886 he went to the residence of Bishop and wife to get the machine, as the note had not been paid; that he found that they had removed, Mrs. Bishop having gone to the home of defendant Bolling, who was her father, her husband being absent in another state; that he went to defendant's house and demanded the machine; that Mrs. Bishop claimed that the machine had been paid for in cattle, and that defendant refused to allow him to take the machine, as it was paid for, and belonged to Mrs. Bishop; that after some further conversation between them, defendant Bolling agreed to go to Guntersville and ascertain if witness had a right to take the machine, and if so, he would have nothing further to do with it; that they met in that town the next day, when defendant said

he was ready to deliver the machine; that witness told defendant to deliver it to one Winston, and that he had never received it. Winston testified that he agreed to receive the machine at the request of the parties; that defendant agreed then and afterwards to send the machine, but failed to do so, and subsequently informed witness that Bishop had moved his family away, and had taken the machine with him. Judgment for plaintiffs, and defendant appealed.

Lusk and Bell, for the appellant.

MCCLELLAN, J. We do not doubt that the title to the machine involved in this action remained in the plaintiffs below, under the contract put in evidence, until the purchase-money thereof was paid. In considering the question whether the transaction between Hooper and Bishop was a payment, it may be admitted that Hooper was the special agent of plaintiffs to receive cattle in payment, and to deliver up the paper, and that he did so receive the cattle and deliver up the paper, as that, without more, the debt was satisfied; and it may be further conceded that he had no authority to enter into an arrangement with Bishop by which creditors of the latter, having a lien of some sort on the property, were allowed to take the cattle, and the note was handed back to him by Bishop, and the satisfaction thereof obviated and expunged, so to speak. Yet we do not doubt that Bishop had full authority to make this arrangement, and that the lack of power to this end in Hooper was cured by the ratification of his unauthorized act in this behalf by his principals, the present plaintiffs. The note did not bind the wife: 2 Brickell's Digest, 98; *Walker v. Struve*, 70 Ala. 167. Under the facts of the case, the delivery of the cattle in payment of the note was no more than an exchange of that property for the machine, vesting title to the machine in the husband alone; and this, even had the cattle belonged to the wife, of which there is no proof: *Woods v. Dunlap*, 73 Ala. 169; *Kennon v. Dibble*, 75 Ala. 351. The title thus being in Bishop alone, it was entirely competent for him to agree that the payment which had so vested it in him should be considered as not having been made, and that it should revert in Kirby and Brother; and this agreement he must be held to have made, by handing the note back to Hooper, in consideration of the cattle being applied to another debt owed by him. The rulings and instructions of the court on this part of the case were free from error.

It is not essential to a conversion which will support the action of trover that the defendant should have the complete manucaption of the property. An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion: *Freeman v. Scurlock*, 27 Ala. 407; *Conner v. Allen*, 33 Ala. 515. Hence it is not important that when Kirby went to the residence of the defendant to demand the machine, it was not in his possession, strictly speaking, but in that of Mrs. Bishop, who then lived on his premises, if the defendant interfered to prevent, and did prevent, the plaintiff from then taking possession of it by the unqualified assertion of a title inconsistent with the plaintiffs', and an unconditional refusal to allow the plaintiffs to take the property away. Whether the defendant had the possession in himself or not, such intermeddling, in defiance of plaintiffs' right, was a conversion. But if there was a *bona fide* controversy as to whether payment had been made; and if the defendant, while asserting payment, and predicated his right to prevent a removal of the property on title in Bishop springing out of payment, recognized the controversy and uncertainty as to whether payment had been made, and declined to allow the machine to be removed until the truth of that matter could be ascertained; and if it was thereupon agreed between him and Kirby that he should go to Guntersville the next day, and satisfy himself about it, and that if he found the note had not been paid, the property should be surrendered to the plaintiffs, — these facts would not constitute a conversion. Such a qualified and conditional refusal by Mrs. Bishop would have been reasonable and justifiable under the circumstances, and would not have afforded any evidence of a conversion by her; and the interference of Bolling in her behalf stands upon the same footing: *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Butler v. Jones*, 80 Ala. 436. In such case the plaintiffs are held to have assented to the retention of possession by Mrs. Bishop, pending the investigation agreed on, and no action for conversion can be predicated on a possession so retained until a demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed: *Voltz v. Blackmar*, 64 N. Y. 646; *Finch v. Clark*, Phill. (N. C.) 335.

Conversion which will sustain trover must be a destruction

of the plaintiffs' property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right; or a withholding of possession under a claim of title inconsistent with the title of the owner: *Glaze v. McMillan*, 7 Port. 279; *Gray v. Crocheron*, 8 Port. 191; *Freeman v. Scurlock*, 27 Ala. 407; *Conner v. Allen*, 33 Ala. 515; *Thweat v. Stamps*, 67 Ala. 96; *Central R. R. etc. Co. v. Lampley*, 76 Ala. 357, 368; 52 Am. Rep. 334; *Tinker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345; *Burroughs v. Bayne*, 5 Hurl. & N. 296; *Fauldes v. Willoughby*, 8 Mees. & W. 539; 2 Greenl. Ev., sec. 642. It is immaterial whether the conversion or appropriation be for the benefit of the defendant or of a third person. "The true inquiry is, Does the defendant exercise a dominion over the property in exclusion or defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use": Cooley on Torts, 448; *Liptrot v. Holmes*, 1 Ga. 381-391.

Conversion upon which recovery in trover may be had must be a positive, tortious act. Non-feasance or neglect of legal duty, mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action: *Sturges v. Keith*, 57 Ill. 451; *Bailey v. Moulthrop*, 55 Vt. 17; *Rodgers v. Hine*, 2 Cal. 571; 56 Am. Dec. 363; *Ragsdale v. Williams*, 8 Ired. 498; 49 Am. Dec. 406. A bailee is not liable in trover for a loss of property through larceny from him, or because of negligence resulting in its destruction: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166. If the bailee undertakes to carry the property to the owner, and fails to do so, and it is subsequently lost while in his possession, through no positive misconduct of his, he is not liable for conversion: *Farrer v. Rollins*, 37 Vt. 295. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him: *Jones v. Hodgkins*, 61 Me. 480. And if, having notice of the claim of the true owner, he delivers the property to another person, or permits another to take it out of his possession, whereby it is lost to the plaintiff, he is liable for its value in this form of action: *Dearborn v. Union Nat. Bank*, 58 Me. 273; *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209.

Each of the several charges given by the court below at the request of the plaintiffs is supported by one or another of the principles we have announced. Only one of them is objectionable in any respect, and that not in such sort as will work a reversal. Charge No. 6 is argumentative, in that it directs that the jury may look to certain testimony, etc., as determining whether defendant had control of the property; but while the charge might have been refused on this ground, the giving of it is not a reversible error: *Birmingham F. Brick Works v. Allen*, 86 Ala. 185.

Of the charges asked by the defendant, the first and tenth direct a verdict for the defendant, if the jury believe the evidence. We suppose these charges, as also charges 5, 7, and 9, were requested on the theory that the cattle transaction, to which reference has been had, was a payment of Bishop's note, and operated a divestiture of plaintiffs' title. This position, as we have seen, is untenable, and it follows that charges 1, 5, 7, 9, and 10 were properly refused. Charge No. 4 is bad, in that it required the jury to find that Bolling had not converted the property, although they should believe that when Kirby demanded it from Mrs. Bishop, Bolling interfered, and unqualifiedly and unconditionally refused to allow him to remove it, and by these means prevented its removal. Charge No. 6 would have defeated a recovery, unless the jury believed Bolling converted the machine to his own use, when he would have been, as we have seen, equally liable for a conversion to the use of Bishop or Mrs. Bishop, or for a delivery to either of them, if he had possession or control of it after notice of plaintiffs' claim. Charge No. 8 is open to the same infirmity as No. 6, and moreover is misleading, at least in its requirement of evidence of possession in the defendant, since the jury might thereby have been induced to the conclusion that his intermeddling with the property while in strictness the possession was in Mrs. Bishop was not a conversion, although it was in one aspect of the evidence a palpable dominion over it to the exclusion of plaintiffs' rights.

The defendant also requested the following charge: "If the jury find from the evidence that all the defendant did in reference to the machine was to move it, with his daughter, to a house on his place, and come to town to make inquiry as to what was the truth as to the payment of the note given by Bishop for the machine, and that he allowed his daughter, Mrs. Bishop, to remain in a house on his place, and that the

machine was afterwards carried away by Bishop, one of the makers of the note, this would not make him guilty of a conversion of the sewing-machine, and the verdict of the jury should be for the defendant." This charge was refused, and an exception reserved. As we read the evidence, every fact it hypothesizes is based on testimony in the case. It is therefore not abstract. It presents the defendant's aspect of the case, not upon a part of the testimony, but on all of it. The jury are not restricted in determining whether they will believe the facts hypothesized to the evidence in behalf of the defendant, but they are directed to consider the whole evidence, and if upon that consideration they find these facts to be true, they must find for the defendant. If the charge asserts a correct proposition of law, therefore, it should have been given: *Alexander v. Wheeler*, 78 Ala. 167; *Munkers v. State*, 87 Ala. 84. Our opinion is, that the charge asserts a sound principle of law. If the facts stated were found to exist by the jury, the only act the defendant did in connection with the property was in conservation of it,—he gave it shelter,—a "kindness to the owner, done without any intention of injury to the thing, or of converting it,—an act perfectly consistent with the right of the owner and his dominion over it": *Conner v. Allen*, 33 Ala. 515; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350. And though he thus gave shelter to the property, it was as property, the possessory right, at least, to which was in Mrs. Bishop; and on these facts he never disturbed her possession, or acquired any possession in himself, that would have authorized or enabled him to have prevented the removal of the machine by Bishop. The charge ought to have been given. So ought charge No. 2. The bare possession of property, without some wrongful act in the acquisition of possession, or in its detention, and without illegal assumption of ownership, or illegal user or misuser, is not a conversion: *Glaze v. McMillan*, 7 Port. 297.

For the errors committed in refusing to give the two charges last considered, the judgment of the circuit court is reversed, and the cause remanded.

CONVERSION OF PERSONALTY SUFFICIENT TO SUSTAIN TROVER—DEFINITIONS. — Conversion of personal property takes place whenever a person who is neither the owner nor entitled to the possession exercises dominion or control over it inconsistent with or in defiance of the rights of a person who is either in possession or entitled to the immediate possession thereof: *Fuller v. Tabor*, 39 Me. 519; *Liptrot v. Holmes*, 1 Ga. 381; *Gilman v. Hill*, 36 N. H. 311; *West*

Jersey R. R. Co. v. Trenton etc. Co., 32 N. J. L. 517; *Bristol v. Burt*, 7 Johns. 254; *Murray v. Burling*, 10 Johns. 172; *Reynolds v. Shuler*, 5 Cow. 323; *Chambers v. Lewis*, 28 N. Y. 454; *Boyce v. Brockway*, 31 N. Y. 490; *Reid v. Colcock*, 1 Nott & McC. 592; 9 Am. Dec. 729; *Allen v. Crary*, 10 Wend. 349; 25 Am. Dec. 566; *Heald v. Carey*, 11 Com. B. 977; 16 Jur. 197; 21 L. J. Com. P. 97; *Ragsdale v. Williams*, 8 Ired. 498; 49 Am. Dec. 406; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310; *Maxwell v. Harrison*, 8 Ga. 61; 52 Am. Dec. 385; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66; *Hale v. Ames*, 2 T. B. Mon. 143; 15 Am. Dec. 150; *Goell v. Smith*, 128 Mass. 238. Conversion has been defined as a dealing by a person with chattels not belonging to him in a manner inconsistent with the rights of the true owner: *Velsain v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; *Ramsby v. Beezley*, 11 Or. 51. The word "owner," as here and elsewhere used in connection with the law of conversion, does not necessarily signify the person in whom the title to the property is vested, for there are instances in which persons who are not owners may recover for a conversion of chattels: *Nicholls v. Bastard*, 1 Tyrw. & G. 156; 2 Crompt. M. & R. 659; 1 Gale, 295; *Jeffries v. G. W. Ry Co.*, 5 El. & B. 862; 2 Jur., N. S., 250; 25 L. J. Q. B. 107; *Roberts v. Wyatt*, 2 Taunt. 268; and in which he who is their owner may not recover therefor. Conversion is an offense against the possession; and a recovery thereof may be had by him who was either in possession or entitled to the immediate possession of the property when the conversion was committed, and by no other person. Hence if the owner was neither in possession nor entitled to the immediate possession of his property when it was converted, whatever his other remedies may be, he cannot recover in trover for the conversion: *Gordon v. Harper*, Term Rep. 9; 2 Esp. 465; *Owen v. Knight*, 4 Bing. N. C. 54; 6 Dowl. P. C. 245; 5 Scott, 307; *Bradley v. Copley*, 1 Com. B. 685; 9 Jur. 599; 14 L. J. Com. P. 222; *Pain v. Sheriff of Middlesex*, Ryan & M. 99; *Middleworth v. Sedgwick*, 10 Cal. 392; *Swift v. Moseley*, 10 Vt. 208; 33 Am. Dec. 197.

"Whoever undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner, is, in contemplation of law, guilty of a conversion": *Watt v. Potter*, 2 Mason, 77. 'A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own': 2 Greenl. Ev., sec. 642. But the use, or disposition, or detention of a thing that 'might be a tort under one circumstance might, if done under others, assume a different appearance'; as, for example, if the use, disposition, or detention was to do a kindness to the owner, and without any intention of injury to the thing, or of converting it to the use of the person using, disposing of, or detaining it, and was merely conservative of it, and perfectly consistent with the right of the owner and his dominion over it: 2 Greenl. Ev., sec. 643; *Drake v. Shorter*, 4 Esp. 165; *Sparks v. Purdy*, 11 Mo. 219; *Watt v. Potter*, 2 Mason, 77; *Glover v. Riddick*, 11 Ired. 582; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350": *Conner v. Allen*, 33 Ala. 516. Hence where the act relied upon as a conversion consisted of the bottling of a large quantity of wine, and there was evidence that it was likely to suffer injury if not bottled, the bottling was adjudged not to be necessarily a conversion, and it was left for the jury to determine from the whole evidence whether a conversion had taken place or not: *Phillpot v. Kelley*, 4 Nev. & M. 611; 3 Ad. & E. 106; 11 Har. & W. 134.

"In the sense of the law of trover, a conversion consists either in the ap-

appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim inconsistent with his own: 2 Saund., Patterson and Williams's ed., 47 h; 2 Greenl. Ev., sec. 642. Lord Holt's general definition of a conversion, in *Baldwin v. Cole*, 6 Mod. 212, is, that it is 'the assuming upon one's self the property in and right of disposing of another's goods': *Tinker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345.

CONVERSION BY SELLING CHATTELS OF ANOTHER. — If one has undertaken to convert the chattels of another to his own use, or to do any act which, if accomplished, must result in depriving the owner of his property, then clearly the wrong-doer is answerable for a conversion: *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670. Hence one who, without authority, assumes to sell or otherwise dispose of the chattels of another, whether for his own benefit or not, is guilty of a conversion: *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Everett v. Coffin*, 6 Wend. 603; 22 Am. Dec. 551; *Gentry v. Madden*, 3 Ark. 127; *Thompson v. Currier*, 24 N. H. 237; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228; *Anderson v. Nicholas*, 28 N. Y. 600.

CONVERSION BY SALE NOT MADE PURSUANT TO AGENT'S, BAILEE'S, OR OFFICER'S AUTHORITY. — Though the person making a sale of the chattels of another might have been authorized to make such sale under certain circumstances, yet if he was not authorized to make the sale at the time or in the manner in which it was made, or to the person who became the purchaser, the act may generally be treated as a conversion: *Bailey v. Col'y*, 34 N. H. 29; 66 Am. Dec. 752; *Perkins v. Thompson*, 3 N. H. 144; *Sargent v. Gile*, 8 N. H. 325; *Grace v. McKissack*, 49 Ala. 163; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; *Johnson v. Stear*, 15 Com. B., N. S., 330; 10 Jur., N. S., 99; 33 L. J. Com. P. 130; 12 Week. Rep. 349; 9 L. T., N. S., 804.

A sheriff or constable who has levied upon property under a writ entitling him to sell it in the manner prescribed by law, for the purpose of satisfying the writ, is deprived of the protection of his writ, and made a trespasser *ab initio*, if he abuses his authority, and hence is liable as for the conversion of the property, if he sells it in defiance of a proper claim for its exemption from sale, or if he makes the sale before or after the time at which he was authorized to make it, or at a place different from that designated in the notice of sale, or in the absence of such notice: *Hall v. Ray*, 40 Vt. 576; 94 Am. Dec. 440; *Evarts v. Burgess*, 48 Vt. 206; *Breck v. Blanchard*, 20 N. Y. 223; 51 Am. Dec. 220; Freeman on Executions, sec. 302.

A pledgee of personalty may also become liable for its conversion by its sale, though he was authorized to sell to certain persons, or after complying with certain prerequisites, if the sale was made before it was authorized, or was made to one not authorized to purchase, or without complying with some of the prerequisites exacted either by the contract of pledge or by the law applicable to the relation of the parties: *Johnson v. Stear*, 15 Com. B., N. S., 330; 10 Jur., N. S., 99; 33 L. J. Com. P. 130; 12 Week. Rep. 349; 9 L. T., N. S., 804; *Maryland F. I. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248.

CONVERSION BY VENDEE OF PROPERTY SOLD WITHOUT AUTHORITY. — When a sale is made under such circumstances that the seller is guilty of a conversion in making it, the vendee is also guilty of a conversion, if he takes possession of the property pursuant to the sale and exercises any dominion or

control over it: *Cooper v. Willomatt*, 1 Com. B. 672; 9 Jur. 598; 14 L. J. Com. P. 219; *Cundy v. Lindsay*, L. R. 3 App. C. 459; 47 L. J. Q. B. 481; 38 L. T., N. S., 575; 26 Week. Rep. 406. A recovery may therefore be had against him in an action of trover without any prior demand upon him for the property, though he purchased it in good faith, and paid a full consideration therefor, in the belief that the seller was the owner of the property or had power to sell and dispose of it: *Gilmore v. Newton*, 9 Allen. 171; 85 Am. Dec. 749; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Sanborn v. Colman*, 6 N. H. 14; 23 Am. Dec. 703; *Freeman v. Underwood*, 66 Me. 229; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; *McCombie v. Davis*, 6 East, 538; *Galvin v. Bacon*, 11 Me. 29; 25 Am. Dec. 258; *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Trudo v. Anderson*, 10 Mich. 358; *Hake v. Buell*, 50 Mich. 89; *Harpending v. Meyer*, 55 Cal. 555; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303; *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739; note in 25 Am. Dec. 605; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652. The mere bidding off or purchasing of property at a sale thereof by one who is neither the owner nor authorized by him to make such sale appears not to be, of itself, sufficient to constitute a conversion, unless it is followed on the part of the purchaser by his taking actual or virtual possession of the property, or exercising some other unequivocal dominion or control over it: *Traylor v. Horrall*, 4 Blackf. 317. The courts of New York insist that one who purchases and takes possession of property in good faith cannot properly be treated as a wrong-doer until he has notice of the invalidity of his title, and they will not sustain an action against him by the owner for their conversion, unless the latter has demanded possession or otherwise made his title known, and the demand has been refused, or some other act done in defiance of the owner's title, after its existence was made known: *Gillett v. Roberts*, 57 N. Y. 28; *Ely v. Ehle*, 3 N. Y. 506; *Barrett v. Warren*, 3 Hill, 348.

CONVERSION, THOUGH NO SALE IS MADE. — It is by no means essential to the conversion of chattels that the wrong-doer sell or attempt to sell them, or even that he do any other act calculated to convert them to his own use. Any other exercise of dominion over personalty in defiance of the owner's rights accomplishes the same legal result. Hence one who aids another to take property from its owner, or to withhold possession of it from him in defiance of his rights, is guilty of a conversion, though the act was done without intending to claim any personal benefit or advantage therefrom, and in the belief that it was merely in the way of rendering assistance to one who was entitled either to take or to retain possession of the property: *Baker v. Beers*, 64 N. H. 102; *Coughlin v. Ball*, 4 Allen, 334; *Mead v. Jack*, 12 Daly, 65; *McCormick v. Stevenson*, 13 Neb. 70; *Freeman v. Scurlock*, 27 Ala. 407; *Scott v. Perkins*, 28 Me. 22; 48 Am. Dec. 470.

CONVERSION BY WORDS ALONE. — There may also be a conversion, though there is no moving or seizing of the chattels, and no interference with them except such as consists in words, spoken or written, indicating an intention to claim and exercise dominion over them inconsistent with the rights of their owner, as where an officer had a writ proclaiming a levy upon goods, and threatened to take them away unless a receipt was given for them, and was prevented from so taking them by the giving of such receipt, though he did not touch them: *Wintringham v. Lafoy*, 7 Cow. 735; *Connah v. Hale*,

23 Wend. 462; *Phillips v. Hall*, 8 Wend. 610; 24 Am. Dec. 108; *Allen v. Crary*, 10 Wend. 349; 25 Am. Dec. 566; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77. Of some of the cases last cited it may be said that the requiring a person to give a receipt for the property was in fact requiring him to hold it for the officer, and therefore was an actual holding by the officer through the receiptor as his agent; but it is not necessary that a person, to be guilty of a conversion, should take actual possession, either in person or by his agent. It is sufficient that, being in a condition to exercise dominion and control over the property, he assumes the right so to do, and the assumption is acquiesced in by the owner or the party in possession at the time the assumption is made: *Bristol v. Burt*, 7 Johns. 254; 5 Am. Dec. 264, *Webber v. Davis*, 44 Me. 147; 69 Am. Dec. 87; *Hall v. Amos*, 5 T. B. Mon. 89; 17 Am. Dec. 42. Therefore, where one who claimed to be entitled to certain hay notified the owner not to remove it, and apparently intended and designed that it should be used by the person in whose possession it was, and by whom it was subsequently used, both were held to be guilty of a conversion, the court, in so deciding, saying: "Any distinct act of dominion wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion. It is not necessary that there should be a manual taking of the property. If the wrong-doer exercises a dominion over it in exclusion or in defiance of the owner's right, whether it be for his own or another's use, it is in law a conversion: Cooley on Torts, 448; 2 Greenl. Ev., sec. 642; *Evans v. Mason*, 64 N. H. 98. 'The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them': Holt, C. J., in *Baldwin v. Cole*, 6 Mod. 212. Although the defendant did not have the possession of the hay after the sale, or the right to control the movements of Bosworth, there was evidence that both understood, after the sale, that Bosworth was authorized by the defendant as vendor to use the hay, and that was a conversion by the defendant. He had sold it for a price to Bosworth. His claiming that he bought it of the plaintiff, and his forbidding the plaintiff to remove it, then in the actual possession of Bosworth, was evidence from which it was competent to find that his purpose was to enable his vendee to consume the hay, and that, for the purpose of this case, its conversion by his vendee, authorized by the vendor, was the act of the vendor. In authorizing and aiding Bosworth to convert it to his own use he became liable to the plaintiff in trover: *Flanders v. Colby*, 28 N. H. 34. When several join in the conversion, trover will lie against either of them: *Puttee v. Gilmore*, 18 N. H. 460; 45 Am. Dec. 385. There was evidence from which it was competent to find a conversion by the defendant": *Baker v. Beers*, 64 N. H. 102.

There is perhaps not an entire accord in the authorities upon the subject of a conversion of chattels by mere words indicating an intention on the part of the speaker to take or to retain possession of them when the property is not in his possession nor under his immediate control when they are uttered. Thus in New York, one who had purchased property from a person having no title was visited at his home, thirty miles distant from the property, by its true owner, who there made a demand for its possession, to which such purchaser replied that he was willing to do what was right; that he did not want any trouble about it; that he would not give it up unless he could get

released from paying the man he bought it of. There was, at the time, nothing to prevent the owner from taking possession of his property where it was. The court held that no conversion had taken place, saying: "It is true that, to constitute a conversion, a manual taking is not necessary, but where words are relied upon, they must be uttered in such circumstances in proximity to the property as to show defiance of the owner's right, — a determination to exercise dominion and control over the property, and to exclude the property from the exercise of his rights": *Gillett v. Roberts*, 57 N. Y. 28.

Though chattels are in the possession of one who claims to be their owner, his assertion of ownership is not a conversion if made to a stranger not in sight of the property, nor in the presence of the owner, nor made with a view to preventing him from taking possession or assuming his rightful dominion and control: *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 446.

ILLUSTRATIONS SHOWING VARIOUS MODES OF CONVERSION. — The following acts have, in harmony with the general rules herein stated, been declared to be sufficient evidence of a conversion on the part of the person guilty of their commission: Sawing logs bearing plaintiff's marks, which had become intermingled in a boom with defendant's logs: *Clark v. Nelson Lumber Co.*, 34 Minn. 289; selling under execution chattels of one who is not a party to the writ, whether the chattels were removed or not: *Sculder v. Anderson*, 54 Mich. 122; attaching the property of one person under a writ against another, though there was no manual taking or removal: *Johnson v. Farr*, 60 N. H. 426; *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345; selling the property of another, though the party making the sale never had nor attempted to deliver the possession of the property sold, and there was no evidence whether the purchaser ever took possession or not: *Ramsby v. Beezley*, 11 Or. 49; procuring a certificate of stock to be issued to one not entitled thereto, and then selling it to an innocent purchaser: *Baker v. Wasson*, 59 Tex. 140; permitting plaintiff's sheep to become intermingled with defendant's, and then assisting the purchaser of defendant's flock to drive away such flock with plaintiff's sheep therein, knowing that such purchaser intended to convert them to his own use, though he said he would send back and pay for them if any one claimed it: *Allen v. McMonagle*, 77 Mo. 478; taking bonds from a bank in which they were deposited, and sending them out of the state, to be used as collateral security for the debt of the taker, though he intended and expected to have the identical bonds returned to their place of custody: *Commonwealth v. Tenney*, 97 Mass. 50; cutting timber on the lands of another, though it is not carried away: *Sanderson v. Haverstick*, 8 Pa. St. 294; claiming the ownership of property, and by threats preventing the rightful owner from taking possession of it: *Hare v. Pearson*, 4 Ired. 76; *Crocket v. Beatty*, 8 Humph. 20; attaching chattels and placing them in the care of a keeper, who, upon demand, refuses to deliver them to their owner: *Bouen v. Sanborn*, 1 Allen, 339; receiving payment, under a claim of right, of a note or security in the possession of the party receiving, but which belongs to another: *Schroepfel v. Corning*, 5 Denio, 236; *Donnell v. Thompson*, 13 Ala. 440; taking possession of premises and letting them, together with the use of chattels thereon, and receiving pay for such use: *Miller v. Plumb*, 6 Cow. 665; 16 Am. Dec. 456; delivery by a bailee of a certificate of stock to the officers of a corporation, to be canceled and a new certificate to be issued to another person, though such delivery was induced by a forged order purporting to be signed by the owner: *Hubbell v. Blandy*, 87 Mich. 209; *ante*, p. 154; receiving the transfer of and collecting a promissory note, which the transferee knew had previously been indorsed to another in blank

as collateral security: *Carter v. Lehman*, 90 Ala. 126; treating a special deposit as though it were a part of the general fund of a bank: *Monmouth Bank v. Dunbar*, 19 Ill. App. 558; refusal by innocent purchasers of stolen property to pay the proceeds of a sale thereof to its rightful owner: *McDaniel v. Adams*, 87 Tenn. 756; delivery by agent in payment of his debt of a watch intrusted to him for sale: *Rodick v. Coburn*, 68 Me. 170; continuing to use and claim a chattel taken in exchange of a person having no title thereto, after being informed of the title of the owner: *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; unjustifiable refusal by a master to proceed on a voyage, or deliver the cargo to its owners: *Portland Bank v. Stubbs*, 6 Mass. 422; receiving a loan of property, knowing that he who granted the loan was without authority to do so: *Rice v. Clark*, 8 Vt. 109; purchasing and collecting a promissory note, with knowledge of the claim of its owner: *Allison v. King*, 25 Iowa, 56; removal of goods by a purchaser after notice that his vendor held them only as a factor: *Scriber v. Masten*, 11 Cal. 303; refusal by an auctioneer to surrender property upon a demand being made on him by an assignee in insolvency, and proceeding to sell in disregard of such demand, after knowledge of the insolvency: *Millikin v. Hathaway*, 148 Mass. 69; agreement by an agent to hold the goods of his principal for a third person: *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607; refusal by an officer to deliver upon demand intoxicating liquors seized without a warrant, and detained without legal authority: *Weston v. Carr*, 71 Me. 356.

CONVERSION BY DELIVERING CHATTELS TO ONE NOT THEIR OWNER. —

If the holder of goods, as the agent or bailee of another, delivers them to one who claims title adverse to the owner, or who seeks possession of them for the purpose of destroying or devoting them to some use inconsistent with the rights of the owner, the party so delivering them is liable for a conversion: *Savage v. Durling*, 151 Mass. 5; *Hill v. Hayes*, 38 Conn. 532; *Hicks v. Lyle*, 46 Mich. 488; *Hubbell v. Blandy*, 87 Mich. 209; *ante*, p. 154; nor can this liability be avoided by showing that the person to whom the delivery is made was an officer claiming the right to seize the property as such under a writ in his hands, unless in fact the writ authorized the seizure: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; *Kiff v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Edwards v. White L. T. Co.*, 104 Mass. 159; 6 Am. Rep. 213; *Hall v. Boston R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783. If, however, a bailee receives goods from one whom he finds in possession of them, and believes to be their owner or entitled to their possession, and subsequently redelivers them to him in good faith in pursuance of the express or implied terms of the bailment, and without any knowledge of the claims of one who turns out to be their true owner, he is not answerable to the latter for their conversion: *Nelson v. Iverson*, 17 Ala. 216; *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Nanson v. Jacob*, 93 Mo. 331; 3 Am. St. Rep. 531; *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 619; *Ogle v. Atkinson*, 5 Taunt. 759; *Biddle v. Bond*, 6 Best & S. 225; *Hardman v. Willcock*, 9 Bing. 328; *Bates v. Stanton*, 1 Duer, 79; *Metcalf v. McLaughlin*, 122 Mass. 84. Perhaps he may safely return them after having notice of the claims of the owner, if he does so before any demand is made for the possession of the property and without asserting any right of dominion or control over it adverse to the title or inconsistent with the rights of the owner: *Rembaugh v. Phipps*, 75 Mo. 422. A bailee of goods from one whom he knows did not lawfully hold them has also been held not to be liable for letting them be taken out of his possession by the bailor, where he did nothing to withhold possession from the owner, and there is nothing to indicate that he would have withheld such

possession had the owner made any demand upon him therefor: *Loring v. Mulcahy*, 3 Allen, 575. A warehouseman who, when an officer goes to his warehouse with a writ of attachment and demands access for the purpose of levying upon certain goods therein, opens the house and permits, or at least does not oppose, the officer's taking them, has been held not to be guilty of a conversion, though the taking was not authorized. The grounds upon which this decision was placed by the court which rendered it were, that the warehouseman in not impeding the officer in finding or taking the goods, and even in pointing them out to him as the goods he was in search of, did not show any intention to give permission to take the goods, but merely submitted to legal process and to the exercise of authority made by the officer holding it: *Clegg v. Boston S. W. Co.*, 149 Mass. 454; 14 Am. St. Rep. 436.

DELIVERY OF CHATTELS TO ONE FOUND IN POSSESSION OF THEM. — The rule that a bailee is not liable for a conversion in delivering goods to one whom he found in possession of them has, at least in one state, been extended so as to protect one who received goods from another in apparent possession of them, though, in contemplation of law, they were in possession of their owner. A job teamster, being applied to by W. to remove goods which were in the latter's house, did as requested, and delivered them to W. at a place designated by him. The goods in fact belonged to G., who had hired the room and placed them therein, leaving the room neither locked nor fastened. In announcing its decision that the teamster was not guilty of a conversion, the court said: "It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them: *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6. And this would be so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner: *Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84. Upon the precise question raised we have found no direct authority, nor was any cited in the argument; but the principle upon which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession. The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances: *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Judson v. Western R. R. Co.*, 6 Allen, 486; 83 Am. Dec. 646. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant, upon well-established authority, would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immedi-

ately taking them into his actual custody by entering the room through the unlocked door, has directed the removal. If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it, and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control: *Gurley v. Armstead*, 148 Mass. 267; 12 Am. St. Rep. 555.

CONVERSION BY ABETTING AND ENCOURAGING A WRONG-DOER. — One may be guilty of a conversion though he does not personally perform any of the acts by which it was consummated, as where he abets and encourages another who makes such conversion, or adopts or approves it after it is made, by taking, using, or consuming the property converted: *Clark v. Whitaker*, 19 Conn. 39; 48 Am. Dec. 160. Therefore a land-owner who, knowing that a house had been wrongfully taken from the land of another, granted permission to the wrong-doer to place it upon his land, and then refused to permit the owner to remove it unless he first paid a sum which was claimed to be due from the wrong-doer, was adjudged to have adopted the original conversion and to be liable therefor: *Jousson v. Lindstrom*, 114 Ind. 152. There are cases, however, which we are unable to wholly reconcile with the principles just stated, and which appear to proceed upon the ground that, when a conversion has been completed, one who has not participated in it, nor himself taken possession of the property so that he is entitled to restore it to its owner, cannot be held liable for its conversion, though he may have aided the wrong-doer in retaining possession, or have received the proceeds of the property when sold by him. Thus in Maine, where it was claimed that defendant had been guilty of a conversion because he had personally resisted the plaintiff's attempt to take possession of his property, the court said: "The proposition that the use of force by one not having possession of goods to prevent the true owner from obtaining them amounts to a conversion of those goods is not sustained as sound in principle. If the defendant in an action of trover has not possession, actual or constructive, at the time of the demand by the true owner and the refusal by him to deliver the property, and there has been no tortious taking or withholding of the same previously, he cannot restore the chattel, and he is absolved from liability, notwithstanding he may forcibly interpose obstacles in order to prevent the true owner from obtaining the possession sought. And it has been held that when a plaintiff relies only upon a demand and refusal as evidence of conversion by the defendant, he must show that the latter had the power to give up the goods": *Boohier v. Boohier*, 39 Me. 406. In Massachusetts, after goods were attached by an officer, an agreement to which he was not a party was made and carried out, whereby the owners, disregarding the attachment, took the goods, sold them, and paid the proceeds to certain of their creditors. An action was subsequently brought against the creditors, on behalf of the attaching officer, and they were sought to be held liable on the ground that they had assented to the conversion before it was made and had received the benefit thereof, but the court declared that the defendants had not been guilty of any conversion, saying: "In the present case there was no taking of the glass by the defendants, and they never had possession of it. They therefore had not

converted it by detaining it from the plaintiff. Nor would they so have converted it, even if they had forcibly prevented the plaintiff from obtaining possession of it: *Boobier v. Boobier*, 39 Me. 409, 410. His remedy in that case must have been sought in some other form of declaration. Not only was there no wrongful taking or detaining of the glass by the defendants, but there was no illegal assumption of the ownership of it, nor any illegal using or misusing of it by them, which constitutes a conversion. They merely suffered the glass company to sell it on an agreement that the company should pay to them the proceeds of the sale, and afterwards received those proceeds. If the defendants had themselves sold the glass, the sale would have been a conversion of it by them, if the plaintiff's attachment was valid; but their suffering others over whom they had no control to convert it by a sale was not a conversion by them. 'To support an action of trover,' says Heath, J., 'there must be a positive tortious act': *Bromley v. Coxwell*, 2 Bos. & P. 439": *Polley v. Lennox Iron Works*, 2 Allen, 182.

Unless a party can be held to have adopted a conversion made by another, either in receiving the benefit of it or by aiding, abetting, or encouraging it when made, he cannot be made answerable for it on the ground that he merely suffered or did not resist it: *Leonard v. Tidd*, 3 Met. 6; *Duffield v. Miller*, 92 Pa. St. 286; *Traylor v. Hughes*, 88 Ala. 617.

INTENT OF WRONG-DOER, WHEN MATERIAL. — It is perhaps difficult to reconcile what is said in the different decisions as to the effect to be given to the intention of the defendant, in determining whether or not he has been guilty of a conversion. There are doubtless cases asserting that the innocence of his intent is immaterial, and others absolving him from liability because of such innocence. The true rule is, or at least should be, that his intent should be taken into consideration when his act is otherwise equivocal. If one sells the chattels of another without authority so to do, the act is necessarily a conversion, and cannot be made any the less such by proving that the wrong-doer had purchased them of another in good faith, or believed himself to be their owner, or acted in good faith as the agent or servant of one whom he supposed to be the owner: *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; *Robinson v. McDonald*, 2 Ga. 116; *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174; *Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581; *Leri v. Booth*, 58 Md. 305; *Branch v. Planters' L. & S. Bank*, 75 Ga. 342; *Lahner v. Hertzog*, 23 Ill. App. 308; *Thacher v. Moors*, 134 Mass. 156; *Seal v. Zell*, 63 Md. 356; *Cerkel v. Waterman*, 63 Cal. 34; or uses or sells property which had come into his possession through the innocent mistake of his agents or servants: *Lee v. McKay*, 3 Ired. 29. In all of these cases there is no doubt that the property has been appropriated to the use of the defendant, and that he intended to so appropriate it, and all that can be said in his favor is, that both his intention and his act resulted from his innocent ignorance of the rights of the true owner. This, while sufficient to protect him from any claim for exemplary damages, does not otherwise deprive the owner of the goods of any legal remedy for their wrongful use or disposition. A purchaser of property from one not authorized to sell it, who takes possession and exercises dominion over it under a claim of right, appropriates it to his own use, though the appropriation may be less irrevocable than if he had sold it and received the proceeds: *Hollis v. Fowler*, 44 L. J. Q. B. 169; 7 H. L. Cas. 757. He is therefore generally, but not universally, regarded as guilty of a conversion, though no demand upon him has been made by the true owner: *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Omaha and Grand S. & R. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185; *Ward v. Car-*

son River Wood Co., 13 Nev. 44. So if any other interference with the chattels of another results in their loss or destruction, this is a conversion, though the interference was occasioned by mistake: *Platt v. Tuttle*, 23 Conn. 233; *Tobin v. Deal*, 60 Wis. 87; 50 Am. Rep. 345. Hence a conversion results from the cutting of grass on the lands of another, though the cutting was unintentional in the sense that it was done in ignorance of the location of the boundary lines: *Donahue v. Shippee*, 15 R. I. 453.

An innocent person cannot be held liable for a conversion, if his act can be justified as having been in any manner authorized by the owner of the property. Therefore if a baker orders flour of K. and H., who, in turn, buy of G. to fill such order, and the warehouseman with whom the flour was stored delivers to K. and H. flour which belonged to M., and K. and H. deliver it to the baker, who uses it, the warehouseman cannot maintain trover against the baker therefor. "In this case," the court said, "when the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it, as is warranted by the authority thus given: *Strickland v. Barrett*, 20 Pick. 415; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470. In this case the plaintiffs delivered the flour to Kemble and Hastings as the flour purchased by them from Greenough. Against the plaintiffs, therefore, the delivery to Kemble and Hastings, and the sale by them to the defendant, was an authority to him to treat it as his own. That it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it with knowledge of the mistake: *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739. But they cannot take advantage of their own mistake to convert into a tort that which has been done in good faith, in pursuance of authority given by themselves": *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216.

Though the intention of a wrong-doer is not to claim any right of property in chattels, or to the possession thereof, or to obtain any benefit from them, he may become answerable for converting them if he abuses them, or by his unlawful and unauthorized dominion over them occasions them to be lost to the owner, as where, after finding cattle trespassing on his premises, he first turns them into a public highway, and then drives them for a great distance, or in a direction opposite to the owner's residence, whereby they are lost to him: *Knour v. Wagoner*, 16 Ind. 414; *Gilson v. Fisk*, 8 N. H. 404; *Knott v. Degges*, 6 Har. & J. 230; *Tobin v. Deal*, 60 Wis. 87; 50 Am. Rep. 345.

Where, on the other hand, though there is some interference with the chattels of another without his authority, they are not sold, lost, destroyed, nor otherwise appropriated to the use of the wrong-doer, his intention may properly be taken into consideration in determining whether there has been a conversion: *Fouldes v. Willoughby*, 8 Mees. & W. 540; 1 Dowl., N. S., 86; 5 Jur. 534. Thus if a landlord wrongfully resumes possession of a leased room, and, as part of such act, takes chattels of the tenant from the room and removes them to another part of the building, in no way denying the right of the tenant to his property, nor hindering him from taking it whenever he wishes, no conversion is committed: *Mattice v. Brinkman*, 74 Mich. 705. And generally, whenever a person claims property, real or personal, and, incidental to the exercise of the right claimed by him, he removes or otherwise interferes with the chattels of another, without claiming any right to them or to their possession or control, and without depriving their owner

of them, or of his possession or control of them, he is not liable for their conversion, though his claim of title or right in the other property was unfounded: *Shea v. Milford*, 145 Mass. 525; *Furnsworth v. Lowery*, 134 Mass. 512; *Niemetz v. St. Louis etc. Ass'n*, 5 Mo. App. 59; *Sparks v. Purdy*, 11 Mo. 219.

Such acts as one may lawfully perform in the exercise of his own rights of property cannot amount to a conversion of the property of another, though they may result in destroying it, or depriving him of the benefit thereof. Hence if the owner of chattels knew that they were on the lands of one who intended to erect a freight-shed thereon, and that a reasonable and necessary prosecution of the work would prevent the subsequent removal of such chattels, he cannot maintain trover because, through his failure to remove them, the construction of the freight-shed has made their removal impossible: *Stackpole v. Eastern Railroad*, 62 N. H. 493; *Aldrich v. Wright*, 53 N. H. 398; 16 Am. Rep. 339.

DEMAND AND REFUSAL AS EVIDENCE OF CONVERSION. — It will be observed that where the intention of the defendant can be successfully urged to exonerate him from a charge of conversion otherwise sustainable, it is not his intention to do no wrong, nor his ignorance that he is doing wrong, which relieves him from liability, but his absence of any intention to use, claim, or dispose of the property, either as his or as the property of some person for whom he is acting, — his freedom from any act inconsistent with or in defiance of the rights of the owner of the property. Hence where a demand for the possession of chattels and a refusal to deliver them are relied upon as evidence of a conversion, the defendant may avoid their effect by showing that his refusal was not in assertion of a claim of right on his part, nor inconsistent with the rights of the owner. Thus if a person in possession of property has a reasonable doubt of the right of the party making a demand on him for such possession, and disclaiming all right on his part, declines to surrender possession until he can ascertain whether he should do so or not, he is not guilty of a conversion: *Zachary v. Pace*, 9 Ark. 212; 47 Am. Dec. 744; *Ingalls v. Bulkley*, 15 Ill. 224; *Fletcher v. Fletcher*, 7 N. H. 452; 28 Am. Dec. 359; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350. "While the law is, that a demand and refusal are generally *prima facie* evidence of a conversion, a qualified, reasonable, and justifiable refusal is not evidence of a conversion. It takes a wrongful refusal to constitute the defendant a tortfeasor, and in the absence of such evidence there can be no conversion. It is well settled that the possessor of goods may refuse to deliver them unless the claimant makes some proper and reasonable show of ownership, which necessarily includes evidence of identification": *Butler v. Jones*, 80 Ala. 436; *Green v. Dunn*, 3 Camp. 216; *Wilde v. Waters*, 16 Com. B. 637; 24 L. J. Com. P. 193; *Philpot v. Kelley*, 4 Nev. & M. 611; 3 Ad. & E. 106; 1 Har. & W. 134; *Varrall v. Robinson*, 2 Crompt. M. & R. 495; 4 Dowl. Pr. 242; 1 Gale, 244; 5 Tyrw. 1069; *Carroll v. Mix*, 51 Barb. 212.

One who has received possession of goods as the agent, bailee, or servant of another may, without being guilty of a conversion, when demand is made upon him for them, decline to deliver them, unless he has had time to ascertain their ownership, or to consult with his principal or bailor; but if after such consultation he relies upon the title of his principal, and refuses to deliver possession, he is liable for a conversion, unless such title is paramount to the rights of the person making the demand: *Singer Mfg. Co. v. King*, 14 R. I. 511; *Lee v. Bayes*, 18 Com. B. 599; *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 618; *Coles v. Wright*, 4 Taunt. 198; *Ward v. Moffett*, 38 Mo. App.

395. A woman who had long been in the possession of a watch died at the house of her brother, after which a demand was made on him for the watch. He replied that the decedent left a will which he would have probated at the earliest moment; that the watch was safe; that he did not feel at liberty to part with its custody until some one was appointed to take charge of her estate. It was decided that the refusal was qualified and reasonable, and therefore did not amount to a conversion of the watch: *Buffington v. Clark*, 15 R. I. 437. If a demand is made by one claiming to act as the agent of another, it may be refused on the ground that he does not present any evidence of his authority: *Watt v. Potter*, 2 Mason, 77; *Taylor v. Spears*, 6 Ark. 381; 44 Am. Dec. 519. Where, however, a party wishes to justify his refusal to deliver property on the ground that he has doubts of the ownership or authority of the person making the demand, he must not make an unqualified refusal, but must show by his response that he does not claim a right to retain the property, and merely desires to act as a prudent man should before delivering up chattels which have been intrusted to his care or into the possession he originally lawfully came: *Dowd v. Wadsworth*, 2 Dev. 130; 18 Am. Dec. 567; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Zachary v. Pace*, 9 Ark. 212; 47 Am. Dec. 744; *Ingalls v. Bulkley*, 15 Ill. 224.

A refusal to deliver chattels on demand can never constitute a conversion, if the party on whom the demand is made did not at the time have power to comply therewith, as where they had previously been lost, stolen, or forcibly or otherwise taken from his possession without his assent: *Abraham v. Nunn*, 42 Ala. 51; *Dearbourn v. Bank*, 58 Me. 273; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Hill v. Belasco*, 17 Ill. App. 194; *Davis v. Buffum*, 51 Me. 160; *Yale v. Saunders*, 16 Vt. 243.

As a general rule, a conversion takes place whenever one in whose possession or control personalty is, upon demand being made upon him therefor by a party entitled thereto, makes an unqualified refusal to surrender it: *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459; *Dusky v. Rudder*, 80 Mo. 400; *German Bank v. Meadowcroft*, 95 Ill. 124; 35 Am. Rep. 137; *Blackman v. Lehman*, 63 Ala. 547; *Stute v. Stevenson*, 46 N. J. L. 326; *Southworth Co. v. Lamb*, 82 Mo. 242; *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31; *Jones v. Hunt*, 74 Tex. 657; *Burroughs v. Bayne*, 5 Hurl. & N. 296; 29 L. J. Ex. 188; 2 L. T., N. S., 16; or places his refusal on some untenable ground, or undertakes to exact, as a condition of delivery, the discharge of some lien or other claim for the payment of which the property is not bound: *Cannee v. Spanton*, 8 Scott N. R. 714; 7 Man. & G. 903; 8 Jur. 1008; 14 L. J. Com. P. 23; *Nutter v. Varney*, 64 N. H. 611; *Briggs v. Haycock*, 63 Cal. 343; *Dusky v. Rudder*, 80 Mo. 400; *Wilson v. Anderton*, 1 Barn. & Adol. 450; *Thompson v. Trail*, 9 Dowl. & R. 31; 6 Barn. & C. 30; 2 Car. & P. 334. One cannot escape the consequence of a demand made on him by saying that he neither admits nor denies the claim, that he does not assent to nor forbid the taking of the property, and that both he and the party making the demand are responsible for their acts, and the law will protect them in their rights, and punish them for unlawful acts; and if the demand is thus answered, there is sufficient evidence of a conversion: *Ingersoll v. Barnes*, 47 Mich. 104. A general refusal to surrender chattels may be evidence of their conversion, though part only of them were under the control of the party so refusing: *Ray v. Light*, 34 Ark. 421.

DEMAND AND REFUSAL, WHEN ESSENTIAL TO A CONVERSION. — In many instances a demand and refusal are necessary to the holding of a person in

possession of goods liable for their conversion. Upon principle, this can be true only when no actual conversion has been made prior to such demand, and when, but for such demand, the person on whom it was made would be entitled to continue to hold possession of the personalty demanded. Hence when a sale has been made of the chattels of another without authority: *Courties v. Cane*, 32 Vt. 232; 76 Am. Dec. 174; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; *Haas v. T aylor*, 80 Ala. 459; *Howitt v. Estelle*, 92 Ill. 218; and in every other case in which an actual conversion has already taken place: *Kendrick v. Rogers*, 26 Minn. 344; *Bunger v. Roddy*, 70 Ind. 26; or in which a demand, if made, must have proven idle and unavailing: *Gottlieb v. Hartman*, 3 Col. 53; or in which the taking was at its inception tortious and illegal: *Rhoades v. Drummond*, 3 Col. 374; *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345; *Farrington v. Payne*, 15 Johns. 431; *Moses v. Walker*, 2 Hilt. 536; *Davis v. Duncan*, 1 McCord, 213; *Jones v. Dugan*, 1 McCord, 428; or in which the possession was procured by duress or fraud practiced on the owner for the purpose of obtaining it: *Foshay v. Ferguson*, 5 Hill, 154; *McCrillis v. Allen*, 57 Vt. 505; *Thurston v. Blanchard*, 22 Pick. 18; *Stevens v. Austin*, 1 Met. 557; *Ryan v. Brant*, 42 Ill. 78; or, though lawfully obtained, the property is misused or abused: *Maguyev v. Hawthorn*, 2 Har. (Del.) 71, — no demand need be made before beginning action for the conversion.

NEGLIGENCE OR NON-FEASANCE CANNOT SUPPORT A CHARGE OF CONVERSION. — If, after a conversion has taken place, the property is lost or destroyed, either through the negligence of the wrong-doer, or the wanton or lawless acts of other persons, the cause of action which arose as soon as the conversion was consummated continues, and a subsequent loss or destruction of the property constitutes no defense to an action for the prior conversion: *Mason v. O'Brien*, 42 Miss. 420. But as a conversion is an appropriation of property to one's use, either actual or constructive, any wrong which does not amount to such appropriation is not a conversion, and while it may entitle the injured person to some remedy, will not support an action of trover. Hence if chattels which were in the possession of a person other than their owner are lost or stolen through want of reasonable care on the part of their custodian, or injured by accident, or through his mere negligence or non-feasance, not accompanied by any misappropriation on his part, he is not answerable for their conversion: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *Dorman v. Kane*, 5 Allen, 38; *Bromley v. Coxwell*, 2 Bos. & P. 438; *Finker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345; *Bailey v. Moulthrop*, 55 Vt. 17; *Moses v. Norris*, 4 N. H. 304; *Williams v. Gesse*, 3 Bing. N. C. 849. Even the destruction of a chattel, if done unintentionally, as where the bailee of a draft burns it in destroying other papers which he considered of no value, without asserting any title to it or claiming any right to hold, detain, or destroy it, is not a conversion: *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; 8 Am. Rep. 564.

RESTORATION OF PROPERTY CONVERTED, WHETHER OWNER MAY BE REQUIRED TO ACCEPT. — Whether one who has been guilty of a conversion of chattels may, in effect, revoke such conversion, and compel the owner of the property to submit to its restoration to him, is a question to which no positive answer can be given. There is no doubt that "it has been the well-established rule in the courts of England for more than a century, that in actions of trover, the court will, under certain circumstances, permit the defendant, after suit is brought, to bring the property claimed into court for the plaintiff, with the costs up to that time, and will then order a stay

of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, unless he be able to show that he has been specially damaged by the conversion of the property by the defendant, in addition to its value at the time of its return. Or the court will, in a proper case, after the verdict, upon tender of the property, reduce the verdict to nominal damages": *Churchill v. Welsh*, 47 Wis. 39; *Fisher v. Prince*, 3 Burr. 1364; *Watts v. Phipps*, Bull. N. P. 49; *Earle v. Holderness*, 4 Bing. 462; 1 Moore & P. 254. Even in England the courts have generally declined to interfere if the value of the chattels converted was uncertain, or the plaintiff insisted upon claiming special damages: *Whitten v. Fuller*, 2 W. Black. 902; *Tucker v. Wright*, 3 Bing. 601; 11 Moore, 500; *Gibson v. Humphrey*, 1 Car. & M. 544; 2 Tyrw. 588.

The existence of the English rule has been recognized in several American decisions, and its applicability to cases in our courts apparently conceded, with the qualification that whether the defendant should be permitted to return the property rested in the discretion of the trial court, which discretion is, however, subject to review by the appellate courts: *Rogers v. Crombie*, 4 Me. 274; *Stevens v. Low*, 2 Hill, 132; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Thayer v. Mantley*, 8 Hun, 550. Still we cannot ascertain that the rule has been actually enforced except in two cases. In Vermont, defendants into whose possession certain bonds lawfully came, and who withheld them from plaintiffs under a claim of right made in good faith, were permitted to bring them into court in mitigation of damages: *Rutland etc. R. R. Co. v. Bank of Middlebury*, 32 Vt. 639. In a subsequent case in the same state, in which the rule under consideration could not be applied, because the defendant, after notice of the plaintiff's title, and without offering to return the property, sold it, nevertheless the court said: "It would seem, upon principle, that in actions of trover and trespass *de bonis asportatis*, when the taking is not willful and the property is not essentially injured, the defendant should be allowed to surrender back the property, and to pay the actual damage for the taking and detention of it into court, together with the cost of the action already accrued; and in case the plaintiff refused to accept the money paid into court, he must proceed at his peril, inasmuch that if at the trial he is nonsuited, or if the jury shall not give him a sum exceeding the money paid into court, he will be obliged to pay the costs of the action. The numerous actions of trover and trespass *de bonis asportatis* growing out of the sale and transfer of personal property, where the vendor had no title, and where, by his false or fraudulent representations, or by some indications of ownership, the vendee was induced to make the purchase, where there was no intentional wrong on the part of the purchaser, and no real damage done by him, require that he should be relieved from the rigor of the rule applicable to cases of willful and malicious trespass. The rule allowing such surrender of the property and payment, in the discretion of the court, is founded in equity, which is 'the correction of that wherein the law (by reason of its universality) is deficient.' It goes upon the principle that when the defendant is ready and willing to pay, and places within the reach of the plaintiff a sum of money equal to the actual debt or damage recoverable by law and the costs already accrued, the action ought not to be further prosecuted at the expense of the defendant": *Bucklin v. Beals*, 38 Vt. 653.

In Wisconsin, the defendants in an action were custodians of several promissory notes, never claiming to own or to have any interest in them, and offering to surrender them if the parties of whom they claimed to be

the bailees would assent. While they were held to have been guilty of a technical conversion in refusing to deliver the notes to their payee, yet they acted in good faith, believing that they had no right to make such delivery, and their refusal to deliver did not occasion any special damages to the plaintiff. After a verdict had been returned against the defendants, they offered to surrender the notes to the plaintiff, and moved that the verdict upon such surrender be reduced to nominal damages. The motion being overruled by the trial court, its action in this respect was reversed on appeal. The opinion of the appellate court shows, however, that the case was an exceptional one, and that the verdict of the jury might well have been set aside on the ground that no conversion had taken place. The following extracts from the opinion show the considerations influencing the final decision: "The question is an open one in this court; and we are disposed to adopt the rule of the English and Vermont courts, in a case like the one at bar, where the defendant holds the property as custodian for the parties in interest, and has never claimed any personal interest in the same, and if guilty of conversion of the same at all, is simply guilty of a technical conversion, through a mistake as to his duty as custodian of the same. It is not a case in which there has been a complete conversion of the property to the use of defendants, and does not come within the reason of the rule of those cases which hold that where there has been such a conversion the defendant cannot mitigate the damages by an offer to return the property. The evidence, we think, clearly establishes the fact that the notes came to the possession of the defendant, either as the agent of the plaintiff solely, or as custodian for both the plaintiff and the maker. It also shows that the defendant made no claim to any ownership of the notes, or to any interest in them; that he offered to surrender them if both parties would agree to the surrender; that, immediately after the action was brought against him, he offered to bring the notes into court, and asked to be relieved of all further responsibility in relation to them; and we think it further shows that his refusal to surrender the notes to the plaintiff upon his demand was made in good faith, believing that he had no right to make such surrender without the consent of the maker, Hartford, and that if he was guilty of any conversion of any of the notes to his own use, it was purely a legal and technical conversion. We are also unable to perceive that the plaintiff suffered any special damage by the refusal of the defendant to deliver the notes on his demand. If any of the notes were due and payable to the plaintiff, and he desired to enforce the payment of them, the fact that they were in possession of the defendant, he not claiming any interest in them, could not hinder the plaintiff from proceeding to enforce their collection, either by action or upon the chattel mortgage. We think great injustice will be done to the defendant if this judgment is permitted to stand. If any faith or credit is to be given to his own testimony, or to the testimony of the two Hartfords, he had at least the right to believe that it was not his duty to surrender the notes to the plaintiff; and although the jury found that he was mistaken in that belief, still, as he, immediately upon being sued, brought the notes into court and asked to be relieved from the further custody of the same, disclaimed all personal interest in them, and stated that his only reason for not delivering them to the plaintiff was because the other party interested in them insisted that he had no right to deliver them to the plaintiff, it would seem most inequitable that he should be compelled to purchase them at their face value, with ten per cent interest added, because of his mistaken belief in this particular. . . . If any defendant who

is sued for a conversion of personal property can be allowed to surrender the property after action brought, this defendant ought to be permitted to do so. As there is no claim made in the plaintiff's complaint that he has suffered any special damages by reason of defendant's refusal to deliver the notes when demanded, nor that there was any depreciation in the value of the notes between the time of their alleged conversion by the defendant and the commencement of this action, or the time of the trial, the return of the notes to the plaintiff would have placed him in as good a position, so far as the evidence on the trial and the verdict of the jury discloses, as though there never had been any technical conversion by the defendant. No injustice would be done by their return to the plaintiff and permitting him to take judgment for nominal damages and costs; whereas great injustice will be done to the defendant by compelling him to pay presently, in cash, a very large sum of money for notes, many of which will not become due for a year or more, and whose real value is a matter of the greatest uncertainty, because he made an honest mistake as to his duty as custodian of them": *Churchill v. Welsh*, 47 Wis. 39.

In no case is one who has converted a chattel entitled to require its owner to permit its restoration if it has deteriorated in value or been essentially injured prior to the offer to restore it: *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Whitaker v. Houghton*, 86 Pa. St. 48. While, so far as we are aware, the right of a defendant who has been guilty of a conversion of chattels to restore them to their owner has not been tested in any of the American courts by any direct proceeding, by motion or otherwise, except in the cases already cited, the emphatic language of the other decisions in which this right has been considered, either directly or incidentally, is such as to convince us that the weight of authority in this country supports the rule that when a cause of action has once accrued to the owner of chattels on account of their conversion by another, the latter can neither destroy it, nor restore the property in mitigation of damages without the assent of the former: *Higgins v. Whitney*, 24 Wend. 379; *Wooley v. Carter*, 7 N. J. L. 85, 11 Am. Dec. 520; *Livermore v. Northrup*, 44 N. Y. 107; *Reynolds v. Shuler*, 5 Cow. 323; *Walker v. Fuller*, 29 Ark. 448; *Hanmer v. Wilsey*, 17 Wend. 91; *Stickney v. Allen*, 10 Gray, 352; *Higgins v. Whitney*, 24 Wend. 379; *Norman v. Rogers*, 29 Ark. 365.

RESTORATION ACCEPTED BY OWNER MITIGATES DAMAGES. — If property which has been converted is returned to its owner, who accepts it, this does not destroy the cause of action which arose on the conversion. The injured party is still entitled to maintain an action for the injury, but the return must be considered in mitigation of damages. In other words, the plaintiff's recovery must be limited to nominal damages, and such special damages as he is shown to have suffered from the conversion before the restoration of the property was accepted: *Kelly v. McDonald*, 39 Ark. 387; *Whitaker v. Houghton*, 86 Pa. St. 48; *Murphy v. Hobbs*, 8 Col. 17; *Western Land and Cattle Co. v. Hall*, 33 Fed. Rep. 236; *Norman v. Rogers*, 29 Ark. 365; *Brewster v. Silliman*, 38 N. Y. 423; *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512; *Reynolds v. Shuler*, 5 Cow. 323; *Barrelett v. Bellgard*, 71 Ill. 280; *Walker v. Fuller*, 29 Ark. 448; *Cook v. Loomis*, 26 Conn. 483.

AGENT OR SERVANT'S LIABILITY FOR CONVERSION. — There can be no doubt that one cannot give another an authority which he himself does not possess, and therefore that he who cannot sell, dispose of, or otherwise interfere with chattels without being guilty of their conversion cannot give an auctioneer or other agent authority to do any of such acts: *Losechman v.*

Machin, 2 Stark. 311; *Stephens v. Elwell*, 4 Maule & S. 259; *Perkins v. Smith*, 1 Wils. 328. Undoubtedly there are cases in which agents act innocently in making conversions of personalty for their principals, and in which there is hardship in holding them personally answerable for acts from which they could reap no benefit, and which they did in good faith, supposing what they did to be within the line of their duty as well as of their authority. In one state it has been said that "we hold the rule of law to be, that an agent or servant who, acting solely for his principal or master, and by his direction, and without knowing of any wrong, or being guilty of any gross negligence in not knowing of it, disposes of or assists the master in disposing of property which the latter had no right to dispose of, is not thereby rendered liable for the conversion of the property": *Leuthold v. Fairchild*, 35 Minn. 100. In the same case it is asserted that there is a conflict in the decisions upon the subject, the cases in New York holding that the conversion is the act of the agent as well as of the master, while those in Massachusetts hold the conversion to be the act of the master alone. No authorities were cited to establish the alleged conflict, and our industry has not enabled us to discover any. On the other hand, all the authorities which have come within our observation affirm that one who has been guilty of an act whereby the chattels of another have been converted cannot evade liability therefor by proving that he acted innocently as the agent of another: *Permynter v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Kimball v. Billings*, 55 Me. 147; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324; *Coles v. Clark*, 3 Cush. 399; *Lee v. Matthews*, 10 Ala. 682; 44 Am. Dec. 498; *Edgerly v. Whalan*, 106 Mass. 307; *McPartland v. Read*, 11 Allen, 231; *Gage v. Whittier*, 17 N. H. 312; *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772; *Story on Agency*, sec. 312; *Spraghts v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Everett v. Coffin*, 6 Wend. 209; 22 Am. Dec. 551; *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwell*, 4 Maule & S. 259.

If an agent is in the possession of goods intrusted to him by his principal, and a demand is made upon him for them by a third person, he is not required to act upon it immediately without any opportunity to consult with his principal, and may therefore, without being guilty of any conversion, decline to surrender possession until he has had such opportunity; but if, either before or after such consultation, he unqualifiedly refuses to surrender possession, he becomes answerable for conversion, unless his principal was entitled to retain such possession: *Singer Mfg. Co. v. King*, 14 R. I. 511; *Lee v. Robinson*, 18 Com. B. 599; 25 L. J. Com. P. 249; *Stephens v. Elwell*, 4 Maule & S. 259; *Mires v. Solebay*, 2 Mod. 242; *Alexander v. Southey*, 5 Barn. & Adol. 247. If an agent purchases chattels from one not authorized to sell them, and his act was previously authorized or subsequently ratified by his principal, the latter is liable for the conversion arising from taking possession of the property pursuant to the sale, though he had no knowledge of the want of authority in the person making the sale: *Hilbery v. Hatton*, 2 Hurl. & C. 822; 33 L. J. Ex. 190; 10 L. T., N. S., 39.

AGENT, WHEN GUILTY OF CONVERTING CHATTELS OF HIS PRINCIPAL. — An agent may unquestionably be guilty of a conversion of the goods of his principal, for which the latter may seek and find redress by an action of trover. Still, this form of action has been pursued with apparent infrequency, and the decisions formulating tests by which to determine whether an agent has been guilty of a conversion are more rare and less satisfactory than one would anticipate before making an attempt to discover and compre-

hend them. Though perhaps a *dictum*, the following statement of the general principle applicable to the subject is as accurate and comprehensible as any to be found in the reports: "The question whether, in any view of the case, this action of trover can be maintained, was discussed at the argument, and as that point may arise on another trial, it will be proper to give it some consideration. The most usual remedies of a principal against his agent are the action of *assumpsit* and a special action on the case, but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some act on the part of the agent, — a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be a departure from his authority before this action for a conversion of the goods can be maintained": *McMorris v. Simpson*, 21 Wend. 614. Therefore an agent is guilty of a conversion if, having no authority to sell the property of his principal, he nevertheless sells it: *Elter v. Bailey*, 8 Pa. St. 442; or having authority to sell it, he exchanges it for other property: *Haas v. Damong*, 9 Iowa, 589; or being intrusted with a note to be sold, and the proceeds to be applied to the payment of a debt of the maker's, he applies it to the payment of a debt due to himself: *Murray v. Burling*, 10 Johns. 172; or being given a note to be sold, with instructions not to let it go out of his reach without receiving the money, he delivers it to another on his promise to get it discounted, and to return the proceeds, and the latter procures such discounting, but appropriates the avails to his own use: *Lavery v. Snetten*, 68 N. Y. 522; 23 Am. Rep. 184; or being sent to obtain a note for his principal, he obtains it payable to himself, and disposes of it for his own use: *McNear v. Atwood*, 17 Me. 434; or being an attorney at law, and authorized to collect money due his principal, he collects it and applies it to his own use: *Cotton v. Sharpstein*, 14 Wis. 226; 80 Am. Dec. 774; or being authorized to dispose of a note in a particular manner and upon certain conditions, he disposes of it in a different manner, and in the absence of any of the required conditions: *Badger v. Hatch*, 71 Me. 562; or who, when money is placed in his hands, belonging to his principal, to be loaned in the latter's name, loans it in the name of himself: *Farrand v. Hurlbut*, 7 Minn. 477; or who, when a note is sent to him to sell, with notice that the sender has drawn upon him for the amount of the note, replies that he will not pay the draft, and who, on being notified that he must pay the draft or return the note, sells the note while declining to pay the draft: *Security Bank v. Fogg*, 148 Mass. 273; *National Bank v. Crocker*, 111 Mass. 163; or who, when wheat is given to him to sell when directed by his principal, refuses either to sell or account for the wheat when directed, and retains possession against the wishes of his principal: *Coleman v. Pearce*, 26 Minn. 123.

In those cases in which an agent actually uses the property of his principal for his own benefit, or refuses to surrender possession thereof to his principal upon a proper demand therefor, or sells or embezzles it, or refuses to account for the proceeds, there can be no doubt that he in fact has appro-

priated it to his own use, and therefore that he has been guilty of and may be held liable for its conversion. If, however, an agent is negligent or is guilty of mere non-feasance or omission, whereby the property of his principal is lost or injured, while he may be and is liable in some form of action, he is not deemed guilty of conversion, and redress against him must be sought in some other form of action than trover. It appears to be conceded that an agent may disobey instructions in some respects, and thereby deprive his principal of his property, without being guilty of a conversion. The rule which the authorities, or some of them, seemingly sustain upon this subject is, that though the agent departs from or acts in disobedience to his instructions, yet if the act which he does is so far within the limits of the powers conceded to him by his principal that it must be regarded as valid as between the principal and the person to whom the agent sells or disposes of the property, that then the sale or disposition, though it may support an action against the agent for a breach of trust, cannot subject him to liability for a conversion. It is true that the acts to which this rule has been applied seem to us to be no more within the bounds of the agent's powers than were his acts in other instances in which the rule was deemed inapplicable. Thus it has been held that an agent authorized to sell goods, but directed not to sell them on credit, or unless he obtains a specified price, was not guilty of their conversion, but only of a breach of duty, when he sold them on credit, or for a price less than that specified: *Sargeant v. Blunt*, 16 Johns. 73; *Loveless v. Fowler*, 79 Ga. 134; 11 Am. St. Rep. 407; *Cairnes v. Bleeker*, 12 Johns. 304; *Dufresne v. Hutchinson*, 3 Taunt. 117. So far as we have been able to ascertain, the rule has not been applied except to sales of property made when the agent was authorized to sell, but had violated his instructions by selling for a price less than that authorized by his principal, or upon credit when the latter commanded the sale to be made for cash only. We are not able to comprehend why a sale on credit can be held to be authorized when an agent was directed to sell for cash only, or how authority given him to sell for a price specified can, under ordinary circumstances, authorize him to sell for an entirely different price; and it seems to us that in either event, when he departs from his instructions, he cannot, as between himself and his principal, be regarded as making other than a tortious and unlawful use and disposition of the latter's property, for which redress ought to be given by an action of trover. However this may be, it seems to be conceded that, with the exception of sales made under the circumstances indicated, any use or disposition of chattels by an agent contrary to the instructions of his principal may be treated by the latter as a conversion: *Laverty v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184; *Syeds v. Hay*, 4 Term Rep. 260; *Hynes v. Patterson*, 95 N. Y. 1; *Badger v. Hatch*, 71 Me. 562. Hence it has been held conversion by an agent, when intrusted with a watch for the purpose of having it appraised by a watchmaker, with a view to procuring a loan thereon, that he permitted it to go out of his possession and to be levied upon under a writ not against its owner: *Spencer v. Blackman*, 9 Wend. 167; or when directed to sell wheat at a specified price on a day named, and if not sold on that day to ship it to New York, he did not sell it on the day designated, but on the day following: *Scott v. Rogers*, 31 N. Y. 676.

A bailee of personalty making a disposition of it not warranted by the contract of bailment becomes thereby guilty of its conversion: *Loescham v. Machin*, 2 Stark. 311. Hence an agent is answerable for a conversion of a chattel, whether intrusted to him for the purpose of selling it or not, when

he pledges it as collateral security for his own debt: *State v. Berning*, 74 Mo. 87; *Birdsall v. Davenport*, 43 Hun, 552; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658; *Nichols v. Gage*, 10 Or. 82; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30; or exchanges it for other property: *Ainsworth v. Partillo*, 13 Ala. 460; *Atkinson v. Jones*, 72 Ala. 248; or sells it, in the absence of authority so to do, whether such want of authority results from the fact that no power of sale existed under any circumstances, or from the failure to comply with some condition precedent to the existence of that power: *Rosenzweig v. Fraser*, 82 Ind. 342; *Sanborn v. Colman*, 6 N. H. 14; 23 Am. Dec. 703. Though a bailee has an interest in property in his possession which he may rightfully transfer, as where he is its lessee, or holds it under a conditional purchase, yet if he makes an absolute, unqualified transfer, his act is inconsistent with the owner's title, and is a conversion: *Swift v. Moseley*, 10 Vt. 208; 33 Am. Dec. 197; *Sims v. James*, 62 Ga. 260.

BAILEE, WHEN GUILTY OF CONVERSION. — A bailee, though he does not sell the property in his care nor part with its custody, may be adjudged guilty of its conversion when he misuses or abuses it. Manifestly there may be some misuse or abuse of property for which a guilty party will not be answerable as for its conversion, but it is difficult, and perhaps impossible, to formulate any test by which to determine what abuses are conversions and what are not. It seems to be certain, however, that a misuse or abuse which the owner of property is entitled to treat as its conversion must be intentional, and inconsistent with the respective rights of the bailee and bailor expressed in or implied by their contract of bailment. A loan by a bailee of railway bonds in his custody to one who agrees to return them upon request has been held to make both the borrower and the lender liable for their conversion: *Branner v. Branner*, 1 Lea, 101. It has also been held that a conversion occurs when an agister of cattle uses them without authority: *Gove v. Watson*, 61 N. H. 136; and when a hirer of a horse or vehicle to be driven to a particular place drives it beyond that place, or in a different direction from it: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lucas v. Trumbull*, 15 Gray, 306; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 300; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500. But to warrant the holding of a bailee for a conversion, the act done by him must be intentional, and inconsistent with the contract of bailment. Hence, though he hired a horse to go to and return from a particular place, yet if, in returning, he innocently got upon the wrong road, and after discovering his error took what he believed to be the best way back, he did not thereby convert such horse, though the way chosen was circuitous and led through another town: *Spooner v. Manchester*, 133 Mass. 270; 43 Am. Rep. 514. Neither can he be held for a conversion where the alleged abuse consisted of an omission, though such omission was stipulated against in the contract of bailment, as where he procured a horse to go and return from a place without stopping, but stopped half-way to see a friend, and during the stoppage put the animal in a stable to be fed: *Evans v. Mason*, 64 N. H. 98.

COMMON CARRIER, WHEN GUILTY OF CONVERSION. — If a bailee has possession of chattels as a common carrier, his mere non-feasance cannot render him liable for a conversion, as where the property is lost through his negligence, or he fails to transport or deliver it within a reasonable time: *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Robinson v. Austin*, 2 Gray, 564; *Bowlin v. Nye*, 10

Cush. 417; *Briggs v. New York etc. R. R. Co.*, 28 Barb. 515; but if he does any affirmative act inconsistent with the rights of the owner of the property, the effect is different: *Dench v. Walker*, 14 Mass. 499. It has been held that if a carrier, instead of going the ordinary route, adopts an extraordinary one, and while out of such ordinary route the property intrusted to him is lost, he is answerable for its conversion: *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227. If, when possession of property is demanded, he unqualifiedly refuses to deliver it: *Lockwood v. Bull*, 1 Cow. 322; 13 Am. Dec. 539; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *McEntee v. New Jersey S. Co.*, 45 N. Y. 34; 6 Am. Rep. 28; or falsely asserts that it is not in his possession: *Louisville etc. R'y Co. v. Lawson*, 88 Ky. 496, — he becomes liable for its conversion. A like liability arises when he delivers it to a person not entitled to it: *Erie Dispatch v. Johnson*, 87 Tenn. 490; *Sword v. Young*, 89 Tenn. 126; *Weyand v. Atchison etc. R'y Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504; *Clayfin v. Boston & L. R. R. Co.*, 7 Allen, 341; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Merchants' D. Co. v. Merriam*, 111 Ind. 5; *Youl v. Harbottle*, Peake, 49; *Devereux v. Barclay*, 2 Barn. & Adol. 702; *Stephenson v. Hart*, 4 Bing. 476; 1 Moore & P. 357; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28; though such person is an officer claiming a right to take it under process then in his hands: *Keff v. Old Colony R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. 301; *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774. Because a carrier is under obligation to deliver to the proper person, and is answerable for a misdelivery, he cannot be treated as guilty of a conversion, though he has refused to make delivery to the party entitled thereto, if, under the circumstances, the refusal was qualified and reasonable, and made upon the ground that the person making the demand had not supported it by sufficient evidence of his ownership of the property, or of his right to the possession thereof: *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28.

MORTGAGOR OR MORTGAGEE, CONVERSION OF CHATTELS BY. — When chattels are mortgaged, any disposition of them inconsistent with the rights either of the mortgagor or the mortgagee, by whomsoever made, may be treated as a conversion, as where the mortgagee sells before condition broken: *Eslow v. Mitchell*, 26 Mich. 500; or after he has sold sufficient of the chattels to discharge the mortgage debt then due: *Brink v. Freoff*, 40 Mich. 610; 44 Mich. 69; or a second mortgagee sells chattels without discharging the claims of the prior mortgage: *Kleinberger v. Brown*, 8 N. Y. Sup. 866. A mortgagor, while he continues in possession and entitled to possession, has an interest in the property which he may transfer, or which may be seized in satisfaction of his debts; and no transfer or seizure which recognizes the rights of the mortgagee and is not inconsistent with them can be treated by him as a conversion: *Heflin v. Slay*, 78 Ala. 180; *Harbison v. Harrell*, 19 Ala. 753; *Hathaway v. Brayman*, 42 N. Y. 322; 1 Am. Rep. 524. On the other hand, any sale, or seizure, or detention of possession in defiance of the mortgagee's rights, whether by the mortgagor or any other person, is a conversion for which the mortgagee is entitled to redress by an action of trover: *Millar v. Allen*, 10 R. I. 49; *Ashmead v. Kellogg*, 23 Conn. 70; *Coles v. Clark*, 3 Cush. 399; *Leonard v. Hair*, 133 Mass. 455; *Black v. Howell*, 56 Iowa, 630; *Jorgenson v. Tait*, 26 Minn. 327; Freeman on Executions, sec. 117.

CO-TENANT, WHEN GUILTY OF CONVERSION. — A part owner of a chattel may be guilty of a conversion of the interest of his co-owner, and, upon principle, the test by which to determine whether he has been so guilty or

not is the same as in other cases, though the difficulty in applying it is greater. A conversion, whether the wrong-doer is a part owner of the chattel converted or not, is some use or disposition of it in defiance of or inconsistent with the rights of the true owner. A part owner of a chattel is entitled in many respects to make the same use of it, when in his possession, as if he were an owner in severalty; and such uses as he may lawfully make and such dominion as he may lawfully exercise cannot be inconsistent with the rights of his co-owner, and the latter cannot therefore treat them as a conversion of his interest. A part owner of a chattel is entitled to remain in its exclusive possession, and to use it exclusively while in such possession, in any ordinary and proper mode of using it, and therefore is not liable in trover or otherwise to his co-tenant for such possession or use: *Freeman on Cotenancy*, sec. 306; *Gilbert v. Dickerson*, 7 Wend. 449; 22 Am. Dec. 592; *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235; *Farr v. Smith*, 9 Wend. 338; 24 Am. Dec. 162; *Kilgore v. Wood*, 56 Me. 150; 96 Am. Dec. 440. If, however, such possession and use are maintained and continued under a denial that his co-tenant has any interest whatever in the property, and a claim that the possessor is its owner in severalty, then it has been held that a conversion takes place: *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Potter v. Neal*, 62 How. Pr. 158. So where chattels were of a peculiar character and susceptible of one use only, a part owner who took and maintained exclusive possession, neither using them himself or permitting their use by his co-tenant, was adjudged to be guilty of their conversion: *Agnew v. Johnson*, 17 Pa. St. 373; 55 Am. Dec. 565.

If chattels owned in co-tenancy are of such a character that a division of them can be made by each part owner taking a quantity thereof proportionate to his interest, without any possibility of such division being unfair, as where money, or wheat, or other grain is held in common, he has a right to make such division, and to sever and take his share, and any prevention of the exercise of this right is a conversion: *Lobdell v. Stowell*, 51 N. Y. 70; *Dahl v. Fuller*, 50 Wis. 501; *Fiquet v. Allison*, 12 Mich. 330; 86 Am. Dec. 54; *Webb v. Munn*, 3 Mich. 139; *Stall v. Wilbur*, 77 N. Y. 158. A like result follows when a co-tenant, who has agreed to take the common property to a designated place for the purpose of there dividing it, takes it to a different place, and claims to have succeeded to the interest of his co-tenant under the contract of purchase: *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 262.

No co-tenant has any right to destroy the subject-matter of the co-tenancy, or to put it to any use which must preclude all further enjoyment of it by his co-tenant, or to mingle it with other property so that its identity is lost and cannot be restored, or to so injure or expose it to peril that it must become either lost or worthless, and therefore each of these acts, because it is inconsistent with the interest of another part owner, may be by him treated as a conversion: *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52; *Freeman on Cotenancy*, secs. 312-318; *Tubbs v. Richardson*, 6 Vt. 442; 27 Am. Dec. 570; *Guyther v. Pettijohn*, 6 Ired. 388; 45 Am. Dec. 499; *Lowe v. Miller*, 3 Gratt. 205; 46 Am. Dec. 188; *Redington v. Chase*, 44 N. H. 36; 82 Am. Dec. 189; *Cowan v. Buyers*, Cooke, 53; 5 Am. Dec. 668.

A part owner of a chattel may undoubtedly sell his interest therein, and transfer to his vendee all the rights possessed by himself before the sale, but he has no power to act for his co-tenant, or to sell or transfer any interest in excess of his moiety. He may, however, undertake to sell the entirety. If he does so, his act is inconsistent with the title of his co-owner, and, upon principle, should be regarded as an unlawful conversion of the latter's inter-

est. Such a majority of the American cases upon the subject declare it to be: *Dyckman v. Valiente*, 42 N. Y. 560; *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Carr v. Dodge*, 40 N. H. 403; *Yamhill B. Co. v. Newby*, 1 Or. 173; *Coursin's Appeal*, 79 Pa. St. 220; *Warren v. Aller*, 1 Pinney, 479; 44 Am. Dec. 406; *Lowe v. Miller*, 3 Gratt. 213; 46 Am. Dec. 188; *Rains v. McNairy*, 4 Humph. 358; 40 Am. Dec. 651; *Person v. Williams*, 25 Minn. 189; *Wheeler v. Wheeler*, 33 Me. 347; *Perminter v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Nowlen v. Colt*, 6 Hill, 461; 41 Am. Dec. 756; *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501; *Hutchinson v. Chase*, 39 Me. 508; 63 Am. Dec. 615; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470; while the English decisions and those of a few of the American states deny that a sale by a part owner can be a conversion of the interest of his co-tenant, unless accompanied by peculiar circumstances resulting in the loss of the property to the latter: *Sanborn v. Merrill*, 15 Vt. 700; 40 Am. Dec. 701; *Welch v. Clark*, 12 Vt. 681; 36 Am. Dec. 368; *Pitt v. Petwoy*, 12 Ired. 73; *Rooks v. Moore*, 1 Busb. 1; 57 Am. Dec. 569; *Barton v. Williams*, 5 Barn. & Ald. 403; *Mayhew v. Herrick*, 7 Com. B. 229; 13 Jur. 1078; 18 L. J. Com. P. 179; *Morgan v. Marquis*, 9 Ex. 145; *Brady v. Arnold*, 19 U. C. C. P. 46; Freeman on Cotenancy, sec. 309.

PERSONALTY WHICH MAY BE CONVERTED. — Every species of personal property which is subject to ownership, and over which another than the owner can exercise dominion or control in defiance of or inconsistent with the owner's rights, may, when such dominion or control is so exercised, be regarded as converted: *Spaulding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68. Hence an action of trover may be sustained for the conversion of money or bank bills: *Moody v. Keener*, 7 Port. 218; promissory notes and other evidence of indebtedness: *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Duy v. Whitney*, 1 Pick. 503; *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; *Griswold v. Judd*, 1 Root, 221; *Comparet v. Burr*, 5 Blackf. 419; *Brickhouse v. Brickhouse*, 11 Ired. 404; *Otisfield v. Mayberry*, 63 Me. 197; *Stone v. Clough*, 41 N. H. 290; *Penniman v. Winner*, 54 Md. 127; contracts for the sale of land and other property: *Hazewell v. Coursen*, 45 N. Y. Sup. Ct. 22; certificates of the stock of corporations: *Kingman v. Pierce*, 17 Mass. 247; *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80; *Neiler v. Kelley*, 69 Pa. St. 403; *Budd v. R. R. Co.*, 12 Or. 271; 53 Am. Rep. 355; *Daygett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; copies of accounts: *Fullam v. Cummings*, 16 Vt. 697; *O'Donoghue v. Corby*, 22 Mo. 394; writs of execution: *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71; and fixtures, which, either from their character, mode, or annexation, or the agreement of the parties, remain personal property: *Smith v. Benson*, 1 Hill, 176; *Osgood v. Howard*, 6 Greenl. 452; 20 Am. Dec. 322; *Harris v. Powers*, 57 Ala. 139; *Dane v. Dane*, 38 N. H. 429; 75 Am. Dec. 195; *Korbe v. Barfour*, 130 Mass. 255; *Powers v. Harris*, 68 Ala. 409; *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532; *Hilborne v. Brown*, 12 Me. 162; *Brown v. Wallis*, 115 Mass. 156; *Crippen v. Morrison*, 13 Mich. 23; but it is said that such an action is not sustainable for the conversion of judgments or other records: *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412; *Cobb v. Cornegay*, 6 Ired. 358; 45 Am. Dec. 497. The fact that the property alleged to have been converted has no value except to its owner will not defeat an action for its conversion: *Pierce v. Gilson*, 9 Vt. 216; *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188. Where a bond, note, or other evidence of indebtedness is, after its payment, seized, detained, or transferred by a person having no right so to do, when it is no longer capable of being asserted as a cause of action, some

of the cases have regarded it as so extinguished by the payment as no longer to be the subject of conversion: *Besherer v. Swisher*, 3 N. J. L. 748; *Todd v. Crookshanks*, 3 Johns. 432; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412. While, in other cases, any wrongful disposition of a paid note or bond has been adjudged to amount to its conversion as against the maker, who by such payment becomes entitled to its possession: *Stone v. Clough*, 41 N. H. 290; *Otisfield v. Mayberry*, 63 Me. 197; *Neal v. Hanson*, 60 Me. 84; *Buck v. Kent*, 3 Vt. 99; 21 Am. Dec. 576; *Spencer v. Dearth*, 43 Vt. 98. If a note is founded upon illegal considerations, the payee cannot sustain an action for its conversion: *Morrill v. Goodenow*, 65 Me. 178; nor can such action be maintained in any instance when the thing converted is such that it was unlawful and criminal for the plaintiff to have it in his possession, as where it is a counterfeit coin, or an implement designed to aid in the making of such coin: *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68.

ROACH v. PRIVETT.

[90 ALABAMA, 391.]

JUDGMENTS — MERGER — FOREIGN JUDGMENT. — A judgment appealed from is merged in a judgment of affirmance on appeal. This rule applies in a suit on a judgment of affirmance rendered in another state.

JUDGMENTS — MERGER BY AFFIRMANCE — JURISDICTION. — When the judgment sued on was affirmed on appeal, and the defendant submitted himself to the jurisdiction of the appellate court, he cannot assail it on the ground that the trial court never acquired jurisdiction of his person. This rule applies to affirmed judgments of other states.

JUDGMENTS — CONCLUSIVENESS OF, AS AGAINST SET-OFF. — A set-off may or may not be pleaded, at the election of the defendant; and if not pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense to another action by the same plaintiff, is not affected or impaired by a judgment against the defendant. This rule applies to a suit on a judgment rendered in another state, in the absence of proof that a different rule prevails there.

PRACTICE — ERROR WITHOUT INJURY IN EXCLUSION OF EVIDENCE. — When evidence is erroneously excluded, the rule of error without injury cannot be invoked, on the ground that the ruling was made after all the evidence on that point had been adduced, and that the evidence was insufficient.

JUDGMENTS. — PAROL EVIDENCE OF JUSTICE'S JUDGMENT rendered during a former term of office is not admissible on proof of search in his office for his docket and papers, and in the absence of proof that he has been in office continually since the judgment was rendered, or has succeeded himself after being out one or more terms.

William L. Martin and J. E. Brown, for the appellant.

Hunt and Clopton, for the appellee.

McCLELLAN, J. The judgment sued on was rendered by the supreme court of Tennessee on appeal from a circuit



AMERICAN STATE REPORTS.

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STATE *v.* GOODWILL, STATE *v.* MINOR.

[33 WEST VIRGINIA, 179.]

Constitutional law, equal rights employers and employes,



WATERCOURSES — FLOATABLE STREAM — RIGHT OF LAND-OWNER TO ERECT MILL-DAM. — The owner of soil over which a floatable stream passes may build a dam across it, but he must furnish a suitable sluice for the public by or through his dam: *Lancey v. Clifford*, 54 Me. 487; 92 Am. Dec. 561; *Dwinel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94, and note; note to *State v. Thompson*, 47 Am. Dec. 589; *Richards v. Peter*, 70 Mich. 286.

STATE v. GOODWILL. STATE v. MINOR.

[33 WEST VIRGINIA, 179.]

CONSTITUTIONAL LAW — EQUAL RIGHTS. — THE RIGHTS OF EVERY INDIVIDUAL must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.

CONSTITUTIONAL LAW. — THE POLICE POWER, however broad and extensive, is not above the constitution, and must be exercised in subordination to it.

CONSTITUTIONAL LAW — EMPLOYERS AND EMPLOYEES. — A statute declaring that all persons engaged in mining coal, ore, or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall not issue, for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, is unconstitutional and void.

Henritze and Haythe, C. W. Smith, J. W. St. Clair, and Brown and Jackson, for the plaintiffs in error.

Alfred Caldwell, attorney-general, for the state.

SNYDER, P. These two cases present the same questions and may therefore be considered together. The first is a writ of error to a judgment of the circuit court of Mercer County pronounced on April 3, 1889; and the second is a writ of error to a judgment of the circuit court of Fayette County pronounced September 29, 1887. Both are indictments and convictions for the violation of section 3 of chapter 63, Acts of 1887: See Code 1887, p. 963.

The title of said act is as follows: "An act to secure to operatives and laborers engaged in and about mines, manufactories of iron and steel, and all other manufactories, the payment of their wages at regular intervals, and in lawful money of the United States." And the first and third sec-

tions are in these words: "1. That all persons, firms, corporations, or associations in this state engaged in mining coal, ore, or other minerals, or mining and manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall pay their employees as provided in this act. . . . 3. That it shall not be lawful for any person, firm, company, corporation, or association engaged in the business aforesaid, their clerk, agent, officer, or servant, in this state, to issue for the payment of labor any order or other paper whatsoever, unless the same purports to be redeemable, for its face value, in lawful money of the United States, bearing interest at the legal rate, made payable to employee or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation, or association giving, making, or issuing the same." The residue of the section makes its violation a misdemeanor, and fixes the penalty at not less than twenty-five dollars, or more than one hundred dollars.

There was a demurrer to each of the indictments, which was overruled by the court; and the plaintiffs in error assign this as ground for the reversal of the judgments.

The main question argued before this court is, whether or not the said statute is constitutional, the counsel for the plaintiffs in error contending that it is unconstitutional and void, and the attorney-general insisting that it is a proper exercise of the police power, and therefore not unconstitutional and void.

It will be observed that this statute applies to certain specified classes of persons, firms, companies, corporations, and associations, and none others. It is by its terms limited to persons, corporations, etc., engaged in mining coal or other minerals, or any kind of manufacturing. While these terms include not only all persons engaged in mining coal and other minerals, and all persons engaged in manufacturing iron and steel, but also all persons engaged in any kind of manufacturing, such as the shoemaker, the cigar-maker, the undertaker, the distiller, the brick-maker, the jeweler, the weaver, the milliner, the dairy-man, and the miller, it does not include the wholesale merchant with his hundreds of clerks and agents, the railroad construction companies or railroad companies with their thousands of employees. The propriety or the necessity, if such exists, of applying the provisions of the statute to these latter is equally as great, if not greater,

as it is to any of the former. The rights and privileges of certain specified employers are abridged, while others of the same class are left free.

By the first section of the fourteenth amendment of the constitution of the United States, all persons born or naturalized in the United States are made citizens thereof; and it then declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And the bill of rights of this state declares that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety": Const., art. 3, sec. 1. Can the legislature, in view of these constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal, or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private, and personal to the parties themselves?

The court, in *People v. Gillson*, 109 N. Y. 398, 4 Am. St. Rep. 465, says: "The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation": Field, J., in *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 111 U. S. 755; *Butchers' Ass'n v. Crescent City Co.*, 1 Abb. 398.

The court in *Civil Rights Cases*, 109 U. S. 23, says: "Under the Fourteenth Amendment, it [Congress] has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. . . .

Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment, which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person or class of persons the right to pursue any peaceful avocation allowed to others. What is called 'class legislation' would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment."

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another; whereas a like general law affecting the whole community equally could not have been enacted: *Wally v. Kennedy*, 2 Yerg. 554; 24 Am. Dec. 511.

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and

to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the supreme court of the United States and other courts: *Yick Wo v. Hopkins*, 118 U. S. 356; *Slaughter House Cases*, 16 Wall. 36; *Butchers' Union Co. v. Crescent City etc. Co.*, 111 U. S. 746; 6 Myer's Fed. Dec., sec. 1000; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *Ex parte Westerfield*, 55 Cal. 550; 36 Am. Rep. 47; *Ragio v. State*, 86 Tenn. 272; *State v. Divine*, 98 N. C. 778.

The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution: *People v. Otis*, 90 N. Y. 48. The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, — which is, as we have seen, property, — is protected by the constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts. "Questions of power," says Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. 419, "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

No one questions the position that, unless the government intervened to protect property and regulate trade, property would cease to exist, and trade would exist only as an engine of fraud; but this does not authorize the government to do for its people what they can do for themselves. The natural law of supply and demand is the best law of trade. In *Munn v. Illinois*, 94 U. S. 113, and other cases involving the same questions, the supreme court of the United States has held that persons or corporations engaged in occupations in which the public have an interest or use may be regulated by statute. But the reasons assigned for these decisions are, that the public has a use in these occupations, and that the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed by others not so en-

gaged; that their business implies a trust and public duty; and that the government has therefore the power to see that this trust is not abused, and that the duty imposed by it is properly performed. On this principle, statutes have been upheld which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph, and other companies; hackmen, warehousemen, owners of water-mills, etc. But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employee, even in this class of occupations, much less in cases that are not impressed with a public trust or duty.

But the claim is made that the legislature should pass the act now in question, in the exercise of the police power which every sovereign state possesses. That power is very broad and comprehensive, and is exercised to promote the health, safety, and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *Salus populi suprema lex est*. It is used to regulate the use of property by enforcing the rule, *Sic utere tuo ut alienum non lædas*. Under it, the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation. The limit of the power cannot be accurately defined, and the courts have not been willing definitely to circumscribe it. But this power, however broad and extensive, is not above the constitution, which is the supreme law; and, so far as it imposes restraints, the police power must be exercised in subordination to it: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; Cooley's Constitutional Limitations, 719; *Mugler v. Kansas*, 123 U. S. 623.

Generally, it is for the legislature to determine what laws and regulations are proper in the exercise of the police power; but if it passes an act ostensibly for the public health or safety, and thereby destroys or takes away the property of a citizen, or interferes with his rights or personal liberty, then it is for the courts to determine whether it is a proper and reasonable exercise of the power, and if it is not, to declare it void: *Austin v. Murray*, 16 Pick. 121; *State v. Gilman*, 33 W. Va. 146.

The right to regulate the rate of interest existed at the time

the constitution was adopted, and cannot therefore be considered as either an abridgment or restraint upon the rights of the citizen guaranteed by the constitution. The power to pass usury laws exists by immemorial usage; but such is not the case with such acts as we are now considering: *Munn v. Illinois*, 94 U. S. 113, 153.

Our act is almost a literal copy of an act passed by the legislature of Pennsylvania on June 29, 1881: Pa. Laws, 1881, p. 147. In *Godcharles v. Wigeman*, 113 Pa. St. 431, the supreme court of that state declared the first four sections of that act unconstitutional and void. The court, in its opinion, says: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, the supreme court of Illinois, in a well-considered opinion, held unconstitutional and void an act of the legislature of that state which required the owners or operators of mines to provide scales for weighing their coal, and make the weight of coal the basis of the wages of miners. A part of the *syllabus* is as follows: "It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power."

In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer,

and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile.

"Such legislation," as is well said by the court in *In re Jacobs*, 98 N. Y. 114, 50 Am. Rep. 636, "may invade one class of rights to-day and another to-morrow; and if it can be sanctioned under the constitution, while far removed in time, we shall not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

For the reasons aforesaid, we are clearly of opinion that the said third section of the act aforesaid is unconstitutional and void. In arriving at this conclusion, we have not been unmindful that the power of the courts to condemn legislative acts as unconstitutional is one of great delicacy, and to be exercised with extreme caution, and even with reluctance. But, as said by Chancellor Kent (1 Kent's Com. 450), "it is only by the free exercise of this power that courts of justice are enabled to repel assaults, and protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights."

The statute itself being, as we have seen, unconstitutional and void, there could be no valid indictment founded upon it; and consequently the circuit court erred in overruling the demurrer to the indictment in each of these cases; and for that reason the judgments of the circuit court are reversed, and the defendants discharged.

The Fourteenth Amendment Considered with Relation to Special Privileges, Burdens, and Restrictions.*

The First Section of the Fourteenth Amendment to the constitution of the United States declares that "all persons born or naturalized in the United

* REFERENCE TO MONOGRAPHIC NOTES.

Statutes prohibiting adulteration of milk: 51 Am. Rep. 347-354.

Statutes prohibiting business on Sunday: 49 Am. Dec. 616-623.

Statutes regulating sales of intoxicating liquors: 35 Am. Dec. 331-334.

States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Many of the state constitutions contain provisions of nearly similar import, the object of which is to secure to all persons equality before the law, and to prevent the imposition of burdens upon one person to which others are not subject under the same circumstances. No questions exceed in interest and importance those which present for judicial determination the validity of statutes assailed on the ground that they concede privileges to, or impose penalties or burdens upon, one or more persons to which others belonging to the same class are not entitled in the one case and not liable in the other.

Original Purpose of the Fourteenth Amendment. — Speaking of the amendments to the constitution of the United States adopted at the close of the Civil War, the supreme court said: "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment in terms mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth. We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may be safely trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it": *Slaughter House Cases*, 16 Wall. 71; *Plunkard v. State*, 67 Md. 364. With respect to the privileges or immunities of citizens of a state as contradistinguished from the privileges or immunities of citizens of the United States, the decision from which we have just quoted established that it was the latter only which were secured by the Fourteenth Amendment, and that if there were any difference between the privileges and immunities "belonging to a citizen of the United States as such, and those belonging to a citizen of a state as such, the latter must rest for their security and protection where they have heretofore rested; for

they are not embraced within this paragraph of the amendment; and furthermore, that the inhibition against any state denying to any person within its jurisdiction the equal protection of its laws was chiefly designed to render void "laws in the states where the newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class, "and to forbid the enactment or enforcement of such laws in the future."

Privileges and Immunities of Citizens. — The Fourteenth Amendment did not add to the privileges and immunities of any citizen of the United States, but merely furnished additional guaranties of such as he already had. Hence, as the right of suffrage was not necessarily a privilege of a citizen, it was not conferred upon any person by that amendment: *Minor v. Happersett*, 21 Wall. 162. The only consequence of its denial was, when denied to any male citizen and inhabitant of a state more than twenty-one years of age, except for participation in some crime, a diminution in the number of representatives in Congress, and electors for President and Vice-President, to which the denying state was otherwise entitled. Nor has any amendment given to all citizens the right to vote, though the fifteenth has prohibited the denial of that right "on account of race, color, or previous condition of servitude." The result is, that any state may discriminate between its citizens by denying to some of them the right of suffrage, provided the test of exclusion is not that of race, color, or previous condition of servitude: *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542. Nor is the right to practice law: *Bradwell v. State*, 16 Wall. 130; or to have a cause in a state court tried before a jury: *Walker v. Saurinet*, 92 U. S. 90, — a privilege or immunity secured by this amendment. And if there is any privilege or immunity of a citizen of the United States which could have been abridged by a state before the adoption of this amendment, and which has by the amendment been withdrawn from the power of state abridgment, it does not stand revealed in any light emitted by the highest of the national courts. The real force of the amendment is contained in its clauses declaring who are citizens, and prohibiting the denial of the equal protection of the laws and the deprivation of life, liberty, or property without due process of law.

Who are Protected by the Fourteenth Amendment. — While, as indicated in the *Slaughter House Cases*, the purpose of the Fourteenth Amendment of protecting the enfranchised negro against oppression and unjust discrimination may properly be considered in determining whether the special privileges granted or burdens exacted by a statute are forbidden by the amendment, and the fact that the statute in question is or is not against or specially applicable to that race may exercise a great or even paramount influence in the deliberations of the judiciary, yet there is no doubt that all other races or persons within the jurisdiction of the state, whether citizens or aliens, "without regard to any differences in race, color, or nationality," are within the protection of that portion of the amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws: *Yick Wo v. Hopkins*, 118 U. S. 369. As to non-residents, a different rule may apply. If they are citizens of the United States, the privileges and immunities to which they are entitled as such are by the express terms of the amendment not to be impaired by any state; but if there is any immunity or privilege peculiar to the citizen of a state, and not possessed by other citizens of the United States, it may doubtless be withheld from non-

residents. It has been decided that a state may impose conditions upon non-residents suing in its courts not imposed upon residents, — such, for instance, as requiring them to give security for costs: *Cummings v. Wingo*, 31 S. C. 427; or may deny to non-residents the right to sue foreign corporations in its courts, unless the cause of action shall have arisen, or the subject of the action shall be situated within, the state: *Central etc. Co. v. Georgia etc. Co.*, 32 S. C. 319. So far as a state possesses property, it may restrict the right to use it to residents. Hence it may prohibit residents of other states from planting or taking oysters, or fishing in tide or other waters, the ownership of which is vested in the state: *People v. Loundes*, 130 N. Y. 455; *McCready v. Virginia*, 94 U. S. 391; *Commonwealth v. Manchester*, 152 Mass. 280; 23 Am. St. Rep. 820; *Manchester v. Massachusetts*, 139 U. S. 240. The privileges to which non-residents are entitled under the constitution must, we apprehend, be those secured them by section 2 of article 4, declaring that “the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.” The consideration of this clause of the constitution is not within the purview of the present note. The leading decisions construing it are *Corfield v. Coryell*, 4 Wash. C. C. 380; *Conner v. Elliott*, 18 How. 591; *Paul v. Virginia*, 8 Wall. 180; *Ward v. Maryland*, 12 Wall. 418.

Corporations, to What Extent Protected.— Private corporations must also be regarded as persons to whom the equal protection of the laws must not be denied, and who cannot be deprived of property without due process of law: *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 394; *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386; *Minneapolis etc. R’y Co. v. Beckwith*, 129 U. S. 26; *Missouri Pac. R’y Co. v. Mackey*, 127 U. S. 205; *Minneapolis etc. R’y Co. v. Herrick*, 127 U. S. 210. “The equal protection of the laws which these bodies may claim is only such as is afforded similar associations within the jurisdiction of the state”: *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. A private corporation is not, however, a citizen of the United States within the meaning of the prohibition against abridging the privileges and immunities of citizens of the United States: *Paul v. Virginia*, 8 Wall. 168. “The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is no every corporation lawful in the state of its creation that other states may be willing to admit within their jurisdiction, or consent that it have offices in them, — such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may therefore require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendments, see *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri v. Lewis*, 101 U. S. 22, 30; *Missouri Pac. R’y Co. v. Humes*, 115 U. S. 512; *Yick Wo v. Hopkins*, 118 U. S. 356; *Hayes v. Missouri*, 120 U. S. 68; *People v. Wemp’e*, 131 N. Y. 64. The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for

allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority": *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. And when a foreign corporation has not complied with the conditions required by the laws of a state to authorize it to do business therein, the act of its agents in coming within the state for the purpose of there doing business may by its laws be declared a crime, and punished as such: *Moses v. State*, 65 Miss. 56.

Nor has any domestic corporation a right to do business or to otherwise exercise its franchise within a state except by its permission. Having power to withhold such permission altogether, the state may grant it upon such conditions as it sees fit, and the exercise of the franchise is an acceptance of the conditions. One of the conditions may be the payment of a tax on the corporate franchise or business. This tax may be exacted of both foreign and domestic corporations doing business or otherwise exercising their franchises in the state. The amount of the tax, the basis upon which it shall be computed, the mode in which it may be ascertained, and the manner in which its collection shall be enforced, are matters for consideration and determination by the state legislature, whose judgment as expressed in its enactments is not subject to review by the judiciary. Nor is it any valid objection to such enactments that, taken in connection with other laws imposing taxes and exacting license fees, they may result in the corporations affected by them being compelled to contribute to the revenues of the states sums largely in excess of those contributed by private persons engaged in the same class of business, and using in its transaction property of the same kind, amount, and value: *Horn S. M. Co. v. New York*, 143 U. S. 305; *Delaware R. R. Tax Case*, 18 Wall. 206; *Home Ins. Co. v. New York*, 134 U. S. 594; *Standard U. C. Co. v. Attorney-General*, 46 N. J. Eq. 276; 19 Am. St. Rep. 394. A statute forbidding the payment by life insurance corporations, whether foreign or domestic, of any rebate of premium as an inducement to any person to insure, and declaring any person violating the prohibition guilty of a misdemeanor, is valid. "The corporations organized under the laws of this state for life insurance are absolutely under the direction and control of the legislature. It may specify how and on what terms they may do business, and enact laws regulating their conduct and the conduct of their agents, for their protection and the protection of their policy-holders, and enforce obedience to such laws by such penalties, forfeitures, and punishments as it may, within constitutional limits, prescribe. As all these corporations must act through agents, it has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves. It would be quite preposterous to say that the legislature could, in the exercise of its legitimate authority, regulate these corporations and prescribe the terms under which they may exist and do business, and yet could not by similar laws regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the laws creating and authorizing them, they must conform to the laws enacted for their conduct, and if they are unwilling to do so, they must go out of existence. So, too, all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations, or cease to act for them": *People v. Formosa*, 131 N. Y. 478; *Commonwealth v. Morningstar*, 144 Pa. St. 103.

Retrospective Effect. — There can be no doubt that the amendment here

under consideration applies to pre-existing statutes as well as to those enacted after its adoption. Though a statute when enacted was constitutional, no proceeding can be taken under it after the adoption of this amendment, the effect of which proceeding, if sustained, must be to deprive some person of a right secured by the amendment against legislative action on the part of any of the states: *Kaukauna v. Green Bay etc. Canal*, 142 U. S. 254.

Burdens and Restrictions Founded on Race.—The general object of the Fourteenth Amendment, and the provisions in the state constitutions of similar import, is to extend to all persons within the jurisdiction of the state the protection of its laws and judicial tribunals on the same terms, and not to permit the granting of privileges to one person to which others of the same class are not entitled, and not to impose upon one person burdens, obligations, or penalties to which others in the same situation are not subjected; and while an individual may often be required to content himself with the privileges granted and to submit to the burdens imposed on all members of the particular class of persons to which he belongs, though some other or all other classes of persons are exempt, yet the classification to which he must thus submit must not be made capriciously, nor directed at a particular class of persons with a view to deprive them of privileges and subject them to burdens merely because they belong to some race or class. So far as the negro race is concerned, the effect of the Fourteenth Amendment is to require that its members be subjected to the same laws, entitled to the same protection, and secured in the same immunities and privileges as members of the white race, and any law depriving any one of a right because of his color is doubtless unconstitutional and void: *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339.

If there is a system of public schools in the state supported by taxation, the children of colored persons cannot, by implication or otherwise, be excluded from the benefits thereof: *Dawson v. Lee*, 83 Ky. 49; nor can the state divide the school funds by appropriating to the support of the schools for white children the moneys received from the property of white persons, leaving for the support of the schools for negroes only such moneys as have been received from property belonging to persons of that race: *Markham v. Manning*, 96 N. C. 132. So far as we are aware, there has been no decision assuring to any member of any race the right to receive his education, or any other privilege to which he is entitled, at the same place or in the same company with members of any other race. The privileges themselves must not be curtailed by law, unless, indeed, it is a curtailment of them to be denied the right to receive them in the midst of members of the other races; and hence a state may provide for separate schools for children of white and of colored races, if the facilities and opportunities for education provided for the one race equal those provided for the other: *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 232; *State v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 323; 17 Am. Rep. 738; *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; and the fact that the children of a colored person may, in a particular case, be compelled to travel farther than white children in the same district to reach a school established for colored children will not entitle them to admission in a school established for whites: *Lehew v. Brummel*, 103 Mo. 546; 23 Am. St. Rep. 895; though doubtless a statute upon the face of which it appeared that this result was sought, or that colored children would be required, as a general rule, to travel farther than whites to reach their schools, would be invalid. Otherwise they might be required

to attend at places so distant from their homes as to effectively prevent their attendance at all.

It appears that colored persons have no constitutional right to ride in the same railway cars with whites, and that railway corporations may voluntarily provide separate cars for the two races, or may be required to do so by state legislation, if the accommodations supplied to the one race equal those supplied to the other: *Louisville etc. R'y Co. v. State*, 66 Miss. 662; 14 Am. St. Rep. 599; *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613. As to places of amusement, like skating-rinks kept by private persons, and charged with no public duty, their managers may, at their pleasure, admit negroes or not: *Bowlin v. Lyon*, 67 Iowa, 536; 56 Am. Rep. 355; unless there is some statute enacted by the state legislature requiring their admission on the same terms as persons of other races, in which event such enactment is valid, and must be obeyed: *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389.

The Liberty of Each Person and his Right to Acquire and Retain Property must always be considered in connection with the rights, liberties, and welfare of others, and each person must submit to such reasonable restrictions as must necessarily be imposed for the better protection of the whole community, and even for the protection of a particular class, and it will hence always be difficult, if not impossible, to define or prescribe any precise test from which to determine with unvarying certainty what restrictions upon the liberties of individuals, or of classes of individuals, are sustainable and what are not. While the courts properly hesitate to formulate definitions of liberty or of due process of law, or to give enumerations of all that may be conceded to one person or denied to another without denying to "any person the equal protection of the laws," yet they have, in some instances, given general descriptions or definitions which, while not intended to be applicable under all circumstances, are usually applicable, and therefore worthy of restatement here. Thus it was said in *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465: "The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all countries from time immemorial, must therefore be free in this country, to all alike, upon the same conditions. The right to pursue them without let or hindrance, except that which is implied to all persons of the same sex, age, and condition, is a distinguishing privilege of the citizens of the United States, and an essential element of that freedom which they claim as their birthright. . . . Civil liberty exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws." *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 757.

General Scope of Fourteenth Amendment. — Mr. Justice Field, in his dis-

senting opinion in *Ex parte Virginia*, 100 U. S. 367, while denying that the operation of the Fourteenth Amendment extended beyond the securing of what he denominated civil rights, said: "And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offenses." The same learned jurist, in pronouncing judgment of the court in *Barbier v. Connolly*, 113 U. S. 27, expressed his views upon this subject as follows: "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Special Privileges and Rules of Law. — Every person must have the right to resort to the courts for redress under substantially the same terms, and no rule of law or of evidence can be applied to one which is not equally applicable to others in controversies of the same character. Hence it has been held that a statute authorizing prosecuting attorneys in criminal cases, at their election, to deprive defendants of the right to the continuance of their case for the purpose of procuring the attendance of witnesses, notwithstanding the use of due diligence, by stipulating that the testimony which it is claimed such witness, if present, would give may be regarded as given by him, is unconstitutional, because under the operation of the statute there may be two persons accused of crime, both of whom have been equally diligent in seeking to procure the attendance of witnesses, one of whom may be forced to trial at the election of the prosecutor without obtaining the advantage of having the jury see and hear and judge of the credibility of his witnesses, while the other, on the prosecutor's making a different election in his case, may receive the benefit of this advantage; *State v. Berkley*, 92 Mo. 41. For similar reasons a statute is unconstitutional which declares that certain acts, if done in a designated river, within the limits of a particular county, shall be regarded as injurious and dangerous, and shall be enjoined without proof that injury or danger has been or will be done them, when the acts are such as may be done without danger or injury, and may be necessary to the enjoyment and protection of private property; *City of Junesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123.

A statute is unconstitutional which deprives a person charged with a criminal offense of the presumption of innocence, or makes acts done by certain persons in certain localities criminal, which if done by other persons in different localities are innocent; as where a statute makes the killing of stock on any railroad within specified counties a misdemeanor, for which the president, receiver, and superintendent of the road, and the engineer and conductor in charge of the train, may be indicted, unless the parties indictable shall, within six months after such killing, and before any indictment is preferred, pay the owner of the stock his charges therefor, or if they are deemed too high, submit the question to arbitration: *State v. Divine*, 98 N.C. 778. It has also been held, in Michigan, that a statute authorizing the owner of stock killed by a railroad: *Lafferty v. Chicago etc. R'y Co.*, 71 Mich. 35; *Wilder v. Chicago etc. R'y Co.*, 70 Mich. 382; or a person suing for certain classes of personal services: *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, — to recover, in addition to the damages, or the amount due, an attorney's fee fixed by statute, is class legislation, and therefore void. These Michigan decisions are, however, probably not sustainable, in view of the more recent and authoritative adjudications in the national courts and elsewhere. In all cases where the liability of a railway corporation or of any other person, natural or artificial, results from its or his failure to observe some rule which the legislature of the state was competent to prescribe in the exercise of the police powers vested in it, it may, by way of penalty, impose on the guilty party not only the payment of the attorney's fees of his adversary: *Burlington etc. R'y Co. v. Dey*, 48 N. W. Rep. 98 (Iowa, Feb. 9, 1891); *Perkins v. St. Louis etc. R'y Co.*, 103 Mo. 52; *Peoria etc. R'y Co. v. Duggan*, 109 Ill. 537; but also damages in excess of those suffered. On this ground a statute was sustained which authorized the recovery of double the value of the stock killed, or the damages caused thereto, by a railway, when the injury was inflicted at a point on the road where the corporation had the right to erect a fence, and had failed to do so, and the injury was not occasioned by the willful act of the owner or of his agent: *Minneapolis R'y Co. v. Beckwith*, 129 U. S. 26; *Humes v. Missouri Pac. R'y Co.*, 82 Mo. 221; *Missouri P. etc. R'y Co. v. Humes*, 115 U. S. 512.

Jurors. — In the eyes of the law, white and colored persons are equal, and neither has any right to insist that a person of his race or color shall be on the jury by which he is tried when accused of crime, or when he is otherwise a party to an action or proceeding: *Lawrence v. Commonwealth*, 81 Va. 484; *State v. Sloan*, 97 N. C. 499; *Virginia v. Rives*, 100 U. S. 313. Each has, however, the right to insist that no person be excluded from the jury because of his color or race. Any statute seeking to justify such exclusion is unconstitutional and void: *Strander v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; and where, in the absence of such statute, or otherwise, it appears that the officer summoning or drawing the jury, grand or petit, has been influenced by considerations of race, and has excluded qualified persons from the jury solely because of their race or color, it has been held that "it would be the duty of the court before which such motion could alone be made in the first instance, on sufficient proof of the facts, to quash such illegally drawn or summoned panel, or any indictment found by such illegally constituted grand jury": *Green v. State*, 73 Ala. 26.

Restrictions on Pursuit of Lawful Business. — One of the rights unquestionably secured to all persons within the jurisdiction of a state is that of following any lawful calling or pursuit, subject only to such conditions and

restrictions as may be imposed for the public welfare, calculated to exclude from the calling persons incompetent to exercise it, or to guard the public from such frauds or impositions as might readily be employed but for some statutory safeguard; but whatever be the nature or object of the imposition or restriction, it must apply to all persons of the same class and condition, or if can be applied to none. "While the power of the legislature to impose restrictions upon the exercise of certain trades and professions for the protection of the public is unquestioned, it must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession, under the same circumstances. The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt. The imposition of special restrictions or burdens or the granting of special privileges to persons engaged in the same business, under the same circumstances, is in contravention of the equal right which all can claim in the enforcement of the laws and in the enjoyment of liberty, and the right of acquiring and possessing property": *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22; *Soon Hing v. Crowley*, 113 U. S. 703; *Yick Wo v. Hopkins*, 118 U. S. 356. Therefore, those statutes which regulate the practice of dentistry and medicine, and provide what qualifications the practitioners must possess, are valid, if they apply equally to all persons who seek to qualify themselves for or to pursue those callings, or either of them, and are not arbitrary in the conditions which they impose.

A statute making unlawful, in cities of over five hundred thousand inhabitants, the manufacture of cigars, or preparation of tobacco in any form, on any floor, or on any part of any floor, in any tenement-house, if such floor, or any part of such floor, is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein, but excepting from the operation of the statute the first floor of any tenement-house on which there is a store for the sale of cigars or tobacco, was also held to be invalid, and void, on the ground that it was arbitrary, because it made unlawful in cities of the class described what was lawful everywhere else in the world, required the occupant of the house either to abandon the trade by which he earned a living for himself and his family or to procure a room elsewhere, "or hire himself out to one who has a room, upon such terms as, under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer," and because "it is therefore plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house, who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property, and of some portion of his personal liberty": *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

The right of every person to pursue any lawful calling without let or hindrance cannot be secured without permitting every person who wishes employment to seek it, and to leave all persons free to accept the services of others on such terms as may be agreed upon by them. Therefore, an ordinance is void which makes it unlawful for a contractor, when having labor performed under a contract with the city, to demand, receive, or contract for more than eight hours' labor in any one day from any person in his employ or under his control, with the promise or understanding that such

person so laboring over eight hours shall receive a sum for a day's work more than that paid for a legal day's work, or to employ any Chinese labor to be used in performing such contract with the city: *Ex parte Kuback*, 85 Cal. 274; 20 Am. St. Rep. 226.

Arbitrary Tests, What are. — An arbitrary test would be one "having no reference to skill, learning, or fitness for the practice of the profession" to which it was applied; as where all persons desiring to practice dentistry are required to have received a dental degree from some college, or a license from a dental society, excepting such persons as have resided or practiced their profession in the town or city of their present residence since January 1, 1875: *State v. Hirman*, 65 N. H. 103; 23 Am. St. Rep. 22. A test is also arbitrary if it is one which is not definite or prescribed by law, and in the application of which the officer to whom its enforcement is committed can find no guide in the law, and may therefore lawfully permit the applicant to carry on business for such reason as to the officer may seem proper, or may lawfully grant a permit to one person while he denies it to another equally well qualified to carry on the business. Therefore, a municipal ordinance which prohibits the carrying on of a laundry by any person within the limits of a city "without having first obtained the assent of the board of supervisors, except the same be located in a building constructed either of brick or of stone," is void, because, "if the applicant for such consent, being in every way a qualified and competent person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent without reason and without responsibility. The power given them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint": *Yick Wo v. Hopkins*, 118 U. S. 358.

Arbitrary Restrictions, Illustrations of. — The following are further illustrations of statutes and ordinances invalid because of their being arbitrary, or imposing restrictions upon or granting privileges to one or more persons to which other persons in the same condition are not entitled and subject: A statute making it unlawful for barbers to keep open their bath-rooms on Sundays while all other persons remained at liberty to keep theirs open: *Rugio v. State*, 86 Tenn. 272; a statute granting to a single corporation the right to take a greater rate of interest than any other person, natural or artificial, is allowed to exact: *Gordon v. Winchester Building Ass'n*, 12 Bush, 110; an ordinance requiring persons whose principal place of business is not in a city designated to obtain an annual license and pay two hundred dollars before selling or offering to sell any merchandise by sample or representation in such city to any person other than persons living in or doing business in the city, while persons doing business within the city, though required to obtain a license, were entitled to have the amount which they must pay therefor regulated by the amount of business done by them: *Fecheimer v. Louisville*, 84 Ky. 306; *Walling v. Michigan*, 116 U. S. 446; a statute making criminal the violation of a labor contract by either party thereto, but imposing a more severe punishment upon a guilty employee than upon a guilty employer: *State v. Williams*, 32 S. C. 123; a statute attempting to restrict the damages recoverable in certain cases of newspaper libel to such as plaintiff might show "he has suffered in respect to his property, business, trade,

profession, or occupation," and the result of which must have been to provide a complete immunity in slandering persons who were without property, and were not engaged in any business, trade, or occupation: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

The Liberty of Making Contracts is absolutely essential to the acquisition, retention, and enjoyment of property, and still it must necessarily be subject to such restraints as will prevent the enforcement of contracts which are illegal, immoral, or against public policy, and protect infants and persons of unsound mind against engagements to which a more mature or sound mind might not assent; and there are also many classes of persons over which others have a great opportunity to exercise fraud, oppression, and imposition, and the law may doubtless interpose safeguards against such exercise, and may perhaps absolutely nullify contracts of such character, and made under such conditions as are likely to be the consequence of fraud, imposition, or oppression. On the other hand, the legislature cannot interpose arbitrary and unreasonable restrictions, nor make those contracts criminal or unlawful which are necessarily innocent in purpose.

Statutes enacted in some of the states for the purpose of preventing merchants from offering to give or giving any article as a gift, prize, premium, or reward to the person purchasing some other article have been assailed as arbitrary infringements upon the right to contract and to do business. In Maryland, a statute of this character was sustained without any apparent consideration of the question whether or not it conflicted with the Fourteenth Amendment: *Long v. State*, 73 Md. 527; *ante*, p. 606; while in New York, a similar enactment was denounced as in violation of the clause of the state constitution providing that "no person shall be deprived of life, liberty, or property without due process of law," and as not being an authorized exercise of the police power of the state: *People v. Gilson*, 109 N. Y. 389; 4 Am. St. Rep. 465. A like contrariety of opinion has resulted from statutes enacted with a view to protecting certain classes of employees from the supposed opportunity of their employers to impose upon them and oppress them by paying their wages otherwise than in money, or by selling them supplies at a greater price than was charged for like supplies when sold to other persons. A statute of Maryland enacted in 1880 provided that every corporation engaged in manufacturing, or in operating a railroad, in Allegheny County, and employing ten hands or more, should pay its employees the full amount of their wages in legal-tender money of the United States, and that any contract by or in behalf of such corporation for the payment of any part of such wages in any other manner shall be and is illegal and void, and every such employee shall be entitled to receive from any such corporation the whole or so much of the wages earned by him as shall not have been actually paid him in legal-tender money of the United States, without set-off or deduction, of his demand in respect to any account or claim whatever, and that the making of any contract forbidden in the statute shall be an indictable offense. This statute was sustained, as against the corporation resisting it, on the ground that as the legislature had the right at any time to alter or amend its charter at pleasure, it could forbid its paying its employees otherwise than in money, and making contracts for such payment: *Shaffer v. Union M. Co.*, 55 Md. 74. A statute making void contracts whereby employees agreed in advance to accept payment in anything else than money for services to be rendered by them was also sustained in Indiana: *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396. On the other hand, the judiciary of the states of Illinois, Pennsylvania, and

West Virginia have regarded every attempt by the legislatures of those states to make void contracts or other dealings between employers and employees as "infringements alike on the right of the employer and the employee, as insulting attempts to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive to his rights as a citizen of the United States": *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179; *ante*, p. 863; *State v. F. C. Coal etc. Co.*, 33 W. Va. 188; *post*, p. 891. This interesting question has not yet been settled by the adjudications of the national courts. To us it seems that the existence of a necessity of protecting certain classes of employees from oppression and imposition by their employers, and the means by which that necessity shall be met, if found to exist, are questions within the police power of the several states, and that when they, in the assumed exercise of that power, determine that such necessity does exist, and devise measures calculated to overcome or mitigate it, their action is not annulled by the Fourteenth Amendment.

Police Power and the Fourteenth Amendment.—In determining whether or not an enactment infringes upon the Fourteenth Amendment by abridging privileges or immunities of a citizen of the United States, we must inquire whether the alleged privilege or immunity which it abridges or destroys is such as was possessed by citizens of the United States before the adoption of the amendment. When, however, the enactment is assailed on the ground that it deprives some person or class of persons of liberty or property without due process of law, or denies to some person or class of persons the equal protection of the laws, the effect of the amendment must be considered in connection with the police power of the state; for it is settled beyond further judicial controversy that these inhibitions do not limit, and were not "designed to limit, the subjects upon which the police power of the state may be exerted": *Barbier v. Connolly*, 113 U. S. 27; *Minneapolis R'y Co. v. Beckwith*, 129 U. S. 29; *Mugler v. Kansas*, 123 U. S. 663. On the other hand, it is equally certain that the legislature cannot, by assuming to exercise the police power, act upon subjects which do not and cannot fall within its dominion, nor impose restrictions or create or enforce discriminations which are not in the legitimate exercise of that power; and that while the judgment of the legislature is accepted upon doubtful subjects: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350; *State v. Moore*, 104 N. C. 744; 17 Am. St. Rep. 696; yet the courts must, in others, overrule it, and refuse to sustain, as exercises of the police power, enactments not sanctioned by it: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

The Police Power "is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest, may be affected by it and be brought within its influence. Under this power, the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints

in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview as that power was defined and understood when the constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits": *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696.

Under the definition given of the police power, that it is the authority residing in every sovereignty to pass laws "for the internal regulation and government of the state, necessary for the public welfare," and the judicial concession that this power is not impaired by the Fourteenth Amendment, there is grave danger that that amendment will become irretrievably lost within the illimitable or indescribable boundaries of the police power. Furthermore, it is conceded that all doubtful questions are to be resolved in favor of the police power: *State v. Moore*, 104 N. C. 744; 17 Am. St. Rep. 696; and that not only does the police power confer upon each state the right to legislate for the public welfare and the preservation of the public health, safety, and morals, but that the power of determining what will injuriously affect either is also primarily vested in the state. "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system, that power is lodged with the legislative branch of government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety": *Mugler v. Kansas*, 123 U. S. 660. We do not assert that any decision has held the legislative determination conclusive, but merely that it must, if the power to determine at all be conceded, be conclusive, unless the statute enacted apparently or professedly to accomplish some of the legitimate objects of the police power "has no real or substantial relation to those objects": *Mugler v. Kansas*, 123 U. S. 661. Manifestly, it is only in extreme cases that the judiciary will, with respect to a matter which it concedes a co-ordinate branch of the government had power, primarily, to determine, overrule, and set at naught the determination there made, when to do so it must, in substance, declare that such determination was in effect a sham, a mere pretense, — a legislative decision which had no real or substantial relation to the objects in furtherance of which it was professedly pronounced. Whenever it is claimed that the grant of a special privilege, or the imposition of a special burden or restriction, must be disregarded, because in violation of the Fourteenth Amendment, we must inquire whether it is one which the legislature might have granted or imposed in good faith, in an honest desire to promote the public morals, health, safety, or welfare, and if so, it can rarely, if ever, be declared void because of this amendment.

Local and Special Legislation, otherwise valid, and not directed against any particular race or nationality, is not invalidated by the Fourteenth Amendment: *Missouri Ry Co. v. Mackey*, 127 U. S. 209; *Dent v. West Virginia*, 129

U. S. 114; *Bell's Gap Road Co. v. Pennsylvania*, 134 U. S. 237; *State v. Schlemmer*, 42 La. Ann. 1166; *Barbier v. Connolly*, 113 U. S. 27, and whether it is intended to operate against one race or nationality, rather than against another, or is otherwise prohibited by the amendment, must be determined from an inspection of the statute, because "the rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts or inferable from their operation, considered with reference to the conditions of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as a natural and reasonable effect of their enactments": *Soon Hing v. Crowley*, 113 U. S. 703. It is no objection to a statute that it is special or local, "if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed": *Missouri R'y Co. v. Mackey*, 127 U. S. 209; *Missouri v. Lewis*, 101 U. S. 22; *Hayes v. Missouri*, 120 U. S. 68. Therefore the following special legislation has been sustained: A statute subjecting railway corporations whose tracks have not been fenced to double damages for injuries to animals on such tracks: *Missouri Pac. R'y Co. v. Humes*, 115 U. S. 512; *Minneapolis & St. L. R'y Co. v. Beckwith*, 129 U. S. 26; or applying to municipal corporations and giving them privileges to which private persons or corporations, or even other municipal corporations, are not entitled: *Preston v. Louisville*, 84 Ky. 118; providing that in prosecutions for crime in cities having a population of more than five hundred thousand inhabitants the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere it is allowed but eight: *Hayes v. Missouri*, 120 U. S. 68; local-option laws which restrict the sale of intoxicating liquors in such cities as may adopt them by a majority vote: *Ex parte Swann*, 96 Mo. 44; municipal ordinances prohibiting the carrying on of public laundries within certain prescribed limits in a city from ten o'clock at night until six o'clock in the morning: *Barbier v. Connolly*, 113 U. S. 23; a statute giving miners or others employed in or about coal mines a prior lien on mining property for work and labor, and land-owners a prior lien for royalty: *Warren v. Sohn*, 112 Ind. 213; or dispensing with undertakings in proceedings by attachment, when the defendants are non-residents: *Heud v. Daniels*, 38 Kan. 1; or with the signature of a wife who is not and has never been a resident of the state to a conveyance by her husband of property, in effect releasing her right to dower by such conveyance, though had she been a resident her signature would have been indispensable: *Buffington v. Grosvenor*, 46 Kan. 730; making every railway corporation organized and doing business in the state liable for damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage: *Missouri Pac. R'y Co. v. Mackey*, 127 U. S. 205; *Minneapolis etc. R'y Co. v. Herrick*, 127 U. S. 210; *Pierce v. Central I. R'y Co.*, 73 Iowa, 140; *Rayburn v. Central I. R'y Co.*, 74 Iowa, 637; creating a presumption of negligence against railway corporations, when damage has been done by fire or other means: *Missouri Pac. R'y Co. v. Merrill*, 40 Kan. 404; *Augusta etc. R. R. Co. v. Randall*, 79 Ga. 304; excluding the defense of contributory negligence when injuries have resulted from the failure of railway corporations to fence their tracks: *Quackenbush v. Wisconsin etc. R'y Co.*, 62 Wis. 411; *Curry v. Chicago etc. R'y Co.*, 43 Wis. 665; or their failure to give signals or warnings when approaching crossings: *Kuminitzky v. Northeastern*

R. R. Co., 25 S. C. 53; punishing employees of railway corporations for mutilating, disfiguring, burning, hauling off, or burying any dead carcass of any animals that shall be killed by any railway in the state without first notifying two citizens of the neighborhood: *Bannon v. State*, 49 Ark. 167; declaring that any person having in his possession Texas cattle shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spreading the disease among other cattle, known as "Texas fever," and also subjecting him to fine and imprisonment: *Kimnish v. Ball*, 129 U. S. 217; exempting growers of tobacco or purchasers thereof who pack the same in the county or the neighborhood where it was grown from having it opened and inspected before being exported from the state, if they have first marked it with the full name of the owner and place of his residence, though other persons are required to submit to such opening and inspection: *Turner v. Maryland*, 107 U. S. 38; affirming 55 Md. 240; restricting the amount of land which may be cultivated by one family or household within the limits of a municipal corporation: *Town Council v. Pressly*, 33 S. C. 56.

Special Punishment for Crimes.—"The Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state": *In re Converse*, 137 U. S. 624; *Leeper v. Texas*, 139 U. S. 462. Nor is it universally true, as stated in this quotation, that no higher punishment can be "imposed upon one than is imposed on all for like offenses." Not only may the state prescribe different punishments for different acts constituting the same offense in different degrees or by different classes of persons: *Ex parte Garza*, 28 Tex. App. 381; 19 Am. St. Rep. 845; but it may doubtless provide that a person who has been before convicted of crime may suffer a more severe punishment than for a first offense against the law: *In re Boggs*, 45 Fed. Rep. 475; and that minors below a specified age shall not be subject to the death penalty, though their crime, if committed by an adult, would be rewarded by that punishment: *Ex parte Walker*, 28 Tex. App. 246. A statute is not invalid because it punishes adultery between persons of different races more severely than if they belonged to the same race: *Pace v. Alabama*, 106 U. S. 583.

Taxation.—The Fourteenth Amendment has not impaired the power of each state to select the subjects of taxation and provide the modes of assessment and collection. The different classes of property may be subject to different modes and degrees of taxation. No one has a right to insist that no property shall be exempt, or that the value of all property shall be ascertained in the same manner, or subject to the same mode or amount of taxation: *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386; *The Delaware R. R. Tax*, 18 Wall. 206; *Maine v. Grand Trunk R'y Co.*, 142 U. S. 217; *State R. R. Tax Cases*, 92 U. S. 575; *Kentucky R. R. Tax Cases*, 115 U. S. 321. If the uses to which any particular class of property is devoted are such that it must be specially benefited by some service rendered by the government, or some department thereof, the expenses of such service may be imposed upon it. Hence a statute providing for a state railway commission, and that the salary of its members shall be borne by the several companies operating railways within the state, is not invalid: *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386. So persons carrying on various occupations may be required to take out a

license and pay a fee therefor; and what persons shall be required to submit to the payment of such fee, and the amount and terms of payment, and modes of collection are subjects for the determination of the state legislature; and the fact that the legislature has imposed a greater burden upon some corporations than upon others, or has burdened some and left others free, is not a valid objection to the statute, provided there is no arbitrary discrimination between persons situated in the same circumstances, and no unlawful interference with interstate commerce: *Bostick v. State*, 47 Ark. 126; *Fahey v. State*, 27 Tex. App. 146; *Rothermel v. Meyerle*, 136 Pa. St. 250; *State v. Wessell*, 109 N. C. 735; *State v. Smithson*, 106 Mo. 149; and merchants, in addition to an *ad valorem* tax on their stock, may be required to pay a tax equivalent to one tenth of one per cent of the total amount of their purchases, excepting purchases of farm products, from their producers: *State v. French*, 109 N. C. 722. The views of the supreme court of the United States concerning the effect of the Fourteenth Amendment upon the right of the states to impose and collect taxes and licenses was thus clearly and forcibly expressed by the late Mr. Justice Bradley, delivering the opinion of the court in *Bell's Gap Road Co. v. Pennsylvania*, 134 U. S. 237: "The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution; but clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt."

Judicial Proceedings. — Nor does the Fourteenth Amendment entitle every person to have the same remedies in the courts, or to pursue them within the same times or in the same modes, as every other person, though in these respects the same rights and remedies must be conceded to all persons in the same condition and circumstances. If a litigant's cause comes on to be tried before a court then presided over by a judge *de facto*, he cannot avoid the judgment against him on the ground that causes in other courts of the state

were decided only by judges *de jure*: *In re Manning*, 139 U. S. 504; nor can be object that his cause happened to belong to a class or to be tried before a court from the decision of which no appeal was allowed, though had it belonged to a different class or fallen within the jurisdiction of a different court, remedies by appeal would have been open to him: *Sulliran v. Haug*, 82 Mich. 548; *St. Louis etc. R'y Co. v. Worthen*, 52 Ark. 529; *Missouri v. Lewis*, 101 U. S. 22; or that in the city where he was tried and convicted of crime, the state was entitled to fifteen peremptory challenges of jurors, and elsewhere to but eight: *Hayes v. Missouri*, 120 U. S. 68; or that a statute limited to ninety days the time within which suit could be brought in a cause of action such as that upon which he sought to recover: *Christy v. Life Indemnity & Ins. Co.*, 48 N. W. Rep. 94 (Iowa, Feb. 10, 1891); or that a statute provided that cases such as his should be tried without a jury: *Walker v. Sauvinet*, 92 U. S. 90; or after a debt due from him had become barred by the statute of limitations, had repealed the statute and thereby revived the remedies against him, and authorized the judgment of which he complained: *Campbell v. Holt*, 115 U. S. 620.

Establishing Markets and Otherwise Regulating the Modes and Places of doing Business. — Each state legislature may, when justified by the police power vested in it, restrict the places and modes of doing business, though in so doing it, in some respects, creates a monopoly. Thus it may forbid the landing and slaughtering of animals whose flesh is intended for food, within a certain city and adjacent parishes, except within certain designated localities, and forbid the keeping or establishing of slaughter-houses within those limits, except by a corporation created by the statute, and may give to such corporation the exclusive privilege of carrying on a live-stock landing and slaughter-house business within those limits, but making it the duty of the corporation to permit any person to slaughter animals in its slaughter-houses. This statute was defensible as an exercise of the police power, because it regulated an unwholesome trade necessary to be carried on in the midst of a dense population, which, unless regulated, might, and probably would, be made offensive to the senses and injurious to the health of the community; *Slaughter House Cases*, 16 Wall. 36. "The regulation and control of markets for the sale of provisions, including the places and distances from each other at which they may be kept, are matters of municipal police power, and may be enforced by the legislation of the city council, to be exercised as, in its discretion, the public health and convenience may require": *Nabul v. Louisiana*, 139 U. S. 64. A statute may make it criminal for any person to vend refreshments at a camp-meeting without the consent of the persons in charge thereof, but exempting from its operation persons having a regular place of business where such meeting is held: *Meyers v. Baker*, 120 Ill. 567. Business may be regulated so as not to be offensive to decency: *Nolin v. Franklin*, 4 Yerg. 163; or as not to create or constitute a nuisance in other respects; and, if necessary, property, the use of which is a public nuisance, may be authorized to be destroyed: *Watertown v. Mayo*, 109 Mass. 315; *Taylor v. State*, 35 Wis. 298; *Mugler v. Kansas*, 123 U. S. 623; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. In Pennsylvania, it has been decided that a statute authorizing the sale of certain articles by hawkers or peddlers relates to the manner of sale, and not to the right of sale, and was sustainable as an exercise of the police power: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

Rules and Restrictions to Prevent Imposition and Fraud. — If a business is of a character offering special opportunities for imposition and fraud or render-

ing imposition and fraud specially difficult of detection or redress, it is unquestionably within the power of the state to impose such regulations and restrictions as to its legislature may seem proper for the better protection of its citizens and others, unless, indeed, the restrictions imposed are of a capricious and arbitrary character, such as could not have been enacted in good faith. Therefore a statute is not subject to constitutional objection which provides that tobacco shall not be carried out of the state unless packed in a designated manner, in hogsheads of a particular size, and either opened and submitted to inspection by a public official, or if packed by the grower or purchaser thereof in the same county or neighborhood where grown, marked with the full name of the owner and his place of residence: *Turner v. State*, 55 Md. 240; 107 U. S. 38; or that it shall be unlawful to sell, deliver, or receive any cotton in the seed in less quantity than one bale, unless the sale is in writing, signed by the parties thereto, witnessed by two witnesses, and the writing delivered, with a fee, to the nearest justice of the peace, to be docketed for the inspection of all persons: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696; or places the sale of fertilizers under the control of a commissioner of agriculture, who is authorized to make analysis of all fertilizers offered for sale in the state, to issue and distribute circulars setting forth the price of fertilizers sold or offered for sale, their analysis as claimed by the manufacturer or dealer in them, to provide tags for attachment to bags, barrels, and packages of fertilizers, which shall be printed, and the word "guaranteed," with the year or season in each year in which they are to be used, and prohibiting the sale or exchange of fertilizers without a license from such commissioner: *Steiner v. Ray*, 84 Ala. 95; 5 Am. St. Rep. 332; or prohibiting the manufacture of oleomargarine, or any other substance or compound other than that produced by unadulterated milk or cream from such milk, designed to take the place of butter or cheese produced from pure milk or cream: *Waterbury v. Newton*, 50 N. J. L. 534; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Marshall*, 64 N. H. 549; *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638; or prohibiting the sale of milk adulterated with pure water, or otherwise, and fixing a standard, and declaring that all milk below that standard is impure or adulterated: *Commonwealth v. Waite*, 11 Allen, 264; 87 Am. Dec. 711; *State v. Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344; or requiring persons selling patent rights to file with the clerk of the county an authenticated copy of the letters patent, and an affidavit that they are genuine and have not been revoked, and that the affiant is authorized to sell the right patented: *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695; or requiring operatives of butter and cheese factories on the co-operative plan to give bonds for the faithful accounting of property received by them: *Hawthorn v. People*, 109 Ill. 302; 50 Am. Rep. 610.

Fixing Rates to be Charged for Services. — Over no subject has litigation been more persistent than that of the right of the legislature to prescribe rates to be charged for services rendered by carriers and others engaged in businesses which are regarded as charged with public use, or "affected with a public interest." It would, we think, be impossible, from existing decisions, to form any reliable test by which to determine in all cases whether the business in question is or is not such as is charged with a public use, or "affected with a public interest" so as to bring it within the power of the legislature to prescribe the charges which may lawfully be made therein. If the business is one which it is not lawful to carry on without a franchise or license from the state, or is rendered especial assistance by the state, by taxation or

otherwise, or is allowed the use of public property or of some public easement, or is granted some exclusive privilege by the state or the public, its charges may be fixed by the legislature: Cooley's Constitutional Limitations, 6th ed., 738. We apprehend, however, that the power of the legislature, though usually exercised over businesses such as we have just referred to, is not limited to them, and may be extended to all cases in which the business is one which is carried on under such circumstances as to create a substantial monopoly or to give special opportunities for extortion or oppression: *People v. Budd*, 17 N. Y. 1; 15 Am. St. Rep. 460; affirmed *Budd v. New York*, 143 U. S. 517; *Sinking Fund Cases*, 99 U. S. 700; *Spring Valley etc. Co. v. Schottler*, 110 U. S. 347; *Dow v. Beidleman*, 125 U. S. 680, 686. At all events, the exercise of this power has been sustained as against common carriers: *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Chicago etc. R'y Co. v. Iowa*, 94 U. S. 155; *Ruggles v. Illinois*, 108 U. S. 526; *Railroad Co. v. Maryland*, 21 Wall. 456; *Dow v. Beidelman*, 49 Ark. 455; warehousemen: *Stone v. Yazoo etc. R. R. Co.*, 62 Miss. 607; 52 Am. Rep. 193; *Delaware etc. R. R. Co. v. Central Stock Yard*, 45 N. J. Eq. 50; corporations authorized to manufacture and sell illuminating gas: *State v. Columbus Gas Co.*, 34 Ohio St. 572; 32 Am. Rep. 390; *Zanesville v. Gas Light Co.*, 47 Ohio St. 1; or to use, rent, and maintain telephones, and the wires and appliances necessary thereto: *Chesapeake & P. T. Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; *Central U. T. Co. v. State*, 118 Ind. 194; 10 Am. St. Rep. 114; *Central U. T. Co. v. Bradbury*, 106 Ind. 1; *Webster Telephone Case*, 17 Neb. 126; 52 Am. Rep. 404; and persons, whether natural or artificial, engaged in the business of elevating, receiving, and discharging grain: *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; affirmed 143 U. S. 517. We had understood *Chicago etc. R'y Co. v. Minnesota*, 134 U. S. 418, as in effect overruling the earlier decisions upon the same subject, and determining that a common carrier or other person could not be prevented from showing in some appropriate judicial tribunal that the charges fixed for his services were unreasonable, and thereby relieving himself from the obligation to conform to such charges. A more recent decision, though by a divided court, has limited the apparent signification of the former decision by restricting its application to cases in which the rates and charges were not fixed by the legislature itself, but by some commission or other tribunal to which the legislative authority has been delegated, and has reaffirmed *Munn v. Illinois*, and the other cases in harmony with it: *Budd v. New York*, 143 U. S. 517.

Regulations and Restrictions to Promote and Secure the Public Health and Safety are also within the police power of the state and may extend to a protection both of person and of property. In cities and other places of dense population, what is known as "fire limits" may be fixed, and the construction, alteration, and repair of wooden and other specially combustible buildings there prohibited: *Respublica v. Duquet*, 2 Yates, 493; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188; *Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89; *Ex parte Fiske*, 72 Cal. 125; the right to store gunpowder and other explosive and dangerous material may be confined to certain limits, where the harm which may be produced by them will be reduced to the minimum: *Foote v. Fire Department*, 5 Hill, 99; *Davenport v. Richmond*, 81 Va. 636; the sale of poisons may be forbidden unless they are labeled so as to give warning of their character and effect: *Morey v. Brown*, 42 N. H. 373; a bicycle or other vehi-

cle which from its form, appearance, or manner of use may frighten horses, and thereby imperil the lives of people, may be excluded from the public highway: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; railroad corporations may be required to fence their tracks and put on cattle-guards: *Wilder v. Maine etc. R. R. Co.*, 65 Me. 322; 20 Am. Rep. 698; *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; or to keep that part of the country within the lines of their right of way safe and convenient for travelers upon it: *Boston etc. R. R. Co. v. County Commissioners*, 79 Me. 386; *People v. Boston & A. R. R. Co.*, 70 N. Y. 569; and to that end to keep in repair suitable crossings, where railways intersect public highways: *State v. Chicago etc. R. R. Co.*, 29 Neb. 412; to require locomotive-engineers and other persons in the employment of railway corporations whose duties call for ability to distinguish between colors to be examined in this respect and that such corporations pay for the expenses of such examination: *Nashville R'y Co. v. Alabama*, 128 U. S. 96.

Statutes Regulating the Practice of Dentistry and of Medicine, providing means of securing the competency of persons engaged therein, and excluding all other persons from such practice, are defensible, both on the ground that they are in the interest of the public health and are designed and well calculated to protect the public from imposition and fraud. They have never been pronounced invalid, except when they imposed arbitrary discriminations between persons equally well qualified to engage in the profession to which such statute applied: *Wilkins v. State*, 113 Ind. 514; *State v. Dent*, 25 W. Va. 1; *Harding v. People*, 10 Col. 387; *People v. Phippin*, 70 Mich. 6; *State v. Green*, 112 Ind. 462; *Dent v. West Virginia*, 129 U. S. 114. And they are not deemed arbitrary because they exempt from their prohibitions midwives and non-resident physicians coming within the state to consult with resident registered physicians: *State v. Van Doran*, 109 N. C. 864.

Statutes Restricting Sales of Intoxicating Liquors. — The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, and is not assured by that portion of the Fourteenth Amendment prohibiting the abridging of such privileges and immunities: *Bartemeyer v. Iowa*, 18 Wall. 129; nor is there elsewhere in that amendment any protection for the liquor traffic. In the legislature is vested the authority to determine whether the manufacture or sale of particular drinks will injuriously affect the public, and they may therefore regulate, restrict, or prohibit the manufacture or the sale of intoxicating liquors, unless perhaps when used for medical purposes: *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623. When the sale of such liquors is permitted, the right to sell them may be restricted to such classes of persons as the legislature may think proper. Hence this right may be confined to male inhabitants of a state: *Blair v. Kilpatrick*, 40 Ind. 315; *Welsh v. State*, 126 Ind. 71; or to citizens of the United States of temperate habits and good character: *Trageser v. Gray*, 73 Md. 250; *ante*, p. 587; and a person convicted of intoxication may be compelled to disclose, "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced," and his refusal to make such disclosure may be punished as a contempt of court: *In re Clayton*, 59 Conn. 510; 21 Am. St. Rep. 128.

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case, the court said: "Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts."

We think there was no evidence to support a consideration in the deed for the lots in question from Beverly Anderson and wife to their minor son. We do not deem it necessary at this time to pass upon the sufficiency of the consideration of the conveyance as to William Mack Anderson.

We recommend a reversal of the judgment, and that a new trial be granted.

The COURT. It is so ordered.

FRAUDULENT CONVEYANCES BETWEEN PARENT AND CHILD. — A conveyance by an insolvent father to his son of property, the consideration for which is that the son should support him during his life, is fraudulent and void as to his existing creditors: *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Johnston v. Harvey*, 2 Penr. & W. 82; 21 Am. Dec. 426, and note; and the same rule exists where the consideration for the conveyance was the earnings of a minor unemancipated son: *Holliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note; *Ionia Savings Bank v. McLean*, 84 Mich. 625.

ROSS v. HIXON.

[46 KANSAS, 550.]

MALICIOUS PROSECUTION — PROBABLE CAUSE — FINDING AS EVIDENCE —

The finding of a committing magistrate that an offense has been committed, and that there is probable cause to believe the defendant guilty thereof, is only *prima facie* and not conclusive evidence of probable cause, in an action for malicious prosecution, brought by such defendant after his discharge, against the complaining witness.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — CONVICTION is generally conclusive of probable cause in actions for malicious prosecution, yet it may be overcome by showing that it was procured by fraud, undue means, or the false testimony of the prosecution.

Hulett and Fletcher, for the plaintiff in error.

Hill and Chenault, for the defendant in error.

SIMPSON, C. On the seventeenth day of January, 1887, Hixon filed an affidavit before a justice of the peace in Bourbon County, charging Ross with having mixed certain poison

with a quantity of flour, with the intent and for the purpose of causing the death of certain persons. Upon said complaint a warrant was issued, and Ross was arrested. A preliminary trial was had on the 4th of February, before the justice who issued the warrant. At the preliminary examination, twelve witnesses were examined for the state and seven for the defendant. After the hearing of all the evidence, the justice bound Ross to appear at the district court and answer the charge. He failed to give bond, and was committed to jail. The finding of the justice was as follows: "After hearing the evidence, I find that said offense has been committed, and that there is probable cause to believe the defendant guilty thereof."

Ross was in jail from the seventeenth day of January, 1887, until May 2, 1887. On the latter date, the district court of Bourbon County being in session, the county attorney filed a statement showing cause for non-prosecution, and Ross was discharged. On the eighth day of August, 1887, he commenced this action for malicious prosecution against James Hixon, the prosecuting witness. A trial was had at the May term, 1888. The plaintiff in error offered evidence showing the proceedings before the justice of the peace on the criminal charge, and tending to prove every material allegation in such an action. When the plaintiff rested, the defendant, Hixon, introduced a large number of witnesses, when he was interrupted by the court, the trial was stopped, and a verdict was ordered for the defendant. The jury returned a verdict for the defendant, and a motion for a new trial was overruled. The record itself discloses no reason for the ruling of the court, but counsel agree that the reason assigned by the trial court was, that the examining magistrate had made a finding of probable cause, and that such finding was conclusive upon that question. It is further claimed by counsel for the defendant in error that the trial court made the further statement: "That as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked."

The sole question discussed in the oral argument of counsel for defendant in error and the briefs on both sides is as to the weight to be given to the finding of the examining magistrate; as to whether it is *prima facie* or conclusive on the question of probable cause; and whether or not, in either case, the finding must be attacked for fraud or undue means by proper allegations in the petition. In the case of *Sweeney v. Perney*, 40

Kan. 102, this court incidentally noticed the conflict in authorities as to whether or not proof of arrest, committal, and indictment is *prima facie* proof of probable cause; and the case of *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167, was cited on one side, and that of *Womack v. Circle*, 29 Gratt. 192, on the other. The question in this case is closely allied to this controversy, but authorities can be found on both sides of this question. In the case of *Bauer v. Clay*, 8 Kan. 580, Mr. Justice Valentine says: "The proof showing that the justice ordered that Clay should be bound over for his appearance at court, or in default of bail, that he should be committed to the county jail, is only *prima facie* and not conclusive evidence of probable cause."

The cases of *Ash v. Marlow*, 20 Ohio, 119, and *Ewing v. Sanford*, 19 Ala. 605, are cited in support. The force of this decision is sought to be destroyed by counsel for defendant in error by an assertion that it is a *dictum*. It is sometimes difficult to draw the line between what is authoritative and what is not in a judicial opinion. The report of the case does not give either the pleadings, the assignment of errors, or the briefs, but it is evident that the question was necessarily involved in the rulings of the trial court, and this court thought it necessary to give this as one of the reasons for affirmance of the judgment below, because, if counsel for defendant in error are now right in their contention, Clay had no cause of action, and the case was decided wrongfully in both the trial and the appellate courts. However the rule may be in cases in which the magistrates have jurisdiction to hear and pass judgment, we are satisfied that the case of *Bauer v. Clay*, 8 Kan. 580, states the true rule in cases in which the magistrates have only power to bind over. This rule is upheld by the cases of *Ash v. Marlow*, 20 Ohio, 119; *Ewing v. Sanford*, 19 Ala. 605; *Raleigh v. Cook*, 60 Tex. 438; *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167; *Hale v. Boylen*, 22 W. Va. 234; *Bacon v. Towne*, 4 Cush. 217; *Spalding v. Lowe*, 56 Mich. 366; *Ganea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287. These are all express adjudications on that particular question. In one of these cases, decided in 1885, being that of *Spalding v. Lowe*, 56 Mich. 366, the defendant requested the trial court to instruct the jury as follows: "It appears from the proofs in this case that an examination was had upon the charge made against Spalding, and that the justice, upon such examination, determined that this of-

fense charged against Spalding had been committed, and that there was probable cause to believe said Spalding guilty thereof. This was a judicial determination the justice was authorized to make, and unless such action and determination of the justice was corrupt or collusive, or was wrongfully procured by the defendant herein, it is final as to the question of probable cause, and your verdict should be for the defendant."

The trial court refused to so instruct the jury, and this refusal was assigned as error in the supreme court; but that court say (page 372): "No authority has been produced in support of it, and we think none exists." We have been unable to find a reported case in which the rule is held as claimed by counsel for defendant in error. There are cases that so hold when the magistrate has power to render a judgment of conviction.

How much weight as proof of probable cause shall be attributed to the judgment of a court in an original action when subsequently reversed for error is elaborately discussed by the supreme court of the United States in the case of *Crescent City Live Stock Co. v. Butchers' Union etc. Co.*, 120 U. S. 141,—a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in Bourbon County had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant, and to punish by fine and imprisonment if guilt was found, then his finding and judgment would come within the rule established by that case to be the law of the land. The question in this case is, How much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that "an offense has been committed, and that there is probable cause to believe the defendant guilty thereof," when the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted a suit for malicious prosecution against the complaining witness? In the one case, there is a solemn judgment, rendered by a court having full and complete jurisdiction both of the parties and subject-matter, binding on all until reversed on appeal or error. In the other case, there is a finding in effect that sufficient facts have been developed that justifies a magistrate in sending the parties before a court competent to ultimately deal with the question of guilt or innocence.

Again, while a conviction is generally conclusive of prob-

able cause, yet it may be overcome by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution: *Womack v. Circle*, 29 Gratt. 192; *Olson v. Neal*, 63 Iowa, 214; *Cloon v. Gerry*, 13 Gray, 201; *Whitney v. Peckham*, 15 Mass. 243; *Peck v. Choteau*, 91 Mo. 138; 60 Am. Rep. 236; *Bowman v. Brown*, 52 Iowa, 437; *Palmer v. Avery*, 41 Barb. 290; *Richey v. McBean*, 17 Ill. 63; *Payson v. Caswell*, 22 Me. 212; *Herman v. Brookerhoff*, 8 Watts, 240; *Jones v. Kirksey*, 10 Ala. 839. In such a case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or it will be suicidal. It is therefore unimportant whether the words used by the court in *Bauer v. Clay*, 8 Kan. 580, are *dicta* or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on this subject. It follows that the other suggestion of counsel, that the finding of the magistrate must be directly attacked in the petition for fraud or undue means, is without force; because, as that finding is only *prima facie*, all that is necessary for the plaintiff to do to win is to overthrow it by a preponderance of evidence. It can be fairly said that there was evidence submitted at the trial by the plaintiff in error, other than the transcript of the proceedings before the examining magistrate, bearing upon the question of probable cause, which the court below permitted to go to the jury, from which they might have found that the *prima facie* case made by the magistrate's finding was overcome.

It is recommended that the judgment of the district court be reversed, and the cause remanded, with instructions to grant a new trial.

The Court. It is so ordered.

Malicious Prosecution of Criminal Charges.*

SCOPE OF THIS NOTE. — In Texas, and perhaps in other states, the institution of a criminal prosecution by one person against another for the purpose of extorting money, or the payment or security of a debt, or with intent to vex, harass, or injure such person, is made an offense by the Penal Code, punishable by fine or imprisonment: *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193. It is not the purpose of this note to treat of malicious prosecution as a crime, nor to show what acts may constitute the offense de-

*REFERENCE TO MONOGRAPHIC NOTES.

Malicious prosecution of civil actions: 14 Am. Dec. 599-603; 41 Am. Rep. 346-348.

Malicious prosecution, where the indictment does not charge a crime: 22 Am. Rep. 639-644.

Malicious prosecution, liability of corporations for: 34 Am. Rep. 495-499.

Malicious prosecution, judgment in, as a bar to subsequent action for libel or slander: 65 Am. Dec. 303, 304.

False imprisonment, liabilities and remedies for: 54 Am. Dec. 258-271.

nounced by the penal codes of any of the states. Our attention will be confined to the consideration of the malicious prosecution of criminal proceedings as grounds for the maintenance of civil actions to redress injuries suffered thereby, including the pleadings and evidence in such actions and the measure of damages applicable thereto.

NATURE AND ESSENTIALS OF THE ACTION.—To maintain a civil action for the malicious prosecution of a criminal charge, the plaintiff must show, — 1. A prosecution of him such as may support a recovery; 2. That it was instigated or procured by the defendant, or where there are two or more defendants, by the co-operation of all of them; 3. That the prosecution has terminated in the final acquittal or discharge of the plaintiff; 4. That it was without probable cause; and 5. That it was malicious: *Vinil v. Core*, 18 W. Va. 1; *Scott v. Shelor*, 28 Gratt. 891; *Wheeler v. Nesbitt*, 24 How. 544.

The essential difference between an action for malicious prosecution and one for false imprisonment is, that in the former the imprisonment must have been under legal process issued as the result of a prosecution commenced or continued maliciously and without probable cause, while the latter lies for an imprisonment which is extrajudicial and without legal process, and from which the prosecutor cannot escape liability by proving that he acted upon probable cause and without malice: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Murphy v. Martin*, 58 Wis. 276; *Mitchell v. State*, 12 Ark. 50; 54 Am. Dec. 253; *Colter v. Lower*, 35 Ind. 285; 9 Am. Rep. 735; *Sutton v. Johnstone*, 1 Term Rep. 493, 784; *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250. What are the elements of damages arising out of a malicious prosecution which may properly be considered by the jury in determining the compensation to be awarded the injured party will be treated in the latter part of this note.

Whether an action be for malicious prosecution, false imprisonment, slander, or libel, injury to the plaintiff's reputation is one of the elements, and ordinarily the chief element, of his damages; and where two or more of these causes of action exist in favor of the plaintiff, and against the defendant, they may generally be united: *Haskins v. Ralston*, 69 Mich. 63; 13 Am. St. Rep. 376; *Shore v. Smith*, 15 Ohio St. 173; *Miles v. Oulfield*, 4 Yeates, 423; 2 Am. Dec. 412. When they all arise out of the same transaction, it is evident that all may be considered by the jury and recompensed by a single verdict: *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Neil v. Thorn*, 88 N. Y. 270; and that one recovery in favor of the accused must preclude any further action by him: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *Sheldon v. Carpenter*, 4 N. Y. 578; 55 Am. Dec. 301.

WHAT PROSECUTIONS WILL SUPPORT THE ACTION.—With respect to the crime alleged against the plaintiff in the prosecution of which he complains, we apprehend that it will sustain an action if it appears to have been a prosecution for any act or offense for which, had he been convicted, he might lawfully have been punished. As already indicated, the subject of the malicious prosecution of civil actions is not within the purview of this note. There are proceedings for which, though not strictly civil actions nor criminal prosecutions, redress may be obtained by actions for malicious prosecution, as where one is arrested or prosecuted on the suggestion of his lunacy: *Lockenow v. Sides*, 57 Ind. 360; 26 Am. Rep. 58; *Look v. Dean*, 108 Mass. 116; 11 Am. Rep. 323; *Turner v. Turner*, Gow, 50; or a search-warrant is maliciously or without probable cause obtained, authorizing the searching of his premises on the allegation that stolen goods are concealed therein: *Whit-*

son v. May, 71 Ind. 269; *Carey v. Sheets*, 67 Ind. 375; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *Olson v. Tvete*, 46 Minn. 225; *Boot v. Cooper*, 1 Term Rep. 535.

Defects in the Accusation or Proceedings.—It may be that the charge as made does not constitute a public offense, or that for some other reason no conviction can be had under it, or though constituting some offense, it does not justify the proceeding taken or warrant issued by the magistrate, and cannot for that reason result in a conviction. In each of the instances supposed, there cannot, if the law is properly construed and applied, be any conviction, and on that account it has been insisted that there is no prosecution such as will sustain an action, though it is shown to be malicious and without probable cause. As we shall hereafter show, it is necessary, to maintain an action for malicious prosecution, that the defendant was guilty of malice and acted without probable cause in preferring the charge which he made. If both of these elements are shown to have been present, it is not material that the prosecutor, in the complaint which he made, did not state facts sufficient to constitute a crime, or that some irregularity of proceeding after the complaint was preferred made the arrest under it improper and unauthorized. Hence if the charge as made was false, malicious, and without probable cause, the person prosecuted cannot be deprived of compensation for such injury as may have resulted to him from it, by proving that the affidavit or complaint was defective in not charging a criminal offense or that the proceedings were otherwise irregular: *Bell v. Keepers*, 37 Kan. 64; *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Potter v. Gjertsen*, 37 Minn. 386; *Forrest v. Collier*, 20 Ala. 175; 56 Am. Dec. 190; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606; *Parli v. Reed*, 30 Kan. 534; *Farley v. Danks*, 4 El. & B. 493; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Dennis v. Ryan*, 65 N. Y. 385; 22 Am. Rep. 635; *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402; *Streight v. Bell*, 37 Ind. 550; *Stocking v. Howard*, 73 Mo. 25. There are cases, however, which, without denying the liability of the prosecutor, insist that it can be enforced only by an action of trespass, as though the arrest were not justified by legal process: *Maher v. Ashmead*, 30 Pa. St. 344; 72 Am. Dec. 708; *Kramer v. Lott*, 50 Pa. St. 495; 88 Am. Dec. 556; *Krause v. Spiegel*, 94 Cal. 370; 28 Am. Rep.

If the Charge Made by the Prosecutor is True, but the legal conclusion drawn from it is erroneous and cannot be sustained, and the prosecution must therefore fail, no action against him can be maintained, as where he correctly stated the facts upon which he relied, and the magistrate erroneously regarded them as criminal and issued his warrant thereon: *Cohen v. Morgan*, 6 Dowl. & R. 8; *Curratt v. Morley*, 1 Gale & D. 45; 1 Q. B. 18; *Hahn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Iowa, 447; *McNeely v. Driskill*, 2 Blackf. 259; *Leigh v. Webb*, 3 Esp. 165; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; or the grand jury found an indictment for a crime different from that supported by the prosecutor's testimony: *Leilig v. Rawson*, 1 Scam. 272; 29 Am. Dec. 354; and whenever the facts are truly stated in the prosecutor's complaint or affidavit, he cannot be held liable, on the failure of the prosecution, because he drew wrong inferences from those facts, and his affidavit named a particular crime as the result of the acts, when they did not, as he supposed, lead to such result, as where the prosecutor charged the commission of larceny, but showed by his affidavit that the property taken was such that larceny could not be committed by taking it: *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *Thaule v. Krekeler*, 81 N. Y. 428.

Want of Jurisdiction in the Court in Which the Prosecution was Commenced.
—Whether a prosecutor may in all cases shield himself by showing that the
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court or tribunal in which he maintained, or attempted to maintain, his prosecution was without jurisdiction to entertain it, is a question upon which the courts are almost equally divided. Certainly, if a complaint were made to a person neither possessing, nor assuming to possess, authority to entertain it, or to cause the person charged to be apprehended or punished, there is, in the eye of the law, no criminal prosecution, and this has been held to be equally true when the charge was made before or to a magistrate possessing some judicial functions, but having no authority over the subject-matter contained in the charge preferred: *Bixby v. Brunlige*, 2 Gray, 129; 61 Am. Dec. 443; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228; *Whiting v. Johnson*, 6 Gray, 246; *Marshall v. Betner*, 17 Ala. 832; *Turpin v. Remy*, 3 Blackf. 210; *Painter v. Ives*, 4 Neb. 122. The majority of the cases upon the subject, in our judgment, sustain the proposition, that though the court in which the prosecution took place did not have jurisdiction over it, yet if it was malicious and without probable cause, and its prosecution inflicted injury upon the person thus prosecuted, he may recover: *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236; *Smith v. Cattell*, 2 Wils. 376; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Elsee v. Smith*, 1 Dowl. & R. 97; *Boon v. Maul*, 3 N. J. L. 863; *Hays v. Younglove*, 7 B. Mon. 545. If the court had jurisdiction over the subject-matter, and its alleged want of authority to proceed with the prosecution rested upon some irregularity or omission, but the warrant issued was valid upon its face, and the want of jurisdiction must be established by extrinsic evidence, the courts will, we think, agree that such want of jurisdiction will not defeat the action for malicious prosecution: *Sweet v. Negus*, 30 Mich. 406; *Gibbs v. Ames*, 119 Mass. 60; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606.

Arrest of Person Prosecuted, whether Essential. — When we come to the inquiry, What stage must the criminal prosecution reach before the prosecutor becomes answerable? and consult the authorities upon the subject, we find that they “speak a varied language.” The majority seem to affirm that it is not until an arrest has been made that a cause of action arises in favor of the person accused, and furthermore, that the arrest must be made under a warrant which is at least valid on its face, so as to constitute a justification to the officer in what he did under it: *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123; *Vinal v. Core*, 18 W. Va. 1; *Lewin v. Uzuber*, 65 Md. 341; *Cooper v. Armour*, 42 Fed. Rep. 215; *Bartlett v. Christilf*, 69 Md. 219. On the other hand, it is said, apparently with the better reason, that the person accused is injured by the mere fact that a criminal charge is maliciously and wantonly preferred against him, whereby his reputation is injuriously affected and he is exposed to disgrace and infamy; that after the charge has been made, and the person accused is thereby injured in his reputation, its dismissal without making any arrest does not absolve the prosecutor from liability: *Coffey v. Myers*, 84 Ind. 105; and some of them go so far as to assert that the mere making of the charge before a magistrate for the purpose of inducing him to entertain it as a charge of felony creates a liability against the accuser, though it is not taken down in writing: *Clarke v. Postan*, 6 Car. & P. 423. None of the authorities insist that any actual imprisonment is essential to support the action. It is sufficient that the officer having the warrant of arrest notifies the person to be arrested of that fact, reads the warrant, and proclaims the arrest, to which the accused submits, and then procures sureties for his appearance before the proper magistrate to answer the charge against him: *Malone v. Huston*, 17 Neb. 107. Nor is it necessary to show that the prosecutor directly procured or assented to the issuing of the warrant on which

the arrest was made, if he preferred the charge in such a way that it thereupon became the duty of some public official to issue a warrant thereon requiring the apprehension of the person accused to answer the accusation made against him: *McLeod v. McLeod*, 75 Ala. 483.

WHO MAY BE HELD LIABLE. — The question who may be held answerable for the malicious prosecution of a criminal charge may be considered, — 1. With reference to the persons who may be guilty of or chargeable with such prosecution; and 2. What acts on the part of persons who have capacity to be thus guilty and chargeable fix upon them responsibility for the injury suffered by the person prosecuted. Upon principle, it would seem that all persons, whether natural or artificial, capable of instituting, or causing to be instituted, a malicious prosecution without probable cause, must respond in damages for their unlawful and malicious act.

The Liability of Private Corporations for malicious prosecutions has been denied in a few cases, partly on the ground that they are incapable of entertaining malice or acting from malicious motives, and partly for the reason that to prosecute any person maliciously and without probable cause is not within the scope of the powers conferred upon them by law or by their charters, and such prosecution must therefore be *ultra vires*: *Owsley v. Montgomery etc. R. R. Co.*, 37 Ala. 560; overruled in *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800; and *Gillett v. Missouri etc. R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653; *Childs v. Bank of Missouri*, 17 Mo. 213; overruled in *Boogher v. Life Ass'n*, 75 Mo. 319; 42 Am. Rep. 413. Probably no law or charter ever authorized a corporation to do any kind of a wrong, or even to neglect or omit to do any duty devolving upon it, and if it may not be held liable for doing things not authorized by law or its charter, it cannot be held liable for anything whatever; for certainly it ought not to be responsible in damages for doing anything authorized by its charter, for in thus doing it must be acting not only by the warrant, but under the protection of the law. The American courts, and perhaps the English also, at the present time, will not exonerate a corporation from responding in damages for a wrong done by it, on the ground that it had no authority or power to do it; and will therefore hold it liable for a malicious prosecution under substantially the same rules of law as apply against private persons: *Fenton v. Wilson Sewing-machine Co.*, 9 Phila. 189; *Williams v. Planters' etc. Co.*, 57 Miss. 759; 34 Am. Rep. 494; *Wheless v. Second Nat. Bank*, 1 Baxt. 469; 25 Am. Rep. 783; *Godspeed v. East Haddam Bank*, 22 Conn. 530; 58 Am. Dec. 439; *Ricord v. Central P. R. R. Co.*, 15 Nev. 167; *Woodward v. St. Louis etc. R. R. Co.*, 85 Mo. 142; *Carter v. Howe Machine Co.*, 51 Md. 290; 34 Am. Rep. 311; *Reed v. Home Savings Bank*, 130 Mass. 443; 39 Am. Rep. 468; *Vance v. Erie R. R. Co.*, 32 N. J. L. 334; 90 Am. Dec. 665; *Morton v. Metropolitan I. Co.*, 34 Hun. 366; 103 N. Y. 645; *Gulf etc. R. R. Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; *National Bank v. Graham*, 100 U. S. 699; *Denver etc. R. R. Co. v. Harris*, 122 U. S. 597; *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800; *Henderson v. Midland R. R. Co.*, 20 Week. Rep. 23; 25 L. T., N. S., 881; *Edwards v. Midland R. R. Co.*, L. R. 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T., N. S., 694; 29 Week. Rep. 669.

Corporations, when Liable. — The difficulty now is, not in showing that private corporations may be answerable for a malicious prosecution, whatever be the nature of their powers, but as they can act only through agents, and as their agents, like those of natural persons, may act in matters over which authority has not been delegated to them, it is often questionable

whether a particular prosecution instituted or carried on by an agent of a corporation is a corporate act or not. Of course, the fact that a prosecution was instituted by an agent of a corporation, even though in what he did he claimed to be acting as such agent, does not subject it to responsibility if he acted without its knowledge, and not within the scope of the authority committed to him: *Stevens v. Mullan et al. R. R. Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 23 L. J. Ex. 328; *Springfield et al. Co. v. Green*, 25 Ill. App. 106. Formal action on the part of the board of directors of a corporation need not be established: *Ricord v. Central P. R. R. Co.*, 15 Nev. 176. If the entire business affairs of the corporation are under the control of a general manager who has authority to institute criminal prosecutions arising out of alleged violations of its rights of property, the corporation is liable if he exercises his authority in such manner and under such circumstances as would support an action against a private person: *Gulf et al. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743. Perhaps a majority of the great transportation companies have special agents or detectives whose duties include the apprehension of all persons who have committed crimes by which the property of the corporation has been embezzled, stolen, or destroyed, or its interests otherwise prejudiced; and while it may be said that the delegation of authority to do these things does not imply that an agent thus constituted shall in any event act maliciously and without probable cause, to this the unanswerable reply has been made by the courts, that one of the consequences liable to attend the delegation of the authority is that of the malicious prosecution of persons who are not offenders, and that when this consequence does result, the corporation must be held answerable: *American Exp. Co. v. Patterson*, 73 Ind. 430; *Evansville et al. R. R. Co. v. McKee*, 99 Ind. 519; 50 Am. Rep. 103; *Goff v. Great Northern R'y Co.*, 3 El. & E. 672; 30 L. J. Q. B. 133; *Pennsylvania Co. v. Weddle*, 100 Ind. 133.

A Prosecution Instituted by a Partner for an alleged crime relating to the property of the firm cannot impose any liability on another partner who did not assent to nor have any knowledge of the prosecution at its commencement, and especially if he repudiates it as soon as known to him: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412.

Sometimes Associations are Formed for the purpose of contributing money and otherwise aiding in the prosecution of alleged criminals or of persons suspected of being guilty of crimes of a specified class, and as the result of this arises the question whether all the members of the association are answerable for prosecutions incited or aided by it, whether they participate therein or not. So far as we can ascertain, this question has not yet been adequately considered. In one instance, where the organization of an association of this character was proved, and that those of its members who were assembled on one occasion voted to prosecute a particular charge and to raise money for that purpose, members who were not present when this vote was taken, and who did not contribute, by money or otherwise, to the prosecution of the charge, were held not to be answerable, though they made contributions to the general purposes of the association: *Johnson v. Miller*, 63 Iowa, 535; 50 Am. Rep. 758; 69 Iowa, 562; 58 Am. Rep. 231.

Whether Infancy or Coverture Necessarily Relieves from liability for a malicious prosecution is a question which has been but little considered. Both infants and married women are, in general, answerable for their torts: Note to *Humphrey v. Douglass*, 33 Am. Dec. 178-185; note to *Craig v. Van Beber*, 18 Am. St. Rep. 720-724; Cooley on Torts, 116; except that a wife may, in

some instances, escape liability on the presumption, when the wrongful act was done in the presence of her husband, that it is to be imputed to him, rather than to her; and when a tort involves some element of design or of guilty intent or purpose not imputable to an infant on account of his tender age or his want of capacity, he cannot, unless his capacity is affirmatively shown, be adjudged guilty of its commission, and if very young, the presumption of his incapacity is indisputable. The court of appeals of New York appears, in *Cussin v. Delany*, 38 N. Y. 178, to have proceeded on the assumption that when a husband and wife prosecute a charge of embezzlement, she may be held liable in damages, though she acted in his presence, upon proof that she acted upon her own motion, and not by his direction. If a civil action is brought in the name of a minor, without his authority or knowledge, by a *prochein ami*, the infant, though he subsequently assents to the suit upon being informed of it, cannot be held liable for its prosecution, for the reason that he had no power to discontinue it during his minority: *Burnham v. Seaverns*, 101 Mass. 360; 100 Am. Dec. 123. His prosecution of an action after coming of age would undoubtedly make him liable: *Sterling v. Adams*, 3 Day, 411. A criminal charge may be preferred by a minor, and if unfounded and malicious, the wrong done is not less than if it were preferred by a person of more advanced years. If the age of the minor, and his manifest capacity and discrimination, and the circumstances accompanying the making of the charge, are such as to demonstrate that his act was malicious and without probable cause, we know of no reason in the law, or elsewhere, for not obliging him to respond in damages for the injury maliciously inflicted by him.

Real Prosecutor, Evidence to Show Who was. — The person sued for malicious prosecution is generally the one who made the affidavit or complaint, or preferred the charge, or otherwise set the machinery of the law in motion, and thereby brought about the arrest of the accused. The person who makes the affidavit upon which the arrest is effected may undoubtedly be regarded as the prosecutor, and held liable as such: *Weil v. Israel*, 42 La. Ann. 955; *Walser v. Thies*, 56 Mo. 89. Nor is it essential to the character and liability of the prosecutor that he should have made the affidavit for the purpose of procuring the arrest. Thus it has been decided that he who by means of his perjured evidence leads a judge to believe that another witness has been guilty of perjury, and to hold the latter to answer and be tried therefor, is liable in damages as for a malicious prosecution: *Fitzjohn v. Mackinder*, 9 Com. B., N. S., 505; 7 Jur., N. S., 1283; 30 L. J. Com. P. 257; 9 Week. Rep. 477; 4 L. T., N. S., 149. But liability does not attach to one who fairly discloses to a magistrate or a prosecuting officer all the information in his possession, and leaves him to judge of the propriety of proceeding with the charge: *Smith v. Austin*, 49 Mich. 286; *Teal v. Fissel*, 28 Fed. Rep. 351. When one has set the machinery of the law in motion, so that in the regular and ordinary course of its action an arrest must be made, or will probably follow, it need not be shown that he ordered or directed the warrant or other process to issue, or participated in its execution: *Walser v. Thies*, 56 Mo. 89; *McLeod v. McLeod*, 75 Ala. 483. On the other hand, he is not answerable for acts which do not properly result from this charge, and were not intended by him, as for a wrongful and unauthorized proceeding of the officer in serving the warrant: *Bartlett v. Hawley*, 38 Minn. 308. The liability of a person for the prosecution of a criminal case need not appear from the record therein. The question is, not whether it proceeded in his name, but whether it proceeded by virtue of his authority or procurement. If he was the real, or one

of the real, prosecutors, he cannot escape liability by keeping some other person in the position of apparent prosecutor. Hence evidence outside of the record is always admissible to show who was in fact prosecutor: *Knauer v. Morrow*, 23 Kan. 360. For he who conducts a prosecution in the name of another is not less liable than if he conducted it in his own name: *Cotterell v. Jones*, 11 Com. B. 713; 16 Jur. 88; 21 L. J. Com. P. 2; *Clements v. Ohrlly*, 2 Car. & K. 868. If the defendant is the person, or one of the persons, who caused the prosecution, he is liable, whatever may be the means he employed. He may have incited some other person to present and verify the complaint, or have procured the action of some prosecuting officer, or have acted by his servant or agent. In employing either of these supposed means of action, he is equally culpable and equally liable: *Stansbury v. Fogle*, 37 Md. 369; *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402; *Wells v. Parsons*, 3 Harr. (Del.) 505; *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228.

A Principal Acting by or through his Agent may be answerable for a malicious prosecution. If he directs the agent in what the latter does, there can be no question that his liability must be the same as if he had acted without the aid or intervention of an agent. But where he did not direct the agent, and the latter acted without his knowledge, then the questions most likely to arise are: 1. Was the act of the agent within the limits of his powers? and 2. If so, can the principal be subjected to exemplary damages, where, from his ignorance of what was done in his name, it is not possible to impute to him actual malice, desire to injure the accused, or reckless and wanton disregard of the latter's rights or feelings? With respect to the first question, it is clear that the agent must have been acting in the business of his principal and within the power delegated to him, either expressly or by implication. Hence where the ticket-seller of a railway corporation, acting at the suggestion of a police-officer, and with a view of aiding in the apprehension of persons engaged in passing counterfeit money, sold tickets and received payment in a bank bill which the agent believed to be counterfeit and worthless, and then caused the arrest of the ticket-buyer while he was yet in the station waiting for his train, it was held, by a divided court, that in what he did the ticket-seller was not transacting the business committed to him, and his principal was not answerable: *Mulligan v. New York etc. R. R. Co.*, 129 N. Y. 506; 27 Am. St. Rep. A principal is not, in an action for a malicious prosecution, necessarily chargeable with whatever knowledge his agents may have had. "Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question. It is not to be conclusively presumed or legally imputed to him merely because of the mental condition or the knowledge of another person, however related to him": *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489. To render one liable for a criminal prosecution, where he acts by his agent, it is not necessary that he know of or contemplate the action taken by the agent, if it was within the power delegated to him, or though not within that power, was ratified after being done: *Kinsey v. Wallace*, 36 Cal. 462; *Forbes v. Hagman*, 75 Va. 168; in each of which events both the principal and the agent are liable, and may be joined as defendants in the same action: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; unless the agent, in what he did, either had probable cause or acted without malice. Therefore, an attorney at law is liable as well as his client when he aided in a prosecution which he knew to be unfounded and malicious: *Staley v. Turner*, 21 Mo. App. 244; *Warfield v. Campbell*, 35 Ala. 349; *Burnap v. Marsh*, 13 Ill. 538. On the other hand, an attorney is not liable who does not know that the action is groundless, even

though he is aware that his client is actuated by malice. He may act upon the statement of facts made to him by his client, and is not under a duty to institute an inquiry for the purpose of verifying his statement before giving advice thereon. Therefore, an instruction to a jury that an attorney is liable if he, "by the exercise of reasonable diligence, might have known that there were no facts sufficient to constitute probable cause" is erroneous: *Peck v. Chouteau*, 91 Mo. 135; 60 Am. Rep. 236; *Bicknell v. Dorion*, 16 Pick. 478.

TERMINATION OF PROSECUTION. — The prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true. A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended so that it cannot be reinstated nor further maintained without commencing a new proceeding, but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein; *Casebeer v. Drakoble*, 13 Neb. 465; *McWilliams v. Hoban*, 42 Md. 56; *Blalock v. Randall*, 76 Ill. 224; *Gillespie v. Hudson*, 11 Kan. 163; *Schippel v. Norton*, 38 Kan. 567. The propriety of this rule is obvious, for if the civil action could be maintained before the termination of the criminal prosecution, it might happen that, after the defendant had been called upon to respond in damages as a malicious prosecutor acting without probable cause, the good faith of his prosecution would be vindicated by a verdict of the jury convicting the accused. In Texas, as we have already shown, the malicious prosecution of criminal cases for certain purposes has been made criminal. As the Penal Code of the state did not expressly require the termination of the malicious prosecution before the prosecution of the prosecutor for instituting it, an information against the defendant for instituting a malicious criminal prosecution need not aver that it has terminated; *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193. We shall now refer to the different means, other than by a trial on the merits, by which a criminal prosecution may so terminate as to support a civil action.

Discharge by Committing Magistrate. — The criminal practice in most of the states requires the accused, if the offense charged is of a serious nature, to be brought before a magistrate for a preliminary examination for the purpose of determining whether the evidence against him is such as to warrant his being held to answer before the grand jury, or before some court having jurisdiction to try him after the information shall have been filed by the proper prosecuting officer. If the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action: *Moyle v. Drake*, 141 Mass. 238; *Costello v. Knight*, 4 Mackey, 65; *Fay v. O'Neill*, 36 N. Y. 11; *Jones v. Finch*, 84 Va. 204.

Failure of Grand Jury to Find Indictment. — If the grand jury considers the charge against the accused, whether after he has been held to answer or otherwise, and refuses to indict, this is also generally regarded as a final termination of a prosecution authorizing an action to be maintained thereon, if it was malicious and without probable cause: *Morgan v. Hughes*, 2 Term Rep. 225; *Potter v. Custerline*, 41 N. J. L. 22; *Graves v. Dawson*, 130 Mass. 78; 39 Am. Rep. 429; *Apgar v. Woolston*, 43 N. J. L. 57; *Standliff v. Palmeter*,

18 Ind. 321; *Hower v. Lewton*, 18 Fla. 328; *Mitchell v. Williams*, 11 Mees. & W. 205; 12 L. J. Ex. 193; though in some of the states the action of the grand jury must be supplemented by an order of court discharging the accused from custody or from the duty of further appearing to answer the charge against him: *Thomas v. De Graffenreid*, 2 Nott & McC. 143; *O'Driscoll v. McBurney*, 2 Nott & McC. 54; *Knott v. Sargent*, 125 Mass. 95. Whether an order of court is necessary or not depends upon the practice in the particular state in which the question arises. It is not the mere failure of the grand jury to indict at any particular time which terminates the prosecution; for their non-action, instead of proceeding from their judgment that no cause for prosecution exists, may be the result of their not being able to secure the attendance of the requisite witnesses, and their consequent postponement of the investigation to some later day, in which event it is clear that the prosecution is not yet at an end: *Knott v. Sargent*, 125 Mass. 95; and whenever, by the practice in the state, the court, notwithstanding no indictment has been made, retains the right to refer the charge to another grand jury, it is probable that a formal order discharging the accused is a condition precedent to the maintenance of an action for his malicious prosecution.

Entry of Nolle Prosequi. — There has been a disinclination to admit that the termination of a prosecution by the entry of *nolle prosequi* will support an action for malicious prosecution, and some cases have affirmed in general terms that it cannot be so supported: *Garing v. Fraser*, 76 Me. 37; *Parker v. Farley*, 10 Cush. 279; *Perker v. Huntington*, 2 Gray, 128; *Brown v. Lakeman*, 12 Cush. 482. But we think they must all, as to this extreme view, be regarded as *dicta*. If some action or proceeding on the part of the court, or otherwise, is required to make an entry of *nolle prosequi* operative as a final termination of a prosecution, then, of course, such action or proceeding must supplement such entry; but when it is manifest that the prosecution is at an end, and cannot be revived, it is not material how it came to its end, and the right of the party injured by it to seek redress is complete: *Kennedy v. Holladay*, 25 Mo. App. 503; *Lowe v. Wartman*, 47 N. J. L. 413; *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Hatch v. Cohen*, 84 N. C. 602; 37 Am. Rep. 630; *Briggs v. Burion*, 44 Vt. 124; *Graves v. Dawson*, 130 Mass. 78; 39 Am. Rep. 429; 133 Mass. 419; *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Richter v. Koster*, 45 Ind. 440. Perhaps if the accused procures or assents to the entry of a *nolle prosequi*, he thereby waives his right to redress by civil action against his prosecutor: *Langford v. Boston etc. R. R. Co.*, 144 Mass. 431; *Parker v. Farley*, 10 Cush. 279; *Coupal v. Ward*, 106 Mass. 289.

Other Means of Terminating Prosecution. — The only reasonable ground for denying that the termination of a prosecution by the entry of a *nolle prosequi* will support an action for malicious prosecution was, that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential: *Schippel v. Norton*, 38 Kan. 567; *Bell v. Matthews*, 37 Kan. 686; *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. Therefore, any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal.

In either event, if the accused is discharged by the court, the prosecution is finally terminated in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment, sufficient in form: *Hays v. Blizzard*, 30 Ind. 457; *Lytton v. Baird*, 95 Ind. 349; *Wicks v. Fentham*, 4 Term Rep. 247; *Pippet v. Hearn*, 1 Dowl. & R. 266; 5 Barn. & Adol. 634. A prisoner may be discharged from custody after a hearing upon a writ of *habeas corpus*. If the legal effect of his discharge is such that the prosecution against him can be carried no further, it must necessarily be such a termination as will justify the commencement of a civil action for redress: *Zelley v. Storey*, 117 Pa. St. 478. If, on the other hand, the prosecution may still go on and the accused may possibly be convicted, his discharge on *habeas corpus*, because it does not relieve him from the duty of further defending himself, cannot support his action for malicious prosecution: *Walker v. Martin*, 43 Ill. 508; *Merriman v. Morgan*, 7 Or. 68. If, before a trial, the prosecution is terminated in any way, as by the failure of the prosecutor to appear, or by the entry of a dismissal by competent authority, the civil action may be at once begun: *Lever v. Hamill*, 57 Ind. 423; *Kelley v. Sage*, 12 Kan. 109; *Clegg v. Waterbury*, 88 Ind. 21; *Swensgaard v. Davis*, 33 Minn. 368; *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Fay v. O'Neill*, 36 N. Y. 11. But if the prosecutor dismisses his prosecution for the purpose of recommencing it in another court, and proceeds without delay to execute such purpose, it is said that the action for malicious prosecution cannot be maintained until the second prosecution has been disposed of; *Schippel v. Norton*, 38 Kan. 567. Whether the fact that the judgment has been appealed from will destroy its effect, so that the action for malicious prosecution cannot be maintained while the appeal is pending, is unsettled; some of the courts conceding this effect to an appeal: *Reynolds v. De Geer*, 13 Ill. App. 113; and others denying it: *Marks v. Townsend*, 97 N. Y. 590.

Prosecutions Resulting in Convictions. — The reason already suggested for requiring a final disposition of a criminal charge before permitting any civil action to be maintained for having instituted the prosecution implied that if such prosecution should not result in favor of the person accused he could under no circumstances recover damages on the ground that it was unfounded and malicious. His conviction, in all cases where he had an opportunity to be heard in his defense, is, while it remains in force, conclusive against him that his prosecution was not without probable cause, and that he cannot recover damages from his prosecution: *Severance v. Judkins*, 73 Me. 376; *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422. If, however, the proceeding of which plaintiff complains was *ex parte*, or one in which the court was obliged to act upon the accusation alone, as where an affidavit is filed to require a party to give sureties to keep the peace, upon the filing of which it is the duty of the magistrate to exact such sureties, the fact that they were exacted, and the accused required to furnish them, is not conclusive against him that his prosecutor did not proceed without probable cause; *Stewart v. Gromett*, 29 L. J. Com. P. 170; 7 Com. B., N. S., 191; 6 Jur., N. S., 776; *Hyde v. Greuch*, 62 Md. 577. Commitments to an insane asylum, though not necessarily *ex parte*, do not rank as final adjudications of probable cause, nor preclude the person committed from sustaining an action against the person procuring his commitment: *Kellogg v. Cochran*, 87 Cal. 192. In civil actions the defendant may be arrested and imprisoned, maliciously and without probable cause, and yet the plaintiff have a right to judgment on the cause of action upon which he sued. If such judgment when rendered does not necessarily

affirm the existence of facts sustaining and warranting the arrest, it cannot estop the defendant from showing that his arrest and detention were malicious and without probable cause, nor from recovering damages therefor: *Fortman v. Rottier*, 8 Ohio St. 548; 72 Am. Dec. 606; *Bump v. Betts*, 19 Wend. 421.

Guilty Person cannot Recover. — No judgment in favor of the plaintiff is sustainable if it appears that there was probable cause for his prosecution. Before proceeding to consider what may be regarded as probable cause on the part of a prosecutor, we wish to remark that the plaintiff, notwithstanding his acquittal, must always be regarded as tendering the issue of his innocence, and must fail in his action if that innocence can be disproved, whether the prosecutor acted from malicious motives or not, and whether or not he knew of the facts establishing plaintiff's guilt. An action for malicious prosecution will never lie in favor of a guilty man: *Newton v. Weaver*, 13 R. I. 616; *Parkhurst v. Masteller*, 57 Iowa, 474; *Whitehurst v. Ward*, 12 Ala. 264; *Three-foot v. Nuckols*, 68 Miss. 117; *Johnson v. Chambers*, 10 Ired. 287; *Barber v. Gould*, 20 Hun, 446; *Plummer v. Gheen*, 3 Hawks, 66; 14 Am. Dec. 572; *Adams v. Lisher*, 3 Blackf. 241; 25 Am. Dec. 102; except that one prosecuted on two or more charges, of one of which he was convicted, may recover for his prosecution on the other charge, by proving that, as to it, his prosecution was without probable cause and malicious: *Reed v. Taylor*, 4 Taunt. 616; *Ellis v. Abrahams*, 8 Q. B. 709; 10 Jur. 593; 15 L. J. Q. B. 221. Sometimes the courts have incautiously said that probable cause did not depend on the guilt or innocence of the accused: *Lytton v. Baird*, 95 Ind. 349; *King v. Calvin*, 11 R. I. 582; *Hazzard v. Flury*, 120 N. Y. 223; *Carl v. Ayers*, 53 N. Y. 14; but when they have so said, they have been referring to the fact that the plaintiff had urged his innocence as conclusive in favor of his right to recover, and have merely intended to affirm that, notwithstanding such innocence, the action of the prosecutor may have been justified because of incriminatory circumstances known to him, and not that the guilt of the accused could co-exist with a right on his part to recover for being prosecuted for a criminal act of which he was guilty.

PROBABLE CAUSE, WHAT IS. — Numerous definitions of probable cause have been given, some of which will be here quoted: "A definition of probable cause sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish. The complete legal idea expressed by that term is not to be gathered from a mere definition. But, perhaps, with reference to many practical cases, it may be nearly accurate to say that probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation": *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. Probable cause is "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted": *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; *Ramsey v. Arrott*, 64 Tex. 320; *Glasgow v. Owen*, 69 Tex. 167; *Wheeler v. Nesbitt*, 24 How. 544; *Scott v. Shelor*, 28 Gratt. 906; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493. "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the person charged is guilty of the offense charged": *Ames v. Snider*, 69 Ill. 376; *Davie v. Wisher*, 72 Ill. 262. "Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry, — that is, such inquiry as the given case rendered

convenient and proper,—which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged, and in a civil case, that a cause of action existed”: *Lacy v. Mitchell*, 23 Ind. 67. “Where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent”: *Hays v. Blizzard*, 30 Ind. 457. “Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty”: *Muns v. Dupont*, 3 Wash. C. C. 31; *Bacon v. Towne*, 4 Cush. 238; *Cole v. Curtis*, 16 Minn. 195; *Casey v. Severson*, 30 Minn. 516. “If the apparent facts are such that a discreet and prudent person would be led to believe that a crime has been committed by the person charged, he will be justified, though it turns out that he was deceived, and that the party accused was innocent”: *Carl v. Ayers*, 53 N. Y. 14; *Hazzard v. Flury*, 120 N. Y. 223. “What is probable cause? It is constituted by such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief or grave suspicion of the guilt of the person”: *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422. To constitute probable cause, “the facts must be such as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe, the plaintiff guilty. We cannot readily perceive how there can be a well-grounded or reasonable suspicion of the existence of a fact, without there is also a belief of it”: *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611. By the code of Georgia it is declared that want of probable cause “shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for his proceeding but his desire to injure the accused.” The illustration thus given by the code has not been treated by the courts of the state as excluding other cases of want of probable cause, and a prosecutor is still liable in that state for acting without probable cause, if he did not act with ordinary care, nor as a man of ordinary prudence would under like circumstances: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449.

Prejudice or Partiality of the Accuser.—There are definitions of probable cause which seem to exact a high degree of impartiality and freedom from prejudice on the part of the prosecutor, but the circumstances under which a prosecution is instituted are often such as to require an injured person to act promptly, and while smarting from loss or personal injury, and therefore when it is too much to expect of him that he can free himself from all prejudice and partiality. Perhaps a definition or instruction exacting of him freedom from partiality and prejudice may be mitigated so as to do him no wrong, if the jury is properly reminded that he cannot be held answerable unless he acts with malice. The more prudent courts have, however, eliminated from their definition “impartiality and freedom from prejudice,” and have permitted juries, in determining the question of probable cause, to take into consideration the circumstances under which the defendant was called upon to act, and considering that these circumstances might be such as to unavoidably affect the judgment, have said that “some allowance may be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be

required of him is, that he shall act as a reasonable and prudent man would be likely to do in like circumstances": *Spear v. Hiles*, 67 Wis. 350; *Cote v. Curtis*, 16 Minn. 182; *Carter v. Sutherland*, 52 Mich. 597; *Casey v. Sevaton*, 30 Minn. 516.

Belief of the Accuser. — Some of the definitions seem to make the question of probable cause depend entirely upon the facts and information upon which the accuser acted, irrespective of the effect which they had upon his mind, and to give no weight to his belief, or want of belief, in the guilt of the person prosecuted. It is doubtless true that the mere belief on the part of the prosecutor in the truth of the charge made by him does not constitute probable cause, for it may be engendered by facts and circumstances which would not produce belief of guilt in the mind of a reasonable and prudent person, and which would, on the contrary, satisfy a reasonable person of the innocence of the accused: *Mowry v. Whipple*, 8 R. I. 360; *Hall v. Hawkins*, 5 Humph. 359; *Barron v. Mason*, 31 Vt. 189; *Spear v. Hiles*, 67 Wis. 361; *Lawrence v. Lanning*, 4 Ind. 194; *Hays v. Blizzard*, 30 Ind. 457; *Graeter v. Williams*, 55 Ind. 461; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Spalding v. Lowe*, 56 Mich. 366. "While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime": *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. "It is claimed by appellant's counsel that the defendant is not liable to this action if the jury found that he honestly believed the plaintiff guilty of the offense when he commenced the prosecution against him. This cannot be the law. No man's liberties or rights can thus be measured by even the honest belief of another. The honest belief of a person commencing a criminal prosecution against another in the guilt of the accused is an essential element or fact for him in showing probable cause, or in disproving the want of it; but he must also show such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief, before his belief can become his vindication or shield. If he should show such ground and circumstances, and yet it was apparent that he did not himself believe in the guilt of the accused, they would not protect him. Nor, on the other hand, would he be liable, if, unknown to him, and beyond the range of inquiry by such cautious man, there were facts which would negative or destroy that belief. The belief, therefore, of the defendant, is a proper matter for inquiry in making out his defense, but does not of itself constitute a defense": *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151. His belief is also admissible to rebut the idea that he was actuated by malice: *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37. That the prosecutor did not believe the accused was guilty, or did not believe there was probable cause for his prosecution, is certainly a very material circumstance, whether it necessarily negatives the defense of probable cause or not. Whether circumstances sufficient to create a belief in the mind of a reasonable man that the accused was guilty of the crime charged, and which, if believed by the prosecutor, would sustain the defense of probable cause, lose their power to shield him upon proof being made that they did not generate that belief in his mind, is not clearly settled, some of the cases indicating that his want of belief is admissible merely to disprove the existence of probable cause, and others that such want of belief is conclusive against this defense: *Bell v. Percy*, 5 Ired. 83; *Broad v. Ham*, 5 Bing. 722; 8 Scott, 40; *James v. Phelps*, 11 Ad. & E. 483; 3 Perry & D. 231; *Haddrick v. Heslop*, 12 Q. B. 267; 12 Jur. 600; 17 L. J. Q. B. 313; *Shaul*

v. *Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep.

Probable Cause, to What Extent a Question for the Jury. — Undoubtedly, when the evidence bearing upon the question of probable cause is conflicting, it is the province of the jury to determine which of the witnesses speak the truth. In actions for malicious prosecution, as in other civil cases, the jury must decide all questions of fact and the court all questions of law, but the mode of submitting the question of fact to the jury may be somewhat different from that employed in other causes. The authorities agree that if there is no dispute concerning the facts, the court must determine the law, and therefore decide whether such undisputed facts do or do not constitute probable cause, and that, on the other hand, to the extent that there is any dispute upon the facts arising from the evidence, such dispute must be submitted to the jury: *Walbridge v. Pruden*, 102 Pa. St. 1; *Stewart v. Sonneborn*, 98 U. S. 187; *Stone v. Crocker*, 24 Pick. 81; *Speck v. Judson*, 63 Me. 207; *Center v. Spring*, 2 Iowa, 393; *Kidder v. Parkhurst*, 3 Allen, 393; *Thaulé v. Krekeler*, 81 N. Y. 428; *Burton v. St. Paul etc. R'y Co.*, 33 Minn. 189; *Donnelly v. Daggett*, 145 Mass. 314; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Rep. 231; *McNulty v. Walker*, 64 Miss. 198; *Medcalfe v. Brooklyn etc. Ins. Co.*, 45 Md. 198; *Johnstone v. Sutton*, 1 Term Rep. 545; 1 Brown Parl. C. 76; *James v. Phelps*, 11 Ad. & E. 483; *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 169; *Turner v. Ambler*, 10 Q. B. 252; 6 Jur. 346; 11 L. J. Q. B. 158; *Caldwell v. Bennett*, 22 S. C. 1; *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Ulmer v. Leland*, 1 Greenl. 135; 10 Am. Dec. 48; *Nash v. Orr*, 3 Brev. 94; 5 Am. Dec. 547; *Plummer v. Gheen*, 3 Hawks, 66; 14 Am. Dec. 572; *Cockfield v. Braveloy*, 2 McMull. 70; 39 Am. Dec. 123; *Coleman v. Heurich*, 2 Mackey, 189; *Heidt v. Webster*, 60 Tex. 207. In some of the states, the practice sanctioned by the decisions of their highest courts is, when the evidence is conflicting, to instruct the jurors as to what constitutes probable cause, and to leave them to decide, in the light of such instruction, whether probable cause for the prosecution existed or not: *Landa v. Obert*, 45 Tex. 539; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Ash v. Marlow*, 20 Ohio, 119; *Cole v. Curtis*, 16 Minn. 182. In other states, the judgment of the jurors is sought in a different mode, with a view to obtaining, if possible, their conclusions on the facts, disconnected from their conclusions of law. They are there required to make special findings of fact, or the cause is submitted to them upon hypothetical instructions in which the evidence is stated, and they are told that if they believe certain evidence, then that probable causes existed or not, as the case may be, or instructed "that if they find the facts in a designated way, then that such facts, when so found, do or do not constitute probable cause": *Eastin v. Stockton Bank*, 66 Cal. 123; 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575; *Greenwade v. Mills*, 31 Miss. 468; *Leggett v. Blount*, N. C. Term Rep. 123; 7 Am. Dec. 702; *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 169; *Bulkeley v. Keteltas*, 6 N. Y. 387; *Bulkeley v. Smith*, 2 Duer, 261; *Grant v. Moore*, 29 Cal. 644; *Chapman v. Heslop*, 2 Conn. L. Rep. 139; 18 Jur. 348; 23 L. J. Q. B. 49; *Lister v. Perryman*, 39 L. J. Ex. 177; L. R. 4 H. L. 521; 19 Week. Rep. 9; 23 L. T., N. S., 269. And in some of the states, the giving to the jury of any definitions or instructions upon abstract propositions relating to probable cause is discouraged, on the ground that they "are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict

shall be rendered": *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. It is well known that there are many instances in which, though evidence is accepted, or conceded to be true, different persons may honestly draw diverse conclusions from it. The definitions of probable cause are such as to require the prosecutor to act as a reasonable and prudent man would under like circumstances. They do not impose liability upon him for mistaken conclusions drawn by him, if they were such as a reasonable and prudent man would draw if placed in the same situation as the prosecutor. The evidence may be without substantial conflict, and the witnesses by whom it was given not only entitled to credit, but in fact implicitly believed, and yet one jury or court might reach the conclusion that the prosecutor acted as a reasonable and prudent man, and another that he did not so act. In such a contingency, is the jury or the court to draw the inference from this undisputed evidence? We have seen but little discussion of this question, but the authorities which unqualifiedly assert that when the evidence is not conflicting the court must decide whether probable cause existed imply that the inference to which we have referred must be drawn by the court. Nevertheless, we think it should be submitted to the jury: *Heyne v. Blair*, 62 N. Y. 19; by some mode which will "leave the question of fact to the jury and the abstract question of law to the judge": *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 192; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. If there is any substantial difference between the two modes of submitting the question of probable cause to the jury, the one which exacts special findings of fact or requires the case to be submitted to the jury hypothetically seems best adapted to enable the court to draw all inferences which are necessary to determine from the established facts whether the action of the prosecutor was that of a reasonable and prudent man or not. The prosecutor's belief or want of belief in the guilt of the accused, or in the information upon which his action was based, is often an issue in the case upon which the maintenance of his defense of probable cause must rest. It is clear that this issue must be submitted to the jury: *Stewart v. Sonneborn*, 98 U. S. 187.

If it be true that the question, What is probable cause? is always one of law for the court, then in every case in which the evidence is not conflicting it ought to be possible to state whether or not it establishes probable cause or the absence of it. We doubt the truth of the assertion that probable cause is always a question of law, even when there is no conflict in the evidence: *Cochran v. Toher*, 14 Minn. 385; *Anderson v. Keller*, 67 Ga. 58; *Stewart v. Sonneborn*, 98 U. S. 187; though there have been and must again be many cases in which it is perfectly clear that undisputed evidence does or does not establish probable cause. We shall now refer to cases of this class, showing many instances in which it has been possible for the court, from the evidence before it, and without the aid of the jury, to determine that the defense of probable cause had or had not been proved.

The Conviction of the Person Prosecuted, while it remains in force, is conclusive evidence of probable cause on the part of the person prosecuting him: Freeman on Judgments, secs. 319, 417; *Griffis v. Sellars*, 3 Dev. & B. 492; 31 Am. Dec. 422; *Herman v. Brookerhoff*, 8 Watts, 240; though no remedy by appeal or otherwise could have been resorted to by the accused for the purpose of reviewing or setting aside the judgment against him as being contrary either to the law or to the evidence: *Basché v. Matthews*, 36 L. J. M. C. 93; L. R. 2 Com. P. 684; 15 Week. Rep. 839; 16 L. T., N. S., 417. If a conviction has been set aside upon appeal or by the granting of a new trial, either in the court in which the conviction was had or upon appeal to some higher

court, it is doubtful whether the judgment does not still continue in all cases to be conclusive evidence of probable cause. In ordinary circumstances, its effect as evidence of probable cause is not diminished by the granting of a new trial or the reversal upon appeal, though it be shown that the evidence upon which the original conviction was procured was false and perjured: *Parker v. Huntington*, 7 Gray, 36; 66 Am. Dec. 455; *Whitney v. Peckham*, 15 Mass. 243; *Parker v. Farley*, 10 Cush. 279; *Cloon v. Gerry*, 13 Gray, 203; *Adams v. Bicknell*, 126 Ind. 210; *Griffis v. Sellars*, 3 Dev. & B. 492; 31 Am. Dec. 422; *Welch v. Boston etc. R. R. Co.*, 14 R. 1. 609; *Reynolds v. Kennedy*, 1 Wils. 232; *Spring v. Besore*, 12 B. Mon. 554; *Phillips v. Kalamazoo*, 53 Mich. 33. There are cases, however, declaring that a conviction, after it has been set aside, no longer constitutes conclusive evidence of probable cause, though it is still receivable in evidence and entitled to great consideration if the trial appears to have been a fair one: *Goodrich v. Warner*, 21 Conn. 432; *Burt v. Place*, 4 Wend. 591; *Moffatt v. Fisher*, 47 Iowa, 474; *Bowman v. Brown*, 52 Iowa, 437. In our judgment, the conviction of the accused must be accepted as conclusive evidence of probable cause, unless the circumstances attending it are exceptional in their character, as where it appears to have been founded on evidence suborned by the prosecutor or known to him to be false, or where it appears that the proceedings in the court in which he was tried were such as to give him no opportunity to vindicate himself: *Womack v. Circle*, 29 Gratt. 192; 32 Gratt. 324; *Kaye v. Kean*, 18 B. Mon. 839; *Spring v. Besore*, 12 B. Mon. 555. If the charge was of a felony, and the accused was convicted of a lesser crime involved in the charge, and this conviction on appeal was reversed and a judgment of acquittal entered, the judgment of conviction is not evidence of probable cause in making the charge a felony: *Labar v. Crane*, 49 Mich. 561.

Indicting or Holding Accused to Answer. — If the examining magistrate decides that the evidence is such as to warrant the holding of the accused to answer, or the grand jury determines that it is sufficient to found an indictment upon, or the jury before which the trial takes place is unable to agree, it clearly appears that other persons than the prosecutor reached the same conclusion that he did respecting the guilt of the accused; and the fact that they did reach this same conclusion is admissible in favor of the prosecutor, and is generally treated as *prima facie* evidence of probable cause: *Johnson v. Miller*, 63 Iowa, 529; 50 Am. Rep. 758; *Sharpe v. Johnston*, 76 Mo. 660; *Hale v. Boylen*, 22 W. Va. 234; *Peck v. Chouteau*, 91 Mo. 138; 60 Am. Rep. 239; *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167; *Bell v. Percy*, 11 Ired. 233; *Brown v. Griffin*, 1 Cheves, 32; *Ross v. Hixon*, 46 Kan. 550; *ante*, p. 123. But this effect is not conceded to the finding of an indictment in Alabama: *Motes v. Bates*, 80 Ala. 382.

Advice of Counsel. — It has been said that the fact of the prosecutor's consulting counsel, and obtaining and acting upon his advice, should be considered rather as tending to rebut malice, than as bearing upon the issue of probable cause: *Brewer v. Jacobs*, 22 Fed. Rep. 217; and that there is a substantial difference between applying the evidence of such advice to the question of malice, and applying it to the issue of probable cause. For if it be regarded as tending merely to disprove malice, it must rest with the jurors to give it such effect as they believe proper; while if it be admissible as evidence of probable cause, it may require the court, as a matter of law, to determine that probable cause existed, from the fact that the prosecutor in good faith, and upon a full disclosure of the circumstances, sought, obtained, and acted upon the advice of disinterested counsel of unquestionable competency:

Paddock v. Watts, 116 Ind. 146; 9 Am. St. Rep. 832. Perhaps evidence of this character may properly be considered by the jury as tending to disprove malice as well as to establish probable cause, but, in our judgment, its chief purpose is to show the existence of probable cause, and, when entirely satisfactory, it must induce the court to decide, as a matter of law, that probable cause did exist, and therefore that the prosecutor cannot be liable for the prosecution. As we shall hereafter show, it is indispensable that the prosecutor act in good faith by not proceeding against one whom he supposes to be innocent, and that in seeking the advice of counsel he must make a full and fair disclosure of all the facts and circumstances within his knowledge, and, perhaps, of all which he might with reasonable diligence have discovered. If his counsel then advises him that there is sufficient cause for the prosecution, and he acts upon such advice, the majority of the courts will protect him in thus acting, though they may not agree as to whether such protection is to be extended to him because probable cause for his action is established, or malice in what he did disproved: *Ravegna v. Macintosh*, 4 Dowl. & R. 107; 2 Barn. & C. 693; 1 Car. & P. 204; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832; *Adams v. Bicknell*, 125 Ind. 210; 22 Am. St. Rep. 576; *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Ross v. Innis*, 26 Ill. 259; *Murphy v. Larson*, 77 Ill. 172; *Walter v. Sample*, 25 Pa. St. 275; *McLeod v. McLeod*, 73 Ala. 42; *Anderson v. Friend*, 71 Ill. 475; *Potter v. Casterline*, 41 N. J. L. 22; *Donnelly v. Daggett*, 145 Mass. 314; *Jones v. Jones*, 71 Cal. 89; *Schippel v. Norton*, 38 Kan. 567; *Mesher v. Idlings*, 72 Iowa, 553; *Stone v. Swift*, 4 Pick. 389; 16 Am. Dec. 349; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *White v. Carr*, 71 Me. 555; 36 Am. Rep. 353; *Wicker v. Hotchkiss*, 62 Ill. 107; 14 Am. Rep. 75; *Smith v. Austin*, 49 Mich. 286; *Emerson v. Cochran*, 111 Pa. St. 619; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Coggsell v. Bohn*, 43 Fed. Rep. 411; *Dreyfus v. Aul*, 29 Neb. 191; *Motes v. Bates*, 80 Ala. 382; *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311; *Smith v. Walter*, 125 Pa. St. 453; *Moore v. Northern P. R. R. Co.*, 37 Minn. 147; *Gilbertson v. Fuller*, 40 Minn. 413; *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep.; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. As the question of malice is for the jury, if it be conceded that evidence of the advice of counsel is receivable merely to disprove malice or to prevent the jury from inferring malice from the absence of probable cause, it follows logically that the jury may disregard evidence of the advice of counsel, if, notwithstanding such evidence, they still believe the prosecutor to have been actuated by malice. Therefore, in those states in which this evidence is applied to the issue of malice, it does not necessarily, however satisfactory the proof, make out the defense, and the prosecutor may be liable if the jury think proper to so hold him, after hearing evidence showing that he in good faith sought, obtained, and acted upon the advice of competent counsel: *Lemay v. Williams*, 32 Ark. 166; *Glasgow v. Owen*, 69 Tex. 167; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Ramsey v. Arrott*, 64 Tex. 320; *Shannon v. Jones*, 76 Tex. 141; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85. The decisions in Georgia upon this subject are governed by the code of that state, which, as construed by its courts, does not admit the advice of counsel as a defense to the action, but merely as a circumstance tending to show absence of malice and the existence of probable cause, to be weighed by the jury with other facts in the case, "as well as to mitigate damages": *Fox v. Davis*, 55 Ga. 298; *Philadelphia F. Ass'n v. Fleming*, 78 Ga. 733. A recent New York case seems to create an exception to the rule that the advice of counsel furnishes probable cause for the proceedings taken in reliance upon it, by declaring

that when the facts are known to the prosecutor, but do not constitute the crime charged by him, then that the advice of his counsel does not protect him absolutely, but must be treated as bearing only upon the issue of malice. "Probable cause," said the court, "may be founded on misinformation as to the facts, but not as to the law": *Hazzard v. Flury*, 120 N. Y. 227. This decision proceeds upon the principle that to the prosecutor must be imputed knowledge of the law, and that he cannot be deemed to proceed upon probable cause, whatever be the advice of his counsel, when the facts as known by him would "not tend to cause a man with knowledge of the law to suspect or believe that it had been violated." But for what purpose are lawyers consulted more legitimate than that of obtaining their opinions upon questions of law? Certainly, if the prosecutor's conduct is to be considered upon the assumption that he knew the law, the advice of counsel can never protect him. For if the advice be correct, he is subject to no liability, and needs no protection; but if incorrect, he is by this decision charged with knowledge of its incorrectness, and denied the defense of probable cause.

Character of Attorney. — In some of the opinions, language is employed which indicates that the question of the competency of the attorney giving the advice must be established, or, at least, that it may be disproved. Where, however, certain persons are regularly licensed to practice law, we apprehend that their attainments in their profession can rarely or never be made an issue on a trial for malicious prosecution, for the purpose of showing that their professional skill was not such as to justify the prosecutor in taking or acting upon their advice: *Horne v. Sullivan*, 83 Ill. 30; though it may be that evidence is receivable for the purpose of showing that, by habits of intemperance and the like, known to the prosecutor, they had ceased to be regarded as reputable or reliable advisers: *Roy v. Goings*, 112 Ill. 656. On the other hand, if the person consulted is not a regular or licensed attorney, but a mere pettifogger, or other person practicing law or undertaking to give advice without any license or authority to do so, his advice is no protection: *Stanton v. Hart*, 27 Mich. 539; *Murphy v. Larson*, 77 Ill. 172; *Olmstead v. Partridge*, 16 Gray, 381; *Buryett v. Burgett*, 43 Ind. 78. If the person consulted was acting as an attorney at law, and his advice was sought in good faith, evidence of it may be "admitted, not in justification of the action, nor in reduction of any actual damage suffered, but in mitigation of any exemplary damages that might be visited upon defendant": *Murphy v. Larson*, 77 Ill. 172.

Advice of Interested or Prejudiced Attorney. — While it would be very unjust to require a person seeking a regularly licensed attorney in good faith, and acting upon his advice, to determine in advance, at his peril, the extent of the professional skill of such attorney, yet from the very necessity of acting in good faith the client must not disregard facts tending to bias the judgment of the attorney, or otherwise to make him an unfit adviser in that particular case. If the client and attorney are conspiring together for the purpose of instituting and maintaining a malicious prosecution, of course the former cannot be protected by the advice of the latter: *Hamilton v. Smith*, 39 Mich. 222. The prosecutor cannot be sure of protection if he acts upon the advice of an attorney whom he knows to be interested, and therefore probably biased by his self-interest: *White v. Carr*, 71 Me. 555; 36 Am. Rep. 353; and where the attorney consulted was also acting for the prosecutor in a civil action relating to the same transaction out of which the prosecution grew, the court may leave it to the jury to decide whether the attorney selected was a proper adviser under the circumstances: *Watt v. Corey*, 76 Me. 87.

Advice of Magistrate. — If a justice of the peace or other magistrate before whom the criminal charge was made is not an attorney at law, he is not a proper person to seek for advice, and the prosecutor is not protected by the fact that he in good faith fully stated all the facts to such magistrate, and was by him advised that the prosecution would be sustained, and acted in consequence of such advice: *Brobst v. Ruff*, 100 Pa. St. 91; 45 Am. Rep. 358; *Gee v. Culver*, 12 Or. 228; *Dolbe v. Norton*, 22 Kan. 101; *Coleman v. Heurich*, 2 Mackey, 189; *Sutton v. McConnell*, 46 Wis. 269; *Straus v. Young*, 36 Md. 246. Whether, if the magistrate were also a licensed attorney, his advice would be sufficient to shield the prosecutor, is a question upon which we have been unable to discover any judicial opinion. If the facts are correctly stated to a magistrate, and he, through error of law, erroneously believes that they constitute a crime, and issues his warrant accordingly, the prosecutor is not liable: *Hahn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Iowa, 447. In a very recent case these authorities are cited as establishing the right of a prosecutor to rely on the advice of a magistrate to the same extent as if he were an attorney: *Ball v. Rawles*, 93 Cal. 235; 27 Am. St. Rep.; but the learned judge either misapprehended the effect of these decisions, or employed language which cannot be correctly understood, unless considered in connection with the peculiar facts of that case. The statements made by the prosecutor to the justice, orally and in the written accusation, were confessedly true. The justice, after examining the penal code of the state, reached the conclusion that the facts so stated to him constituted a crime; but the courts subsequently determined that the accusation did not charge the commission of any criminal act. In other words, the case belonged to the class to which we have referred, in which there was abundant cause for belief in the truth of the acts charged, but the magistrate, through his error of law, mistook innocent acts for crimes, and issued his warrant solely on account of such error. Doubtless, the advice of a magistrate is admissible, when obtained and followed in good faith, as tending to rebut the presumption of malice: *Sisk v. Hurst*, 1 W. Va. 53.

The Advice of Counsel must be Sought and Acted upon in Good Faith. — It appears to be essential to the existence of the good faith required by the authorities that the advice of the counsel, together with the facts known to the prosecutor, generate in his mind a belief in the guilt of the accused. When a client fully and fairly states the case to his attorney for the purpose of receiving his advice and acting upon it, we think he should be protected by the opinion given him, though it does not meet his concurrence. He consults the attorney because he supposes him to be learned in the law, and capable of forming a more correct opinion than himself, and therefore he ought to be protected while acting upon that opinion, though he does not comprehend it, and is still unable to surrender his own previously formed conclusion upon the same subject. The cases are infrequent, but so far as we have seen, they incline towards holding the prosecutor answerable if he acted upon the advice of an attorney, if he nevertheless believed that the prosecution would fail, or that the accused was innocent: *Johnson v. Miller*, 47 N. W. Rep. 903 (Iowa); especially if actuated by hostile feelings: *Sharpe Johnston*, 76 Mo. 660.

Failure to Disclose All the Facts to the Attorney. — A prosecutor cannot be acting in good faith when he proceeds upon the advice of an attorney taken without informing him of all the facts within the knowledge of the prosecutor which might reasonably be supposed to affect the opinion of the attorney. If he withheld any of such facts, the opinion obtained cannot protect him:

Cointement v. Cropper, 41 La. Ann. 303; *Cuthbert v. Galloway*, 35 Fed. Rep. 466; *Norrell v. Vogel*, 39 Minn. 107; *Roy v. Goings*, 112 Ill. 656; *Dreyfus v. Aul*, 29 Neb. 191; *Thurston v. Wright*, 77 Mich. 96; *Beidler v. Beirhaert*, 25 Ill. App. 422; *Mesher v. Iddings*, 72 Iowa, 553; *Forbes v. Hagman*, 75 Va. 168; *Decoux v. Lieux*, 23 La. Ann. 392; *Block v. Meyers*, 33 La. Ann. 776; *Logan v. Maytag*, 57 Iowa, 107; *Davie v. Wisher*, 72 Ill. 262; *Kimmel v. Henry*, 64 Ill. 505. The omission to state any material fact, though it resulted from an honest mistake of the prosecutor in supposing it not to be material, deprives him of the immunity otherwise obtainable by seeking the advice of counsel. If, after obtaining the advice of counsel, and before the delivery of the warrant of the arrest, new and material facts come to the knowledge of the prosecutor, tending to lessen the probability of the guilt of the accused, the prosecutor should communicate such facts to his counsel for his further opinion before proceeding to the execution of the warrant: *Ash v. Marlow*, 20 Ohio, 119.

Want of Diligence in not Ascertaining All the Facts.—A number of authorities declare that the prosecutor is not protected by the advice of his counsel unless, in addition to the facts known to him, he further stated all facts which he could have ascertained by reasonable diligence: *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterbach*, 37 Md. 282; *Hill v. Palm*, 38 Mo. 13; *Pipkin v. Haucke*, 15 Mo. App. 373; *Sharpe v. Johnston*, 76 Mo. 660. This, however, is probably an inaccurate statement of the law, or, at least, one which is inapplicable when the prosecutor was acting in good faith, and without anything to indicate to him that further inquiry might reveal to him circumstances which, if disclosed to his counsel, would probably affect the advice given. Upon this subject we think the better opinion is that expressed by the supreme court of Iowa in *Johnson v. Miller*, 69 Iowa, 562, 58 Am. Rep. 231, as follows: "One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to counsel a full and fair statement of all the material facts known to him. If he has a reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected." The mere statement of a prosecutor, in giving evidence in his defense, that he made a full and fair disclosure of all the facts to his counsel is not conclusive. What he stated should be proved by him or other competent evidence, and the jurors left to draw the conclusion whether the statement made was a full and fair one or not: *McLeod v. McLeod*, 73 Ala. 42.

Instances of Probable Cause.—The following facts have been held to constitute probable cause: The stealing of coal during the night, and the finding of it the next morning in a place where the accused kept his coal, though he denied all knowledge of the crime: *McDonald v. Atlantic etc. Ry Co.*, 21 Pac.

Rep. 338 (Ariz.); prosecution based upon statement, apparently truthful, made by a child eleven years of age, who claimed to have seen the offense committed by the accused: *Dwain v. Descalso*, 66 Cal. 415; the intentional killing of one person by another, though the accused, on his trial, was acquitted on the ground that he acted in self-defense: *Glaze v. Whitley*, 5 Or. 164; *Dietz v. Langfill*, 63 Pa. St. 234; prosecution based upon information received from respectable persons believed to be credible: *Chetfield v. Comelford*, 4 Fost. & F. 1008; or upon facts and circumstances brought to the knowledge of the prosecutor through the usual and ordinary business channels, believed by him to be true, and of such a character and coming from such source that business men of ordinary care, prudence, and discretion would act upon them under similar circumstances: *Galloway v. Burr*, 32 Mich. 332; or upon the fact that the prosecutor's property was burned, and a woman who was in charge of it pointed out the accused as one of the persons by whom it was fired: *Angelo v. Faul*, 85 Ill. 166; or upon statements of a person made in the presence of the prosecuting attorney of the state, to which statements such person would not testify on the trial of the accused: *Andereson v. Friend*, 85 Ill. 135; or upon the confession of a convict implicating himself and others, giving a detailed statement of the facts preceding, attending, and following the crime, when the party to whom the confession was made investigated the statements and found them to be substantially correct, and acted upon the confession thus fortified by personal investigation, though the persons suspected or accused were not notified of the accusation before taking proceedings against them: *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311; or upon information that the accused was unlawfully selling lottery tickets, verified by the statement of a person sent to the office of the accused to buy such tickets, and who returned with one which he stated he had bought of the accused: *Plassan v. Louisiana Lottery Co.*, 34 La. Ann. 246; a prosecution of a mortgagor for secreting personal property with intent to defraud the mortgagee, where it appeared that such property had been removed to some place unknown to the mortgagee or his agents; that he was not informed of any intention to so remove it, nor of the place to which it had been taken; that the mortgagor was about to remove to another state, and refused to tell an agent of the mortgagee where such property was, though he professed a willingness to inform another agent, should he apply for such information: *Hooper v. Vernon*, Sup. Ct. Md., March, 1891. Where the plaintiff had for several years before January 1, 1869, been employed in an extensive mercantile business, and had received large shipments of goods during a large part of the month of December, 1868, through defendants as common carriers, without paying freight thereon, and he also received through them money packages of considerable value, and he gave defendants checks for freight, all of which were dishonored at the bank for want of funds, and on January 3d, demand being made upon plaintiff for payment of the freight bills, he told defendant's agents that he had no money, and since January had been doing business as agent, it was held that these facts furnished probable cause for swearing that the plaintiff had within two years fraudulently conveyed and assigned his property to hinder and defraud his creditors: *Barrett v. Spaid*, 70 Ill. 408. There is probable cause for a prosecution when property has been stolen and several persons have told the prosecutor that they had seen it at the house of the accused, and the prosecutor himself believed he had seen part of it there, and made an affidavit for a search-warrant, in which he charged the property to have been stolen, and he, at the time, believed his charge to be true: *Bailey v. Dodge*, 28 Kan. 72.

Instances of Want of Probable Cause. — If a tenant of premises, returning at night from a temporary absence, finds the entrance thereto barred, and removes the obstruction and enters, and thereupon the landlord appears, and in a menacing manner orders the tenant to leave, which he declines to do, and tells the landlord that if he interferes with him, he will kill him, and the landlord then makes an affidavit for the arrest of the defendant, charging him with breaking into the premises and threatening to kill, and requests the warrant to be served at night after the tenant had gone to bed, and compels him to be taken to jail without being given any opportunity to procure bail for his appearance, the action of the landlord is without probable cause, and the circumstances are such as to justify the jury in regarding it as malicious: *Chapman v. Cawrey*, 50 Ill. 512. The following prosecutions were also adjudged to be without probable cause: A prosecution for taking and withholding a package from the United States mail, when the accused had not done anything to create a suspicion of his guilt, and the belief of the prosecutor was founded upon mistake of himself and his assistants in overlooking the package while it was in the mail-wagon: *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514; a prosecution for larceny in disposing of mortgaged chattels when the mortgagee, when the mortgage was being drawn, had assented that the mortgagor might sell them whenever fit for market: *Walker v. Camp*, 69 Iowa, 741; a prosecution for breaking into a store with intent to steal, when the property in the store had been attached as the property of the accused, and the prosecutor had reason to believe that the breaking into the store was done under a claim of right and without felonious intent, there being no attempt at secrecy or concealment, or to carry away goods: *Robsin v. Kingsbury*, 138 Mass. 538.

MALICE. — To sustain an action for malicious prosecution, there must be a concurrence of malice and want of probable cause. Neither, however clearly established, will support an action, in the absence of the other: *Farmer v. Darling*, 4 Burr. 1971; *Kelton v. Bevins*, Cooke, 90; 5 Am. Dec. 670; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Leidig v. Rawson*, 1 Scam. 272; 29 Am. Dec. 354; *Maloney v. Doane*, 15 La. 278; 35 Am. Dec. 204; *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379; *Dearmond v. St. Amant*, 40 La. Ann. 374; *Girov v. Graham*, 41 La. Ann. 511; *McGarry v. Missouri P. R. R. Co.*, 36 Mo. App. 340; *Evans v. Thompson*, 12 Heisk. 534; *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220; *Deitz v. Langfitt*, 63 Pa. St. 234; *Turner v. O'Brien*, 11 Neb. 108; *Stacy v. Emery*, 97 U. S. 642; *Glaze v. Whitley*, 5 Or. 164; *Murphy v. Martin*, 58 Wis. 276. We have heretofore shown that if the accused was guilty he cannot recover for his prosecution, however malicious the motives of the prosecutor. But his defense does not require proof of the actual guilt of the accused. It is sufficient that there was probable cause for the prosecution, and if that be found to have existed, it is not material that the prosecutor was also influenced by malice or other unlawful motive. Malice, however clearly proved, cannot support the action if there was probable cause for the prosecution, nor can it be so extreme in its character or manifestation as to create an inference or presumption that there was no probable cause: *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Green v. Cochran*, 43 Iowa, 544; *Krug v. Ward*, 77 Ill. 603; *Kaufman v. Wicks*, 62 Tex. 234; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Ulmer v. Leland*, 1 Greenl. 135; 10 Am. Dec. 48; *Smith v. Zent*, 59 Ind. 362; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. On the other hand, while the absence of probable cause may jus-

tify the jury in inferring malice or in not exacting any other evidence of it, yet if the absence of probable cause, considered in connection with all the evidence in the case, does not satisfy the jury that the prosecution was actuated by malice, the verdict should be for the defendant: *Schofield v. Ferrers*, 47 Pa. St. 194; 86 Am. Dec. 532; *McGarry v. Missouri P. R'y Co.*, 36 Mo. App. 340; *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37.

Definitions of Malice. — It has been said that a satisfactory definition of the term "malice" "may not be easy." Of course, it includes all cases in which the prosecutor has ill-will against the accused, and because of such ill-will institutes or continues the prosecution against him; but it is not necessary to prove any actual ill-will or grudge, for one having no ill-will against another may notwithstanding be guilty of the malicious prosecution of him: *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311. "The malice necessary to sustain this action is not express malice or specific desire to vex or injure from malevolence or motives of ill-will, but the willful doing of an unlawful act to the prejudice of another": *Johnson v. Ebberts*, 6 Saw. 538; 11 Fed. Rep. 129. "Any other motive than a bona fide purpose to bring the accused to punishment as a violator of the criminal law, or associated with such bona fide purpose, is malicious. There need be no personal ill-will, hate, desire for revenge, or other base or malignant passion. Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, is in legal contemplation maliciously done": *Lunsford v. Deitrich*, Ala., May, 1891; *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220. "The malice necessary to be shown in order to maintain this action is not necessarily revenge or other base or malevolent passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is malicious": *Wills v. Noyes*, 12 Pick. 324; *Pullen v. Glidden*, 66 Me. 202. A prosecution brought to aid in the collection of a debt or to obtain possession of property, and not to vindicate justice, is malicious: *Ross v. Langworthy*, 13 Neb. 492; *Krug v. Ward*, 77 Ill. 603; *Kelley v. Sage*, 12 Kan. 109; *Gabel v. Weisensee*, 49 Tex. 131. So it has been held that a prosecution with a view to frightening others, and thereby deterring them from committing depredations on the property of a corporation, is malicious: *Stevens v. Midland C. R'y Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 23 L. J. Ex. 328; though it is obvious that this motive does not deprive the prosecutor of the protection of probable cause, nor expose him to liability when he had reasonable ground for believing, and did believe, in the guilt of the accused, for surely the deterring of others from the commission of crime is not a less laudable object than the punishment of those already guilty: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. Malice, in its legal sense, is any improper and sinister motive not necessarily arising from spite or hatred, nor prompted by a corrupt design, towards the accused. Any act "done wrongfully, and without reasonable and probable cause in a wanton disregard of the rights of another, is malicious in law": *Mitchell v. Wall*, 111 Mass. 492; *Commonwealth v. Snelling*, 15 Pick. 337. "Malice means wickedness of purpose, or a wrongful or malevolent design against another, a purpose to injure another, a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice": *Shannon v. Jones*, 76 Tex. 141; *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193. "Malice,

then, in the enlarged sense and meaning of the law, is not restricted only to actual anger, hatred, and revenge, but includes every other unlawful and unjustifiable motive. So that it may be said that any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts under the influence of it": *Gee v. Culver*, 13 Or. 598. In the light of the foregoing definitions, it clearly appears that the purposes of the prosecution, justly rendering it subject to the charge of being malicious and unlawful, may be infinite in variety, while there is one single purpose which always relieves it from this charge, and this is the purpose of bringing to justice one believed to be guilty of crime; and, therefore, that however numerous may be the instances or specifications of malice, they are all embraced within this definition: Malice in a criminal prosecution is merely the instituting or maintaining of such prosecution without being induced so to do by the desire to bring the accused to justice: *Spear v. Hiles*, 67 Wis. 350; *Vinal v. Core*, 18 W. Va. 1; *Sterens v. Midland C. R. R. Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 33 L. J. Ex. 328; *Johns v. Marsh*, 52 Md. 323; *Alexander v. Harrison*, 38 Mo. 258; 90 Am. Dec. 431. If this design is present, and its influence controlling, the action of the prosecutor is not malicious, though influenced to some extent by other and forbidden considerations. "If the selfish element is only incidental, it cannot be regarded as evidence of malice, for it can hardly be expected that all selfish aims and desires can be eliminated from such prosecution": *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493. Hence one who in good faith and upon probable cause prosecutes another for a malicious trespass is not rendered answerable for a malicious prosecution by the fact that one of his purposes in bringing the prosecution was to prevent the accused from building a house on the premises on which the trespass was alleged to have been committed: *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep.

Malice is a Question for the Jury. — If the facts are such as to establish want of probable cause, then the issue of malice on the part of the prosecutor must be determined. There is no doubt that this is a question for the jury. The court is not permitted to determine it either by telling the jury that because of the absence of probable cause, they should find for the plaintiff, nor by instructing them that the evidence in the case created a presumption of malice, or made such presumption conclusive. Any action of the court tending to take the decision of this question from the jury is erroneous, and entitles the defeated party to a new trial: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Harkrader v. Moore*, 44 Cal. 144; *Levy v. Brannan*, 39 Cal. 485; *Potter v. Seale*, 8 Cal. 218; *Gee v. Culver*, 12 Or. 228; *Strickler v. Greer*, 95 Ind. 596; *Stewart v. Sonneborn*, 98 U. S. 187; *Mitchell v. Jenkins*, 2 Nev. & M. 301; 5 Barn. & Adol. 588; *Schofield v. Ferrers*, 47 Pa. St. 194; 86 Am. Dec. 532.

Inferring Malice. — The authorities all declare that malice must be proved: *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Flickinger v. Wagner*, 46 Md. 581; *George v. Radford*, 3 Car. & P. 464; *Turner v. Turner*, Gow, 50. By this is not meant that there must be any direct or specific proof of ill-will, or of a desire to injure the accused, or of any other wrongful motive. While the absence of probable cause does not render the prosecutor liable if his act was not malicious, still the same evidence which proves the absence of probable cause for the prosecution may satisfy the jury that it was malicious, and if it does so satisfy them, they should find for the plaintiff. Some of the authorities say that malice may be inferred from want of probable cause:

Mitchell v. Jenkins, 2 Nev. & M. 301; 5 Barn. & Adol. 588; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373; *Bell v. Graham*, 1 Nott & McC. 278; 9 Am. Dec. 687; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514; *Murphy v. Hobbs*, 7 Col. 541; 49 Am. Rep. 366; *Heap v. Parrish*, 104 Ind. 36; *Roy v. Goings*, 112 Ill. 656; *Block v. Meyers*, 33 La. Ann. 776; *Decoux v. Lieux*, 23 La. Ann. 392; *Harpham v. Whitney*, 77 Ill. 32; and others that it may be inferred from the same facts which established the want of probable cause: *Sharpe v. Johnston*, 76 Mo. 660. The distinction is not material. What is meant by either form of expression is, that the jury may, without any evidence being offered, except that which tends to show that there was no probable cause for the prosecution, conclude that it was malicious; but that they are not bound to draw such conclusion as a matter of law, nor at all, unless it is generated in their minds from the evidence. They should not be instructed to draw it, but left free to infer it, or not, as from the evidence to them shall seem to be true: *Harkrader v. Moore*, 44 Cal. 144; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Carson v. Edgeworth*, 43 Mich. 241; *Strickler v. Greer*, 95 Ind. 596; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Oliver v. Pate*, 43 Ind. 132; *Greer v. Whitfield*, 4 Lea, 85.

PLAINTIFF'S PLEADINGS. — "Originally, an action of this character was an action on the case in the nature of a writ of conspiracy, in which the plaintiff, in the declaration, charged the defendant with having falsely and maliciously caused his arrest. The defendant in his plea set forth the grounds of his suspicion under which he caused the arrest, the sufficiency of which was determined by the court upon a demurrer to the plea: *Chambers v. Taylor*, Cro. Eliz. 900; *Coxe v. Wirrall*, Cro. Jac. 193; Com. Dig., tit. Pleader, 2, K; *Wear v. Wells*, 3 Bulst. 284. In process of time a change was effected in the manner of pleading the cause of action, by which the plaintiff anticipated this plea by averring in the declaration a want of probable cause: *Savil v. Roberts*, 1 Salk. 13; 1 Ld. Raym. 374; and the facts were presented under the general issue": *Ball v. Rawles*, 93 Cal. 229; 27 Am. St. Rep. In actions for malicious prosecution, as well as in other civil actions, the substantial elements of the plaintiff's complaint or declaration may be ascertained by considering what is essential to the maintenance of his action. These essentials have been heretofore stated, and each of them must appear from the complaint to have existed. The prosecution of the plaintiff must be shown. The proceedings need not be set out in full, but their substance must be stated: *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316. The jurisdiction of the court in which the prosecution took place need not be alleged in those states in which it is not regarded as essential to the maintenance of the action: *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236. It must also appear from the complaint not only that the prosecution has been terminated, but that its termination was such as to entitle the plaintiff to maintain the action, as that he has been acquitted, or discharged from custody, so that no further prosecution can take place without making a new accusation: *Fisher v. Bristow*, 1 Doug. 215; *Morgan v. Hughes*, 2 Term Rep. 225; *Johnson v. Finch*, 93 N. C. 205; *Hatch v. Cohen*, 84 N. C. 602; 37 Am. Rep. 630; *Wall v. Toomey*, 52 Conn. 35; *Gorrell v. Snow*, 31 Ind. 215; *Hays v. Blizzard*, 30 Ind. 457; *Whitworth v. Hall*, 2 Barn. & Adol. 695; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

The Existence of Probable Cause for the Prosecution must be Denied in the Complaint: Dennehey v. Woodsum, 100 Mass. 195; *Turner v. Turner*, 85 Tenn. 387. The usual form of making this denial is to allege that the prosecution was without reasonable or probable cause: *Adams v. Lisher*, 3 Blackf. 241; 25 Am. Dec. 102; *Scotten v. Longfellow*, 40 Ind. 23; and there appears to be no doubt of the sufficiency of this general allegation, and that there is no necessity of stating the facts or evidence by which the plaintiff will support it: *Benson v. Bacon*, 99 Ind. 156; though if such facts are so fully stated as to show that the prosecution was without probable cause, the general allegation of its absence may be omitted: *Wall v. Toomey*, 52 Conn. 35. As it is not the innocence of the accused or the failure of the prosecution which subjects the prosecutor to liability, but his having proceeded in the absence of probable cause, any allegation which falls short of showing this absence is insufficient. Hence a complaint is defective in this respect which merely alleges that the charge made was false and malicious: *Scotten v. Longfellow*, 40 Ind. 23; *Kirtley v. Deck*, 2 Munf. 10; 5 Am. Dec. 445; *Young v. Gregorie*, 3 Call, 446; 2 Am. Dec. 556; *Ziegler v. Powell*, 54 Ind. 173. The complaint must also allege that the charge against the plaintiff was made maliciously, as well as without probable cause: *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; and if the recovery of special damages is sought, they should be stated with particularity: *Stanfield v. Phillips*, 78 Pa. St. 73; as where plaintiff wishes to enhance damages by showing his mistreatment while in prison: *Miles v. Weston*, 60 Ill. 361; or his losses in his business: *Horne v. Sullivan*, 83 Ill. 30.

ANSWER. — In an early South Carolina case it was erroneously stated that the defense of probable cause presents new matter, and therefore is not admissible under the general issue: *Fant v. McDaniel*, 1 Brev. 172; 2 Am. Dec. 660. The absence of probable cause is one of the grounds of action necessarily alleged in the plaintiff's complaint, and anything which merely disproves the necessary allegations of the plaintiff's complaint is not new matter, and need not be specially alleged. With reference to the various matters which we have shown must be stated in the complaint, there is no doubt that they may be put in issue by a general denial, and that all evidence tending to counteract or contradict the evidence required to be offered by plaintiff in support of his complaint is admissible under the general issue, and therefore need not be specially pleaded. Hence, under the general issue, the defendant is entitled to prove, if he can, that the plaintiff was guilty of the crime charged against him: *Bruley v. Rose*, 57 Iowa, 651; or that the prosecution was not malicious: *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; *Sparling v. Conway*, 75 Mo. 510; or was upon probable cause: *Trogden v. Deckard*, 45 Ind. 572; *Brigham v. Aldrich*, 105 Mass. 212; *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; and as part of his defense of probable cause, the advice which he received from his counsel, and that it was made after a full and fair disclosure of the facts: *Sparling v. Conway*, 6 Mo. App. 283; 75 Mo. 510; *Lery v. Brannan*, 39 Cal. 485; *Folger v. Washburn*, 137 Mass. 60.

EVIDENCE — *Burden of Proof*. — As it is essential that the plaintiff in his complaint affirmatively allege all the facts necessary to support his action, it follows that he must assume the burden of proof in respect to each of these allegations, and by his evidence establish to the satisfaction of the court and jury that he has been prosecuted by the defendant, that the prosecution has terminated in his favor, that it was malicious, and without probable cause; and if by his evidence he does not make out a *prima facie* case upon all of

these issues, he must fail: *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Lavender v. Hudgens*, 32 Ark. 763; *Mitchinson v. Cross*, 58 Ill. 366; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 375; *Morton v. Young*, 55 Me. 24; 92 Am. Dec. 565; *Jones v. Jones*, 71 Cal. 89; *McNulty v. Walker*, 64 Miss. 198; *Sutton v. Anderson*, 103 Pa. St. 151; *McFarland v. Washburn*, 14 Ill. App. 369; *Palmer v. Richardson*, 70 Ill. 544; *Davie v. Wisher*, 72 Ill. 262; *Calef v. Thomas*, 81 Ill. 478; *Scott v. Shelor*, 28 Gratt. 891; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. It has been said, however, that after proof of malice, slight evidence of want of probable cause is sufficient: *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; and because it involves a negative, that only such proof of want of probable cause is required in any case: *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644. We shall first refer to the evidence admissible on behalf of the plaintiff to make out his case, and next to the evidence receivable on behalf of the defendant to rebut the case of the plaintiff.

Evidence of the Proceedings in Court.—A judicial record is always admissible to prove itself, and as the plaintiff's cause of action is based upon the commencement and termination of the prosecution against him in a court of justice, he must necessarily be both allowed and required to prove such commencement and termination by the best evidence. In one case it was very strangely said that the record of the plaintiff's acquittal is not admissible in evidence in his favor: *Skidmore v. Bricker*, 77 Ill. 164; but the argument used against its admission demonstrates that what the court meant was, that it was not admissible for the purpose of proving that his prosecution was malicious or without probable cause. It is not within the purpose of this note to consider when or how the judicial record shall be authenticated or proved. When desired as a part of the evidence in an action for malicious prosecution, it must doubtless be proved, as in other cases, or it will be rejected: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37; though if the original record cannot be had, its contents may be established by secondary evidence: *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; and when proved either by secondary or original evidence, so that it would be admissible in any other action in which it is material, it must necessarily be admitted in an action for malicious prosecution for the purpose of proving that there was a prosecution and when and how it ended: *Olmstead v. Parttridge*, 16 Gray, 381; *Winn v. Peckham*, 42 Wis. 493; *Mass v. Meire*, 37 Iowa, 97; *Ames v. Snider*, 69 Ill. 376; *Sweeney v. Perney*, 40 Kan. 102; *Cooper v. Utterbach*, 37 Md. 282. Its effect when it proves a conviction as well as a prosecution has been considered at page 142.

Failure to Indict or to Hold the Accused to Answer.—Whether the acquittal or discharge of the accused may be considered as evidence bearing upon the question of probable cause for his prosecution or not, is a question upon which the courts are not in entire harmony. The majority of the decisions upon the subject affirm that the failure of the examining magistrate to commit or the grand jury to indict the accused is admissible, not merely as evidence that there was no sufficient proof to warrant indicting him or holding him to answer, but further, that the prosecutor did not have probable cause for his prosecution: *Sharpe v. Johnston*, 76 Mo. 660; *Bornholdt v. Souillard*, 36 La. Ann. 103; *Bigelow v. Sickles*, 80 Wis. 98; *Frost v. Holland*, 75 Me. 108; *Vinal v. Core*, 18 W. Va. 42; *Jones v. Finch*, 84 Va. 204; *Nicholson v. Coghill*, 9 Dowl. & R. 13; *Johnson v. Chambers*, 10 Ired. 27; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterbach*, 37 Md. 282; *Strauss v. Young*, 36 Md. 254; *Casperson*

v. *Sproule*, 39 Mo. 39. When we remember that the commencement of the prosecution must precede the examination before the magistrate or the grand jury, and that at the latter the accused has the benefit of all explanatory circumstances which have been discovered since the charge was preferred against him, and sometimes of such evidence as he can procure either to explain or contradict that upon which the prosecutor was authorized to act, it seems remarkable that the finding of the examining magistrate or of the grand jury, even though it be conceded to be evidence of the want of probable cause for holding the accused to answer, should have ever been received as evidence of want of probable cause on the part of the prosecutor when he instituted the prosecution. It is not disputed that the jury may infer the existence of malice from the want of probable cause. If the absence of probable cause may be inferred from the failure of the prosecution, then the final result is, or may be, that the prosecutor may be held liable for a malicious prosecution without any other evidence than that of his having caused a prosecution, or, at least, that the burden of proof must be assumed by the defendant after the plaintiff has introduced the formal evidence of his prosecution and discharge. Hence, in a few of the states, the decisions declare that the discharge of the accused is not admissible as evidence of probable cause, and that the effect of such discharge is limited to proving that the prosecution has terminated: *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493; *Heldt v. Webster*, 60 Tex. 207; *Guinea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Frowman v. Smith*, Litt. Sel. Cas. 7; 12 Am. Dec. 265; *Staub v. Van Bethuysen*, 36 La. Ann. 467; *Apger v. Woolston*, 43 N. J. L. 57.

Acquittal as Evidence of Want of Probable Cause. — If the prosecution terminated in favor of the accused otherwise than by his discharge by the grand jury or the committing magistrate, the decisions agree that such termination is not evidence of the absence of probable cause. Hence, though he proves a verdict of acquittal and a judgment in his favor thereon, he must still offer some evidence tending to show that his prosecution was without probable cause: *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Bitting v. Ten Eyck*, 82 Ind. 421; 42 Am. Rep. 505; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Stewart v. Sonneborn*, 98 U. S. 187; *Ullman v. Abrams*, 9 Bush, 738; *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Sweeney v. Perney*, 40 Kan. 102. In some of the states, a justice of the peace, or other magistrate before whom a criminal prosecution is tried, is required, if he finds it to have been malicious and without probable cause, to state such conclusion in his docket, and to assess the costs against the prosecutor. The effect of his conclusion is, however, limited to the imposition of such costs, and his finding cannot be received in a civil action as evidence of the want of probable cause: *Casey v. Seratson*, 30 Minn. 516. So the abandonment of the prosecution, or its dismissal on the entry of a *nolle prosequi*, at the instance or with the assent of the prosecutor, after the accused has been held to answer by a magistrate or grand jury, is not evidence of the want of probable cause for the commencement of the prosecution: *Flickinger v. Wagner*, 46 Md. 580; *Yorum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123; *Joiner v. Ocean Steamship Co.*, 86 Ga. 238; *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Green v. Cochran*, 43 Iowa, 544.

Evidence that the Prosecution was to Accomplish Some Collateral Purpose or to forward some private interest of the prosecutor is always admissible, both to show the absence of probable cause and to create the inference that it was malicious, and that the real or chief object of the prosecutor was to obtain

possession of property, or the payment of a debt, and the like: *Schofield v. Ferrers*, 47 Pa. St. 194; 86 Am. Dec. 532; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832; *Kimball v. Bates*, 50 Me. 308; *McDonald v. Rooke*, 2 Bing. N. C. 207; 2 Scott, 359; 1 Hodges, 314; *Brooks v. Warnick*, 2 Stark. 389; *Grundy v. Crescent News and Hotel Co.*, 33 La. Ann. 974; *Hiatt v. Kinkaid*, 28 Neb. 721; *Tucker v. Cannon*, 28 Neb. 196.

Reputation of the Plaintiff. — In a couple of cases decided in the court of appeals of Missouri, it was asserted that the plaintiff in an action for malicious prosecution ought not to be allowed to prove that his reputation before such prosecution was good: *Kennedy v. Holladay*, 25 Mo. App. 503; *Brennan v. Tracy*, 2 Mo. App. 540; and in Illinois it was said that while evidence of the plaintiff's good reputation should be received when the charge against him was made upon information and belief, for the purpose of showing whether the defendant probably believed what he swore he did, yet that it was not admissible, where the charge was made as of the prosecutor's own knowledge: *Skidmore v. Bricker*, 77 Ill. 164. Reason or authority in support of either decision we have not heard or seen, and hope to be spared hearing or seeing. Certainly a reasonable man ought to pause before making a charge of crime against one whom he knows to bear a good reputation, and to have lived a blameless life in the community in which he resides. For the purpose of showing that his prosecution was without probable cause, the plaintiff may, therefore, offer evidence of his previous good reputation, and that it was known to his accuser, or, from the latter's long acquaintance, should have been known to him: *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373; *Blizzard v. Hayes*, 46 Ind. 166; 15 Am. Rep. 291; *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Israel v. Brooks*, 23 Ill. 575.

Evidence Tending to Prove Actual Ill-will on the part of the prosecutor towards the accused is always admissible for the purpose of raising the inference that the prosecution was induced by malice: *Caddy v. Barlow*, 1 Moody & R. 275; *Thomas v. Norris*, 64 N. C. 780. Such ill-will or malice may be established to the satisfaction of the jury from the conduct as well as language of the prosecutor, and without showing any other hostile demonstrations beyond those manifested in the mode of prosecuting or preferring the charge, as where the means employed by the prosecutor were unnecessarily injurious: *Thompson v. Force*, 65 Ill. 370; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; or the value of the property the accused was charged with taking was, in the affidavit for his arrest, grossly overstated: *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; or unusual zeal was manifested by the prosecutor: *Garvey v. Wayson*, 42 Md. 178; *Straus v. Young*, 36 Md. 246; or his acts were rash and wanton: *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Casebeer Rice*, 18 Neb. 203; or a false statement of the case was made by him for the purpose of procuring advice from an attorney, favorable to the arrest: *Wild v. Odell*, 56 Cal. 136.

The Facts and Circumstances under Which the Prosecutor Acted may be proved for the purpose of showing that he could not, as a reasonable man, have believed in the truth of the charge made by him, and that his conduct can be imputed to nothing but malice. Thus plaintiff may prove that he was the owner of property with the theft of which he was charged, and that the prosecutor knew of such ownership: *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37; that though the accused was charged with unlawfully and forcibly defending possession of property, the only defense made by him was in lawful resistance of an attack made by the prosecutor: *Casebeer v. Rice*, 18

Neb. 203; that a charge of larceny was preferred, when the prosecutor knew that the property had been taken up under the estray laws, and had no reason for believing it to have been stolen: *Bauer v. Clwy*, 8 Kan. 580; that the prosecutor charged the commission of the crime of perjury in making an affidavit averring his insolvency, when he must have known, from a proper examination of his affairs, that he was in fact insolvent, and that the charge of insolvency was true: *Montross v. Bradshy*, 68 Ill. 185; that at the time the accused was charged with having fraudulently disposed of mortgaged chattels, he had a large amount of other property liable to be taken in payment of his debts, for the purpose of showing that his prosecutor could not have believed that the disposal of the mortgaged property was for the purpose of defrauding the mortgagee: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489.

As bearing upon the question of probable cause, the plaintiff may offer and the court receive evidence tending to show that the person upon whose information the prosecutor acted was known to him to be unreliable or to have been in prison: *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594. It is not evidence of the absence of probable cause that the prosecutor did not seek the accused for the purpose of inquiring whether he had any defense, or of giving him an opportunity to explain the circumstances creating the belief in his guilt: *Miller v. Chicago etc. R. R. Co.*, 41 Fed. Rep. 898; and even when the accused is sought and denies his guilt, the prosecution, after such denial, is not without probable cause, if all the known facts in the case, including the denial, were sufficient to induce a reasonable ground of suspicion of the plaintiff's guilt: *Chicago etc. R. R. Co. v. Kriski*, 30 Neb. 215. The fact that no evidence was offered by the prosecutor to sustain his charge when it came up for hearing and trial may be proved by any person who was present at the trial or hearing, for the purpose of showing that it was without probable cause: *John v. Bridgman*, 27 Ohio St. 22. But if there was some evidence offered, the judge or magistrate will not be permitted to state his view of its effect, nor that he discharged the accused because the evidence was insufficient to hold him: *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; nor are any of the observations of the judge or magistrate during the trial or examination, or in pronouncing judgment, admissible against the prosecutor: *Wetzlar v. Zachariah*, 16 L. T., N. S., 432; *Barker v. Angell*, 2 Moody & R. 371. There is a conflict in the authorities as to whether on the trial of the civil action for malicious prosecution evidence may be received for the purpose of showing what was the testimony of a witness at the hearing or trial of the criminal charge. On the one side, it is said that such evidence is inadmissible either to show probable cause or the want of it, because it is not the best evidence, and that the witnesses examined at the criminal trial, if their testimony is again desired, must be called and examined at the trial of the civil action: *Richards v. Foulke*, 3 Ohio, 52; *Burt v. Place*, 4 Wend. 591; but a slight preponderance of the authorities dissents from this view, and maintains that upon the issue of probable cause it is competent for either party to show what was testified to at the trial of the criminal charge; that this need not be proved by the testimony of the witnesses themselves, for they may have forgotten their own testimony, or may, in the civil action, testify falsely concerning it, and, therefore, that it is competent, either from the reporter's notes of the trial, or by the oral testimony of any other person who was present and remembers, to prove what was said by any witness or witnesses upon his examination on the trial of the criminal charge: *Goodrich v. Warner*, 21 Conn. 432; *Brown v. Willoughby*, 5 Col. 1; *Bacon v. Towne*, 4 Cush. 238. The declarations of the arresting officer are not admis-

sible for the purpose of showing the malice of the prosecutor, where they were not made in his presence or hearing, nor by his authority: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; nor can the right of the officer to represent or speak for the prosecutor or the existence of a conspiracy between him and the officer be proved by the latter's declarations: *Chrisman v. Carney*, 33 Ark. 318. The plaintiff ought not to be allowed to give evidence, the only purpose of which must be to create a prejudice against the defendant or a sympathy for the plaintiff. Hence the reception of evidence to the effect that the character of the defendant was bad: *Walker v. Pittman*, 108 Ind. 341; or that the plaintiff was a minor when he was prosecuted, or at the time of the commission of the supposed crime of which he was charged, is erroneous: *Motes v. Bates*, 74 Ala. 374.

Evidence for Defendant—Judicial Proceedings.—The record of the criminal prosecution is also evidence for the defendant, and so far as it speaks in his favor is in some respects more efficient than when it is received on behalf of the plaintiff. What its effect is when it shows a conviction, whether such a conviction has been vacated or not, we have considered at page 142. If anything appears from the proceedings against the plaintiff which may be construed as an admission either of his guilt, or of there being probable cause for his prosecution, it is admissible against him. Therefore, it has been held that the voluntary waiver by the accused of his examination, and his entering into recognizance for his appearance to answer the charge against him, were admissible as evidence of probable cause for his prosecution: *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Vansickle v. Brown*, 68 Mo. 627. The fact that the accused was held to answer by the examining magistrate, or was indicted by the grand jury, is generally treated as *prima facie* but never as conclusive evidence of probable cause: *Diemer v. Herber*, 75 Cal. 287; *Ganea v. Southern Pac. R. R Co.*, 51 Cal. 140; *Hale v. Boylen*, 22 W. Va. 234; *Raleigh v. Cook*, 60 Tex. 438; *Graham v. Noble*, 13 Serg. & R. 233; *Bacon v. Towne*, 4 Cush. 217; *Ross v. Hixon*, 46 Kan. 550; *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167; *Garrard v. Willet*, 4 J. J. Marsh. 628; *Peck v. Chouteau*, 91 Mo. 138; 60 Am. Rep. 236; *Bell v. Percy*, 11 Ired. 233; *Brown v. Griffin*, Cheves, 32; and the principal case; though this effect has sometimes been denied to his indictment: *Motes v. Bates*, 80 Ala. 382. If the jury or the court entertained doubt upon the subject of the innocence of the accused, this fact is generally permitted to be proved, as tending to show probable cause. If there were two trials, because the jury on the first trial could not agree, this is unquestionably evidence of probable cause: *Johnson v. Miller*, 63 Iowa, 529; 50 Am. Rep. 758; and though the jury ultimately concurred in a verdict of acquittal on the first trial, it has been held that parol evidence is admissible for the purpose of showing that they hesitated, and that they entertained doubts of the innocence of the accused from the evidence before them: *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Smith v. Macdonald*, 3 Esp. 7. This character of evidence concerning the deliberations of the grand jury has been excluded, and we think properly, both because the accused may not have had any opportunity to present evidence in his favor before them, and because public policy is best subserved by keeping secret the votes and opinions of the grand jurors: *Scotten v. Longfellow*, 40 Ind. 23.

Bad Reputation of Plaintiff.—One of the elements of damage which the jury may properly consider is the injury to the reputation of the plaintiff by his prosecution, and that injury is manifestly less when, before the prosecution, he had little or no reputation to lose. So one is more likely to entertain a reasonable belief in the guilt of a person of bad reputation than of one

whose reputation is good. Evidence of the bad reputation of the plaintiff before the charge was preferred against him is therefore admissible both in mitigation of damages and to show that his prosecution was not without probable cause: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Gregory v. Chambers*, 78 Mo. 294; *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773; *Fitzgibbon v. Brown*, 43 Me. 169; *Rodriguez v. Tadmire*, 2 Esp. 721; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *Gee v. Culver*, 13 Or. 598; *Pullen v. Glidden*, 68 Me. 559. The defendant is entitled to show that when the plaintiff was arrested he was in the company of a person of bad character, and that he harbored and habitually associated with persons of that character, and thereby exposed himself to suspicion: *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; or, though the prosecution was for larceny, that the plaintiff had the reputation of being a gambler and horse-racer: *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773. If the prosecution was for the purpose of compelling plaintiff to give sureties to keep the peace, the defendant may show not only that the plaintiff threatened him, but that his reputation was that of a violent and quarrelsome man: *Sherwood v. Reed*, 35 Conn. 450; 95 Am. Dec. 284. From the general rule that the bad reputation of the plaintiff may be proved by the defendant, there is a slight and feeble dissent: *Oliver v. Pate*, 43 Ind. 132; *Eschbach v. Hurtt*, 47 Md. 61. In Wisconsin, while the general rule is conceded, it has been held that evidence of such reputation is not admissible under the general issue: *Scheer v. Keown*, 34 Wis. 349.

Evidence of Other Crimes. — Though the plaintiff must be prepared to defend his general reputation, he is not required to meet charges of specific offenses: *Gregory v. Thomas*, 2 Bibb, 286; 5 Am. Dec. 608; nor can the prosecutor support his defense of probable cause by proving that though the plaintiff did not commit the crime of which he was accused, yet that he did at or about the same time commit another and entirely different offense: *Carson v. Edgeworth*, 43 Mich. 241; *Chrisman v. Carney*, 33 Ark. 316; *Patterson v. Garlock*, 39 Mich. 447; *Sutton v. McConnell*, 46 Wis. 269. When, however, a guilty knowledge is essential to the crime of which plaintiff was accused, the defendant may prove facts and circumstances, known to him at the time of the prosecution, sufficient to create a belief in the mind of a reasonable man, and in fact creating a belief in the defendant's mind, that the accused had committed other offenses like that for which he was prosecuted: *Thelin v. Dorsey*, 59 Md. 539; *Thomas v. Russell*, 9 Ex. 764.

Defendant's Evidence of his Motives. — The defendant in those states in which he is permitted to testify in his own behalf is allowed to give direct evidence of his motives and purposes in the prosecution. He may be asked whether he was actuated by malice or not, whether he made the complaint against the accused in good faith, entertaining an honest belief in his guilt: *Sherburne v. Rodman*, 51 Wis. 474; *Greer v. Whitfield*, 4 Lea, 85; or whether he had any ill-feelings against him: *Vansickle v. Brown*, 68 Mo. 627; *McCormick v. Perry*, 47 Hun, 71; *Coleman v. Heurich*, 2 Mackey, 189; or whether from all the facts known to him when he commences the prosecution, taken in connection with the advice of his counsel, he believed the charge to be true and the accused guilty: *Heap v. Parrish*, 10 Ind. 36; *Turner v. O'Brien*, 5 Neb. 542; *Spaulding v. Lowe*, 56 Mich. 366; *Sparling v. Conway*, 75 Mo. 510. Of course the testimony on this point is not conclusive in his favor, but is to be weighed in connection with the other evidence of the case, and the jury must determine from what he did and the circumstances under which he did it, as well as from his present testimony concerning his motives, whether his prosecution was without probable cause and malicious or not.

Facts not Known to the Prosecutor. — Evidence tending to prove the actual guilt of the plaintiff is always admissible in favor of the defendant, for a guilty man will not be permitted to recover for his prosecution whether the facts within the knowledge of the prosecutor at the time the charge was made were or were not sufficient to justify the making of it. But with this exception, the defense of probable cause, so far as it is made to depend upon the ground that there were circumstances sufficient to excite the suspicion of a reasonable and prudent man, and generate in his mind the conviction of the guilt of the accused, is restricted to facts known to the prosecutor when he preferred his charge. It may be that there were other existing circumstances of which he afterwards became aware, and which, had he known them at the time, would have strengthened his conviction and made it more reasonable, but as he, from not knowing them, could not have acted upon them, evidence of them should not be received to justify his action: *Harkrader v. Moore*, 44 Cal. 144; *Delegal v. Highley*, 3 Bing. N. C. 959; *Galloway v. Stewart*, 49 Ind. 156; 19 Am. Rep. 677; *Turner v. Ambler*, 10 Q. B. 252; 6 Jur. 346; 11 L. J. Q. B. 158; *Threefoot v. Nuckols*, 68 Miss. 116; *Bell v. Percy*, 5 Ired. 233; *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594; *Josselyn v. McAllister*, 25 Mich. 45. Nor, on the other hand, can the effect of circumstances, known to the prosecutor, tending to establish the existence of probable cause be weakened by other explanatory or exculpatory facts of which he had no knowledge or notice: *King v. Colvin*, 11 R. I. 582.

Evidence of Facts Justifying the Prosecutor. — In a preceding part of this note we have given instances of prosecutions deemed, as matter of law, to be upon probable cause, and of others from which probable cause was adjudged to be absent. What was there said should be considered in connection with what we shall here say upon the subject of the evidence on the part of the defendant tending to show that the facts and circumstances under which he acted were such as to justify his action.

Actions for malicious prosecution often furnish temptations for seeking to bring before the jury evidence of extrinsic matters for the purpose of awakening their prejudices or sympathies, and there is no doubt that all matters which can only minister to this purpose ought to be rigidly excluded: *Brown v. Smith*, 83 Ill. 291. But when the defense is, that the prosecutor acted in good faith, and as a prudent and reasonable man would act in the same circumstances, it is evident that his defense cannot be fully and fairly made unless he is permitted to disclose to the jury all the facts and circumstances influencing his action, and which were such as a prudent and law-abiding man might reasonably and lawfully act upon: *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Collins v. Fisher*, 50 Ill. 359.

A Mere Suspicion or Belief that the accused had committed the crime of which he is charged, however sincere, is not evidence of probable cause. Nor is it material that other persons than the prosecutor shared in such belief. Hence he should not be permitted to prove his own belief or the belief of others, or that he had been told by others that the accused was guilty, or that there was a general suspicion of such guilt in the community, except he also shows that such belief was based upon such information as might generate it in the mind of a prudent, reasonable man: *Brainerd v. Brackett*, 33 Me. 580; *Holburn v. Neal*, 4 Dana, 120; *Carl v. Ayers*, 53 N. Y. 14; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Norvel v. Vogel*, 39 Minn. 107; *Farnham v. Feeley*, 56 N. Y. 451. Some of the courts have, however, and perhaps correctly, admitted evidence that it was commonly reported in the neighborhood in which the parties lived that the plaintiff had committed the crime for

which he was prosecuted, not as being in itself sufficient to establish probable cause, but as lending force to any other criminatory facts or information: *Pullen v. Glidden*, 68 Me. 559; *Baron v. Mason*, 31 Vt. 201.

The Prosecutor is not Required to Act upon his Personal Knowledge. — “Actual knowledge that the crime was committed is not necessary, nor is it essential that the prosecutor shall know the facts and circumstances upon which he predicates his belief. He may act upon creditable information or deceptive appearances of guilt, if he acts in good faith”; *Brown v. Willoughby*, 5 Col. 1; *Hooper v. Vernon*, Sup. Ct. Md., March, 1891. While the prosecutor may act upon information received from others, it would seem to be his duty not to act upon mere general charges of the commission of the crime without doing anything to verify their truth when he could easily do so, and especially when the person accused bears a good reputation: *Bornholdt v. Souillard*, 36 La. Ann. 103. What was said or told to the defendant must generally be admitted in evidence, not for the purpose of establishing that what was told was true, but of showing whence came the information on which he acted; and if the source was apparently reliable, and of a character to induce a prudent, cautious man to believe that the plaintiff had been guilty of the offense for which he was arrested, and the defendant did so believe, then such information makes out the defense of probable cause: *Lamb v. Galland*, 44 Cal. 609. If the person from whom the information is derived is known to be of bad reputation, as where he is a discharged convict, the prosecutor is not justified in acting upon such information without taking any steps to verify it: *Anderson v. Friend*, 71 Ill. 475; *Chapman v. Dunn*, 56 Mich. 31; and where the information was in the form of a confession, it may be shown, to break its force as evidence of probable cause, that it was, in effect, extorted by the accused from the person making it: *Harpham v. Whitney*, 77 Ill. 32; *Dorsey v. Clapp*, 22 Neb. 564. Where the information was received from a person of bad reputation, of which the prosecutor and his counsel were not informed, the court refused to decide, as a matter of law, that they were guilty of such want of diligence as to deprive them of the defense of probable cause, from the fact that they did not take any measures to ascertain the reputation of their informant, as they might readily have done: *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220. “However suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will tend to explain the suspicious appearances and exonerate the accused from the criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence”: *Fugan v. Knox*, 66 N. Y. 525. The facts and circumstances upon which the defense relies as evidence of probable cause must tend to show the commission of the crime charged. It is not sufficient that they existed and tended to prove, or proved, a wrongful or criminal act, if it was not the act charged. Hence probable cause for a prosecution for larceny is not shown by evidence that the facts upon which the defendant proceeded tend to prove that the property had been converted: *Turner v. O'Brien*, 5 Neb. 542; *Falvey v. Faxon*, 143 Mass. 284; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 661; *Bobsin v. Kingsbury*, 138 Mass. 538; nor for perjury, by showing that the accused swore falsely in a matter not material to the issue on trial: *Plath v. Braunsdorff*, 40 Wis. 107. When, by mistake, a charge is made of one crime or against a certain person, when the prosecutor intended to charge another crime or another person, it is said that proof of the crime intended to be charged may be received in mitigation of damages: *Ripley v. McBarron*, 125 Mass. 272; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am.

Rep. 170. The defendant is always allowed to prove that he acted upon the advice of counsel taken in good faith and upon full disclosure of facts: *Wright v. Hanna*, 98 Ind. 217; *Levy v. Brannan*, 39 Cal. 485; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Workman v. Shelly*, 79 Ind. 442; and may show what opinion the latter gave him: *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521. And if the defendant sought to obtain the advice of his counsel before commencing the prosecution, but was unable to do so because he could not find him, it may be shown, to rebut the inference of malice, and in mitigation of damages, that before the arrest was effected, the attorney was found and consulted, and his advice followed: *Hopkins v. McGillicuddy*, 69 Me. 273. For the purpose of avoiding the effect of the advice given by the attorney, it may be shown, either upon cross-examination of defendant's witnesses, or by witnesses for the plaintiff in rebuttal, what facts were stated to the attorney, or that some of the material facts were omitted from the statement: *Cooper v. Utterbach*, 37 Md. 282; or from such omission, or from other facts and circumstances, that the advice of the attorney was sought merely as a cover to protect defendant, and not in good faith with a view to being guided and controlled by it: *McCarthy v. Kitchen*, 59 Ind. 500.

DAMAGES. — The amount of damages to be awarded the injured party is, in an action for malicious prosecution, left to the discretion of the jury, to be determined by them from all the evidence submitted for their consideration. It is not proper to permit witnesses to testify to the amount of such damages: *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37. It is their province to disclose the facts and circumstances from which the conclusion of the jury is to be drawn, and when drawn, it will not be reviewed by the court except in extreme cases: *Chapman v. Dodd*, 10 Minn. 350; *Ross v. Innes*, 35 Ill. 487; 85 Am. Dec. 373; in which the amount of the recovery is so disproportionate to the injury suffered as to indicate that the jury must have been actuated by passion, prejudice, or some other inadmissible motive: *Loewenthal v. Streng*, 90 Ill. 74; *Walker v. Martin*, 52 Ill. 347. It is important, however, to consider what elements of damage may properly influence the jury in reaching a verdict, for without determining what these elements are, it is impossible to decide what evidence should be admitted or excluded, or what injuries are necessarily redressed by a verdict and judgment in favor of the plaintiff, so as to preclude any further recovery by him. Speaking of an action for malicious prosecution, the supreme court of Michigan said: "We may observe, in general terms, that the elements of damage were the expenses of the plaintiff, if any, in and about the prosecution complained of to protect himself; his loss of time; his deprivation of liberty, and the loss of his society to his family; the injury to his fame; personal mortification, and the smart and injury of the malicious arts and acts of oppression of the parties": *Hamilton v. Smith*, 39 Mich. 222. In an early case, it was said that for a malicious prosecution the plaintiff may recover for damages, — 1. To his fame; 2. To his person; and 3. To his property. The damages to his fame are of the same character, and may include the same elements as if the action were for slander or libel. The damages to his person include loss of his liberty, and the danger to which he is subjected of loss of life or liberty through the prosecution. The damages to his property embrace his losses in defending himself against the charge for which he is prosecuted: *Savile v. Roberts*, 1 Ld. Raym. 374; *Lavender v. Hudgens*, 32 Ark. 763. There is no doubt that he may recover for each of these three elements of damage, but probably there are conceded elements of damage which it would be difficult to include in either of these classifications.

Reputation, Damage to. — That the plaintiff may recover, in an action for malicious prosecution, for injuries resulting to his reputation from the making of the charge against him is beyond controversy; and therefore he cannot sustain a subsequent action of slander or libel for preferring the charge against him, though if the charge was repeated at other times, a separate action may be sustained for the damages resulting from this repetition: *Sheldon v. Carpenter*, 4 N. Y. 578; 55 Am. Dec. 301; *Rockwell v. Brown*, 36 N. Y. 207.

Mental Suffering. — We do not know that mental suffering can properly be regarded as an injury either to reputation, person, or property, but the authorities agree that the indignity of being charged with the commission of crime, and the mental suffering occasioned to the accused thereby, are proper matters to be considered by the jury, and compensated by their verdict: *Parkhurst v. Masteller*, 57 Iowa, 474; *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37; *McWilliams v. Hoban*, 42 Md. 56.

The Imprisonment of the Plaintiff being a natural consequence of his prosecution, he may recover such damages as naturally arise therefrom. They necessarily include compensation for wounded pride and the consequent mental suffering, injury to his health, including insanity and mental aberration: *Plath v. Braunsdorff*, 40 Wis. 107; and loss of time: *Hamilton v. Smith*, 39 Mich. 222. The mode in which plaintiff was treated may also be shown, as that he suffered from cold, or the want of proper food and bedding, or was kept separate from his wife: *Spear v. Hiles*, 67 Wis. 350; *Abrahams v. Cooper*, 81 Pa. St. 232. On the other hand, it has been held that the prosecutor is not answerable for the mode in which the officers of a prison discharged their duties; and therefore that indignities and neglects of theirs ought not to be permitted to enhance the damages recoverable by the sufferer: *Zebley v. Storey*, 117 Pa. St. 478.

Attorneys' Fees. — Expenses incurred in defending himself against the prosecution, which he claims to have been malicious, may be recovered by the plaintiff, including a reasonable fee for his counsel in such criminal prosecution, whether it has been actually paid or not: *Marshall v. Betner*, 17 Ala. 832; *Zeigler v. Powell*, 54 Ind. 173; *Gregory v. Chambers*, 78 Mo. 294; *Krug v. Ward*, 77 Ill. 603; *Walker v. Pittman*, 108 Ind. 341; *Landa v. Obert*, 45 Tex. 539.

The Condition of the Plaintiff's Family or the effect of his prosecution upon any member of it seems not to constitute an element of damage proper for the consideration of the jury. Hence he should not be permitted, for the purpose of enhancing his damages, to prove that his wife was dead and he had four children to support and care for: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; nor that he had a wife living, and that her health had been injured and her mind unbalanced by his prosecution: *Hampton v. Jones*, 58 Iowa, 317.

Exemplary Damages. — In actions for malicious prosecution, as in other actions for tort, there is a difference of opinion as to whether damages may be allowed by way of punishment or example, the one side insisting "that compensation to the plaintiff is the purpose in view; and when that is accorded, anything beyond, by whatever name called, is unauthorized; that it is not the province of the jury, after full damages have been found for plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff": *Wilson v. Bowen*, 64 Mich. 133; and the other contending that, except as to expenses

incurred and other elements of damage susceptible of precise proof, "no measure of damages can be prescribed except the enlightened conscience of impartial jurors": *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; and that as the action is not maintainable unless the conduct of the defendant has been both malicious and without probable cause, the jury may not only compensate plaintiff for his actual damages, but, in addition thereto, award a further sum as a punishment of defendant for his wrongful and malicious act: *McWilliams v. Hoban*, 42 Md. 56; *Parkhurst v. Masteller*, 57 Iowa, 474. To warrant the giving of exemplary damages, the courts generally require that the evidence be such as to justify the inference of actual malice, or the "prosecution to have been pursued by the defendant for his private ends and with reckless disregard of the rights of plaintiff": *Vinal v. Core*, 18 W. Va. 1; *Cooper v. Utterbach*, 37 Md. 284; *Spear v. Hiles*, 67 Wis. 350; or "a formed design to injure and oppress": *Barnett v. Reed*, 51 Pa. St. 191. Hence if the defendant became responsible merely by approving an unlawful arrest after it had been made, being without previous knowledge of it, and free from all actual malice, he cannot be subjected to exemplary damages: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *Grund v. Van Vleck*, 69 Ill. 478. If no actual damages resulted from the malicious prosecution, there can be no award of exemplary damages. If the defendant has done no actual injury, there is no legal reason for punishing him: *Schippel v. Norton*, 38 Kan. 567.

Wealth of Defendant. — The injury to the fame or reputation of the accused is probably greater when his accuser is a person of wealth than when he is of humble or indigent circumstances, and this consideration might justify the admission of evidence of the defendant's pecuniary condition in all cases; but at all events, where it is conceded that the jury may award exemplary damages by way of punishment, evidence of the wealth of defendant must necessarily be received to enable them to determine what would operate as a sufficient punishment in the case before them; for a penalty adequate as a punishment of a man of small or moderate fortune would have no punishing or deterring effect upon a defendant of great wealth: *Peck v. Small*, 35 Minn. 465; *Spear v. Hiles*, 67 Wis. 350; *Weaver v. Page*, 6 Cal. 681; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; *Whitfield v. Westbrook*, 40 Miss. 311; *Winn v. Peckham*, 42 Wis. 493.

Mitigation of Damages. — With reference to the actual damages suffered by plaintiff, there can generally be no mitigation; for if he is entitled to recover at all, he is entitled to compensation for whatever he has suffered, and the amount of his recovery cannot be diminished by proof of defendant's good faith, or of anything else not sufficient to make out a complete defense: *Fenelon v. Butts*, 53 Wis. 344; *Wilson v. Young*, 31 Wis. 574. The previous bad reputation of the plaintiff may be proved in mitigation, because the injury resulting to him from the prosecution was probably less than if his reputation had previously been unquestioned: *Fitzgibbon v. Brown*, 43 Me. 169; *Bacon v. Towne*, 4 Cush. 247; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169. All evidence tending to disprove malice is also admissible in mitigation of exemplary damages. Therefore, evidence of the excitement under which defendant labored when he instituted the prosecution, and all other facts and circumstances which may legitimately be considered in determining whether and to what extent he should be punished, are admissible in mitigation of damages: *Carter v. Sutherland*, 52 Mich. 597; *Bradner v. Faulkner*, 93 N. Y. 515.

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PEOPLE *v.* WEMPLE.

[131 NEW YORK, 64.]

Taxation of foreign corporations.



question were in the old code, no reference to those of the present code is called for; but the latter, in the respect under consideration, do not modify the rule applicable to the present case.

These views lead to the conclusion that the defendant was justified in his refusal to accept, under the contract, the title which the plaintiffs were able to convey, and that the judgment should be affirmed.

ABATEMENT OF ACTION BY DEATH OF PLAINTIFF. — At common law, in all actions where there were two or more plaintiffs, the death of one of them, pending the action, was an abatement of the action: *Haven v. Brown*, 7 Greenl. 421; 22 Am. Dec. 208. *Gainer v. Gainer*, 30 W. Va. 390, is a case in which the action abated by the death of the plaintiff. Judicial writs do not generally abate by the death of a party, but it is otherwise as to the original writ: *Hanson v. Barnes*, 3 Gill & J. 359; 22 Am. Dec. 322, and note.

PEOPLE v. WEMPLE.

[131 NEW YORK, 64.]

TAXATION — JURISDICTION. — A CORPORATION CREATED BY THE LAWS OF ANOTHER STATE, but doing business in this state, is subject to the jurisdiction of the officer whose duty it is to determine and assess the amount of taxes which the corporations are bound to pay to the state, and is subject to taxation as well as a domestic corporation.

TAXATION — JURISDICTION — TAX ON FOREIGN CORPORATIONS. — If a corporation created by the laws of a sister state employs the whole or any part of its capital here, and thus has the benefit and protection of the government and laws of the state to the extent of the capital so employed, there is no reason why it should not be subject, to the extent of such capital, to the same burdens and obligations as a domestic corporation. The tax is imposed for the privilege, which is extended to it by the statute, of doing business here as a corporation and in its corporate name.

CONSTITUTIONAL LAW — REGULATION OF COMMERCE. — A STATUTE IMPOSING A TAX UPON CORPORATIONS created in another state, the basis of which is the amount or portion of their capital in use in this state in the transaction of their ordinary business, is not in conflict with the provision of the constitution of the United States conferring upon Congress the power to regulate commerce between the states. When the state permits a foreign corporation to transact business within its limits in its corporate name, and imposes taxes on it for the privilege, this is not a regulation of interstate commerce, but a lawful exercise of the power of taxation upon a corporation that for the time being is within its jurisdiction for that purpose.

William W. MacFarland, for the appellant.

Charles F. Tabor, attorney-general, for the appellee.

O'BRIEN, J. The relator is a corporation organized under the laws of New Jersey, having an authorized capital of five million dollars, four million of which has been issued. On September 2, 1890, the comptroller of this state, in pursuance of chapter 361 of the Laws of 1881, fixed and determined the amount of taxes due from the relator to the state for the three years ending November 1, 1889, at \$2,303.42, and in arriving at this result, he found that the amount of its capital stock employed by the relator within this state was \$100,000 for the year 1887, \$1,333,333 for the year 1888, and \$121,212 for the year 1889. No question appears to be made by the relator in regard to the correctness of the comptroller's action in estimating and fixing the amount of its capital in use in this state, or in determining the amount of the tax thereon, if it is liable for any tax at all. The relator's sole contention on this branch of the case is, that it is not doing business within the state, and hence is not within the statute. If the relator is within the statute, and the comptroller had jurisdiction to inquire and determine whether the relator was employing any part of its capital in business within this state, and if so, the amount, we do not understand that the relator complains of the disposition made of the facts bearing on the questions of value. In regard to the facts bearing on the question whether the relator is doing business within this state, the return to the writ of *certiorari* brought to review the action of the comptroller states that it "consisted in part of maintaining a sales agency in the city of New York, and in selling the product of its mills in this state, and in refining crude oil within this state, and delivering the same to purchasers therein, and maintaining a depot or warehouse in the state of New York for the storage of its products therein, and in keeping on deposit, in the banks in the city of New York, large sums of money for the use of the relator and for the carrying on of its business; that during the year 1887, nearly forty per cent of the total sales of products by the relator were sales made in the state of New York; and during the year 1888, over thirty-three and one third per cent of the total sales of relator's products were made in the state of New York; and during the year 1889, over three per cent of its total sales were made in the state of New York." It further appears that the relator's business is the manufacture and production of oil from cotton-seed, and refining and selling the same. Its principal office is at Camden, New Jersey, but it has an office or agency in the city of New York.

During the year 1888, it kept in banks of this state, for use in the transaction of its business, \$15,124, and during the year 1889, \$88,773.74. During the three years for which the tax was assessed, it sold in this state about one third of its whole product. There can be no doubt that a corporation created by the laws of another state, but doing business in this state, is subject to the jurisdiction of the officer whose duty it is, under the act of 1881, to determine and assess the amount of taxes which corporations are bound to pay to the state, and is subject to taxation as well as a domestic corporation. The basis of the tax is the amount or portion of its capital in use here in the transaction of its ordinary business. How much that may be in any particular case is generally a question of fact, to be determined by the comptroller under the procedure pointed out by the statute. There is no injustice or hardship in such a law. If a foreign corporation or a corporation created by the laws of a sister state employs the whole or a portion of its capital here, and thus has the benefit and protection of the government and laws of the state to the extent of the capital so employed, there is no reason why it should not be subjected, to the extent of the capital so employed, to the same burdens and obligations as a domestic corporation. The tax is not imposed upon its property, but for the privilege which is extended to it by the state of doing business here as a corporation and in its corporate name. Since the statute has been amended so as to make the amount of capital used in this state the basis of the tax, the amount of business transacted here is of much less importance than formerly. If but a very small part of the corporate business is done here, and but a small part of the capital employed here, then the tax is correspondingly light. The facts in this case show that during the year for which the assessment was made, the relator employed a portion of its capital and conducted a substantial part of its business operations within this state, and that was enough to subject it to the obligation to defray some part of the public burdens. The statute in question, in its application to corporations created by the laws of another state and doing business here, has been frequently construed by this court, and the principles applicable to such cases stated. The facts of this case bring it within the rule of liability enunciated in these cases: *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Horn Silver Mining Co.*, 105 N. Y. 76; *People v. Wemple*, 129 N. Y. 548.

The statute under which the tax in question was imposed is not in conflict with the provisions of the federal constitution, which confers upon Congress the exclusive power to regulate commerce between the states. Though the relator is a New Jersey corporation, its principal manufacturing operations are carried on in the southern or cotton-producing states. For the purpose of disposing of its product, it is necessary or convenient to establish and keep an agency in the city of New York, and to employ some part of its capital here, though it may be a comparatively small part, and to sell a considerable part of the product of its factories here. All this it does in its corporate name and character. The state has the power to exclude corporations of other states from doing business within its jurisdiction. If, however, it permits them to come here and transact their business, it may impose a tax upon them for this privilege, and this is not a regulation by the state of interstate commerce, but a lawful exercise of the power of taxation upon corporate bodies that for the time being are within its jurisdiction for that purpose. If the contention of the learned counsel for the relator should prevail, then any manufacturing corporation in other states, or even in a foreign country, could come here and establish an office or agency, and transact a part, or even the whole, of its business here, and escape taxation entirely, upon the ground that it was engaged in selling some part of its product in other states or in foreign countries, and therefore was engaged in interstate or foreign commerce, within the meaning of the federal constitution. The commercial clause of the federal constitution does not preclude the states from exercising the power of taxation in such a case as is disclosed by this record. The cases in which statutes enacted by the states have been held invalid as regulations of commerce were stated by Mr. Justice Field in *Sherlock v. Alling*, 93 U. S. 102. As those legislative acts which "imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribe conditions in accordance with which commerce in particular articles, or between particular places, was required to be conducted." They are all cases which operate directly upon commerce. In another part of the same opinion the learned judge explains the scope and meaning of the provision conferring upon Congress exclusive power

to regulate commerce. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of its citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution." The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or to exact conditions for such a privilege, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 12; *Pembina etc. Mining Co. v. Pennsylvania*, 125 U. S. 181, 190.

The cases are numerous in the highest federal court where legislation such as that now under consideration has been held to be valid, and none of the cases cited by the learned counsel for the relator hold that a state statute imposing a tax upon a manufacturing corporation of another state for the privilege of doing business here is invalid: *State Freight Tax Cases*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284; *Delaware R. R. Tax Case*, 18 Wall. 208; *Erie R'y Co. v. Pennsylvania*, 21 Wall. 492; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 119; *Smith v. Alabama*, 124 U. S. 482; *Home Ins. Co. v. New York*, 134 U. S. 599; *Marye v. Baltimore and Ohio R. R.*, 127 U. S. 123. The property of a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in the same business; but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as interference with and obstruction of the power of Congress in the regulation of commerce: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 211.

The obligation imposed upon the relator by the act of 1881, to pay a tax to the state treasury as a condition of enjoying the privilege of transacting business here, does not, in our opinion, conflict with any provision of the federal constitution,

The judgment of the general term should be affirmed. with costs.

INTERSTATE COMMERCE, CONSTITUTIONALITY OF STATE REGULATIONS OF. — *Constitutional Provisions.* — One of the powers conferred upon the Congress of the United States by section 8 of article 1 of the national constitution is that of regulating commerce “with foreign nations, and among the several states, and with the Indian tribes.” Among the limitations of the powers of the individual states contained in section 10 of the same article are, “that no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress,” and “no state shall, without the consent of Congress, lay any duty on tonnage.” The object of this note is to aid in determining what legislation on the part of the states may be disregarded and pronounced invalid, either because it is upon a subject committed to Congress by section 8, or upon which the states are expressly forbidden to act by section 10; in other words, in determining what state legislation is invalid for the reason that it interferes with interstate commerce or with commerce with a foreign nation.

Concurrent Authority of Congress and of the State Legislatures. — One of the most difficult questions to decide was, whether or not the clauses of the constitution which we have quoted left any concurrent power in the states over the subjects to which those clauses relate. With respect to the prohibitions mentioned in section 10, there could be no doubt that they excluded or annulled all state action except upon the conditions there prescribed. But the power given Congress by section 8, “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” is not in terms exclusive; and if the power of the states to act upon the same subject is excluded, or to the extent to which it is excluded, the exclusion results from the impossibility of there existing two sovereigns having at the same time the right to regulate and control the same subject-matter. There can never have been any reasonable doubt that when Congress exercised to any extent the power given it to regulate commerce, whatever it did within the limits of the power conceded to it was paramount to any state action and beyond the reach of any state annulment. But many regulations which directly or indirectly affect commerce with foreign nations or among the several states may be enacted which do not conflict with any pre-existing regulation of commerce, and against the policy of which the national legislature has never spoken. Do these regulations remain in force until the national legislature prescribes some rule inconsistent with them? or does the mere grant of the power to Congress exclude all state action, whether Congress thinks proper to exercise its powers or not? “The doctrine now firmly established is, that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration

that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted": *Bowman v. Chicago etc. R'y Co.*, 125 U. S. 507; *Leisy v. Hardin*, 135 U. S. 108; *Welton v. State of Missouri*, 91 U. S. 275; *County of Mobile v. Kimball*, 102 U. S. 691; *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569.

Considering the objections made to a statute of the state of Mississippi, providing for the improvement of the river, harbor, and bay of Mobile, Mr. Justice Field, speaking for the supreme court of the United States, said: "The objection that the law of the state, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of state authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between citizens of the several states, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity in their regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation": *Mobile County v. Kimball*, 102 U. S. 696.

There may, in some instances, be a difficulty in determining whether the regulation in question is upon a subject "national in its character," and which "admits and requires uniformity of regulation, affecting alike all the states"; but if it is ascertained to belong to that class, then it is now established that it must be disregarded. "As the grant of power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the consent of Congress, and in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or in other words, what is or is not a regulation of such commerce. When that is determined, the controversy is at an end": *Leisy v. Hardin*, 135 U. S. 100.

Speaking upon the same topic, Mr. Justice Bradley, in *Brown v. Houston*,

114 U. S. 630, said: "The power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power, if in the absence of congressional action the states may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley v. Board of Wardens*, 12 How. 319, the power of Congress is exclusive wherever the matter is national in its character, or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the states is repugnant to such freedom."

The following state regulations have been held to affect matters national in their character, and admitting and requiring uniformity of regulation, and therefore to be invalid, though not in conflict with any regulation prescribed by Congress: Imposing taxes on any passenger from a foreign country landing at a port of this state: *People v. Compagnie Generale*, 107 U. S. 59; prohibiting common carriers from bringing intoxicating liquors from any other state or territory without first being furnished with a certificate as prescribed in the state statute: *Bowman v. Chicago & N. W. Railway*, 125 U. S. 508; exacting the payment of a specific sum per week or month from all persons selling merchandise by sample: *Robbins v. Shelby Taxing District*, 120 U. S. 493; taxing freight transported from state to state: *State Freight Tax Cases*, 15 Wall. 232; granting exclusive rights to establish and maintain electric telegraph lines: *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; or to navigate all the waters within the jurisdiction of the states, with boats moved by fire or steam: *Gibbons v. Ogden*, 9 Wheat. 1; requiring all persons engaged in the transportation of passengers among the states to give all persons traveling within the state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color: *Hull v. De Cuir*, 95 U. S. 485; imposing a tax on the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state: *Fargo v. Michigan*, 121 U. S. 230; or upon the gross receipts of a steamship company, derived from the transportation of persons and property by sea between different states: *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326. Various other regulations of the character here under consideration are referred to in other parts of this note, under appropriate headings. The views ultimately prevailing in the supreme court of the United States upon this subject were first most distinctly promulgated by Judge Curtis in his opinion in *Cooley v. Board of Wardens*, 12 How. 318, in which he said: "The diversities of opinion, therefore, which have existed upon this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as

to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The ultimate views of the supreme court upon this subject, together with the authorities supporting them, are well represented by the following extract from the opinion of Mr. Justice Bradley, speaking for the court in *Robbins v. Shelby Taxing Dist.*, 120 U. S. 492: "1. The constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. This was decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, and was virtually involved in the case of *Gibbons v. Ogden*, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others in *Brown v. Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35, 42; *Ward v. Maryland*, 12 Wall. 418, 430; *State Freight Tax Cases*, 15 Wall. 232, 279; *Henderson v. Mayor of New York*, 92 U. S. 259, 272; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557. 2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 222, by Mr. Justice Grier in the *Passenger Cases*, 7 How. 283, 462, and has been affirmed in subsequent cases: *State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557. 3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is, when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belong-

ing to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state mingled with and forming part of the great mass of property therein. But in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject."

Among the state regulations incidentally affecting interstate commerce, which have been held to be enforceable and valid, on the ground that they were local rather than national in their scope and object, or related generally to the rights, duties, and liabilities of citizens, and affected the operations of foreign or interstate commerce only indirectly or remotely, are the following: Statutes creating liabilities for marine torts, and permitting their enforcement after the death of the person injured: *Sherlock v. Atling*, 93 U. S. 99; *Steamboat Co. v. Chise*, 16 Wall. 522; or prohibiting the floating of loose sawlogs in a navigable river within the state, "without the same being rafted or joined together or inclosed in boats, and under the control, supervision, and pilotage of men especially placed in charge of the same and actually thereon": *Craig v. Kline*, 65 Pa. St. 399. Other local regulations which are permitted to incidentally affect interstate and foreign commerce are mentioned in different parts of this note, the principal of which may be found under the headings, "Navigation — Rivers, Obstruction of," "Ferries," "Wharfage Fees," "Pilots and their Charges," "Regulation of Common Carriers," "The Police Power and Interstate Commerce," "Quarantine Laws," etc.

New Subjects and Instrumentalities of Commerce. — The power given to Congress to regulate commerce is not restricted to commerce and its instrumentalities existing at the time of the adoption of the constitution, but extends to all subjects of commerce and all means of carrying it on, whether known or anticipated when the constitution was adopted or not. Hence, though an invention is recent, yet if it, as in the case of the electric telegraph, becomes one of the instrumentalities of commerce, any state regulation of it, or of its use which amounts to a regulation of commerce, is prohibited: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Atlantic Tel. Co.*, 5 Nev. 102; *Yates v. Milwaukee*, 10 Wall. 497.

What is Commerce. — "Commerce undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse"; and it therefore includes navigation by or through which commerce is carried on between two or more states or with a foreign nation: *Gibbons v. Ogden*, 9 Wheat. 1; *Moor v. Veazie*, 32 Me. 343; 52 Am. Dec. 655; *Veazie v. Moor*, 14 How. 568. "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens

or subjects of other countries, or between citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted": *Welton v. State of Missouri*, 91 U. S. 280. "Commerce is the interchange or mutual change of goods, productions, or property of any kind, between nations or individuals. Transportation is the means by which commerce is carried on; without transportation, there could be no commerce between nations or among states. Any regulation of the transportation of interstate commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication affecting commerce, operates as a regulation of commerce itself": *Council Bluffs v. Kansas City etc. R. R. Co.*, 45 Iowa, 338; 24 Am. Rep. 773. It is obvious that if the several states could regulate transportation or the other means by which commerce must be or is ordinarily carried on, they could thereby indirectly regulate commerce itself. Therefore no state regulation of the instrumentalities of interstate commerce is admissible. Hence a vessel engaged in navigation between different states, or telegraph or telephone companies employed in interstate commerce, are, except as to purely domestic commerce, not affected by state regulations unless local in their character, and such as must necessarily be included with the police powers of the state: *The Daniel Ball*, 10 Wall. 557; *Leloup v. Mobile*, 127 U. S. 640; *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *ante*, p. 462.

Commerce when Begins so as to Protect Subjects of. — The fact that articles or a class of articles are proper subjects of interstate commerce, or that they are intended to be employed in such commerce, does not relieve them from the authority of the state to make regulations concerning them. When they begin to move from one state to another as articles of trade, then commerce commences: *The Daniel Ball*, 10 Wall. 557. If goods are in course of transportation through a state, though detained within it by some cause of delay, "they are in the course of commercial transportation, and are clearly under the protection of the constitution. There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be the legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination": *Coe v. Errol*, 116 U. S. 525. Until this moment arrives, they cannot be within the protection "of the national law of commercial regulation," though there is an intention to export them, and they have been brought from the place of their growth or manufacture to some point or station for the purpose of exporting them thence by railroad or some other means of transportation there available: *Coe v. Errol*, 116 U. S. 517; *Turpin v. Burgess*, 117 U. S. 504; *Turner v. Maryland*, 107 U. S. 38. If an article of commerce is such that the state, in the lawful exercise of its police powers, may prohibit its manufacture within the state, on the ground that it is injurious to the health or morals of its inhabitants, or for some other sufficient reason, the exercise of the police power cannot be avoided or invalidated by the claim, whether true or false, that the articles, if their manufacture is allowed by law, will become subjects of interstate commerce: *Beer Co. v. Massachusetts*, 97 U. S. 25; *Kansas v. Zeibolt*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Powell v. Pennsylvania*, 127 U. S. 678.

Commerce, Termination of Right of Subjects of, to Protection. — While the commencement of transportation is also the commencement of the right of the articles transported to protection as articles of interstate commerce, the completion of such transportation does not terminate the right to such protection.

It is manifest that the right to regulate commerce as soon as the subjects of it reach a state, or place in the state, where their owners desire to sell or engage in traffic with them would be equivalent to a right to regulate commerce between states, and to impose regulations at variance with those imposed by Congress, or to enforce restrictions where Congress intended all should be free from restraint. Therefore, though an article is such that the state, in the exercise of its police powers, may forbid its manufacture in the state, or its sale if there manufactured, still if it is an article of commerce, the state has no power to impose any regulation or restriction which will prevent its being brought within the state, or its sale at any time after its arrival, and while it remains in original packages: *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *State v. Intoxicating Liquors*, 83 Me. 158. The protection to the importer ceases when he has so acted that the property imported becomes "incorporated and mixed up with the general mass of property in the country, which happens when the original package is no longer such in his hands": *Brown v. Maryland*, 12 Wheat. 419; *Low v. Austin*, 13 Wall. 29; *Keith v. State*, 91 Ala. 1. The only question remaining to be finally determined is, What is an original package, and the breaking thereof, within the meaning of these decisions? As to size or quantity, there can be no doubt that the importer may, in the absence of congressional legislation to the contrary, make it as large or small as to him may seem convenient or desirable for accomplishing the purpose he has in view of transporting his property from one state and making it a subject of sale or exchange in another.

Original Packages. — "Evidently the 'original package' referred to in these decisions was and is the package of the importer as it existed at the time of its transportation from one state into the other. The whole subject has relation to commerce and to interstate commerce, and to nothing else. Hence the words must mean the package as transported by the importer himself, or by his agent, either a common carrier or a private carrier, for the purposes of commerce; and therefore it would seem that it is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. Certainly an importer has as much right, under the federal constitution, to import into a state and sell against its laws a single gill of intoxicating liquor as he has to import into such state and sell against its laws a gallon or a barrel or a hogshead of the same interdicted article. In some cases of interstate commerce it would scarcely seem necessary that any package should be used. For instance, in the transportation of live-stock, the individual articles transported might be horses, cows, sheep, or hogs, and these articles might be very large or very small, even little pigs, and none of them placed in packages": *State v. Winters*, 44 Kan. 728.

An importer of articles of commerce from one state into another may, if he chooses, ship them in small boxes or bottles, and the smallness of the box or bottle cannot prevent it from being entitled to protection as an original package: *In re Beine*, 42 Fed. Rep. 545; *Keith v. State*, 91 Ala. 1. But he may, on the other hand, find it more convenient, or that his property is less liable to breakage or destruction, when he incloses two or more bottles or boxes within something, as with a cord, a paper wrapper, or a larger box. On what principle are the articles thus protected or united to be treated differently from the treatment applicable to them when they are shipped separately? If two or more bottles happen to be tied together with a cord, or inclosed in a paper or other wrapper, does the cutting of the cord or the

tearing of the wrapper deprive their owner of the protection of the constitution? And what is there in the language of the constitution to indicate that one transporting goods from one state to another should not be entitled to sell them by retail as well as by wholesale, or that his right to sell in either manner should be dependent on the form or size of the package in which he happens to ship them. We think that the use of the term "original package" was merely intended to furnish one of the tests by which it could easily be ascertained whether the articles in question were the same articles imported, and to assert that because they were still in such packages, they could not have been commingled with other articles, and were therefore undoubtedly still entitled to protection. But there is no reason why this test should be exclusive, nor have we seen any case in the national courts in which articles still in the possession and ownership of the importer have been denied protection because, when imported, they were boxed up or inclosed with other articles from which they have since been separated; but in some of the state courts, bottles of intoxicating liquors, which had they been shipped separately would have been treated as in original packages and entitled to protection, have been decided to have lost their immunity because taken out of the boxes in which they were shipped before being exposed for sale: *Smith v. State*, 54 Ark. 248; *Keith v. State*, 91 Ala. 2; *Wade v. State*, 63 Vt. 80.

Navigation — Rivers, Obstruction of. — While, as we have heretofore shown, the power to regulate commerce includes the power to regulate navigation, and, as a general rule, that any state regulation of navigation which affects interstate commerce is so far inoperative and void, still there are regulations of a local character which a state may lawfully enact and enforce, which indirectly affect navigation, and through it interstate commerce, and which are nevertheless upheld. Thus the construction and maintenance of a bridge across a navigable stream, while it tends to interfere with navigation, and to that extent to obstruct commerce, may aid transportation across the stream, and the advantage which it affords commerce may exceed the detriment to it arising from the obstructions to navigation. The local legislature, in the absence of any congressional action upon the subject, is permitted to determine whether commerce is best promoted by a bridge or not, and therefore any enactment by the state upon this subject is controlling, unless it conflicts with national legislation: *Gilman v. Philadelphia*, 3 Wall. 713; *Veazie v. Moor*, 14 How. 568; *Willamette Iron Bridge v. Hatch*, 125 U. S. 1; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Hamilton v. Vicksburg R. R. Co.*, 119 U. S. 280; *Huse v. Glover*, 119 U. S. 543; *State v. Leighton*, 83 Me. 419. So there are instances where dams across navigable streams may promote rather than hinder commerce, as where by such dams the capacity of rivers for water carriage is increased. "In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantially obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter": *Pound v. Turck*, 95 U. S. 459.

When, however, Congress interposes to sanction or condemn an obstruction to navigation, its authority is paramount and its action conclusive. Hence, after it has authorized the maintenance of a bridge, it can no longer be pro-

ceeded against as unlawful, and when, on the other hand, it condemns a bridge or a particular class of bridges, or other obstructions, they can no longer be defended as innocent and lawful: *Newport & C. Bridge Co. v. United States*, 105 U. S. 471, 499; *The Clinton Bridge*, 10 Wall. 454; *Miller v. Mayor*, 109 U. S. 385. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the states, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the Parliament of England": *South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 724; *Thames Bank v. Lovell*, 18 Conn. 500; 46 Am. Dec. 332.

Rivers, Improvements, Charging Tolls for Use of. — The legislature of a state may authorize the improvement of a river within its limits by opening, widening, deepening, or straightening it, or changing its general course, and may authorize tolls to be charged all persons using it, as compensation for the advantage derived by them from its use in its improved condition: *Withers v. Buckley*, 20 How. 84; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288; *Ruggles v. Improvement Co.*, 123 U. S. 297; *Huse v. Glover*, 119 U. S. 543; *McReynolds v. Smolthouse*, 8 Bush, 447; *Thames Bank v. Lovell*, 18 Conn. 500; 46 Am. Dec. 332; *Wisconsin R. etc. Co. v. Manson*, 43 Wis. 255; 28 Am. Rep. 542; *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; 29 Am. Rep. 339.

Ferries. — The earlier cases in the national courts indicate that the states have the right to grant ferry licenses, and the privilege of maintaining ferries over navigable waters within their limits, although the opposite shore on which the ferry must land is in another state, and that a license fee may be imposed on the keepers of ferries living in a state, for boats owned by them and used in ferrying passengers and goods from a landing in the state across a navigable stream to a landing in another state: *Carroll v. Campbell*, 17 S. W. Rep. 884; Mo., Dec. 1891; *The Lottawanna*, 21 Wall. 577; *Fanning v. Gregoire*, 16 How. 534; *Conway v. Taylor's Ex'rs*, 1 Black, 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. Nor do we understand the later decisions as denying "that the privilege of keeping a ferry, with a right to take tolls for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such restrictions as may be required for the safety, comfort, and convenience of the public"; but they do make it clear that no taxes can be imposed upon the property used in the business of maintaining and operating a ferry between two or more states, the effect of which may be to regulate interstate commerce, and that such property is exempt "from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property": *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

Wharfage Fees. — A city or state may have improved landings or erected wharves on a navigable stream or in a harbor. If so, it may charge for the use of such landing or wharf, and may declare that the compensation for such

use shall be proportionate to the size or tonnage of the vessel, and the regulation imposing and enforcing such compensation is not objectionable either as a regulation of commerce or as a tax on tonnage: *Worsley v. Second Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333; *Sweeney v. Otis*, 37 La. Ann. 520; *Cincinnati etc. Co. v. Catlettsburg*, 105 U. S. 559. "A duty on tonnage is a charge for the privilege of entering or trading or lying in a port or harbor; wharfage is a charge for the use of a wharf"; and if a city owning a wharf adopts an ordinance whereby specific charges "for landing at or using it are imposed as and for wharfage," such charges cannot be avoided or the ordinance declared invalid on the ground that they are excessive, and "constitute but a duty on tonnage, in the name and under the pretext of wharfage." The intent of the legislative body imposing charges professedly for wharfage cannot be ascertained and thwarted by extrinsic evidence: *Parkersburg etc. Trans. Co. v. Parkersburg*, 107 U. S. 691; *Ouachita P. Co. v. Aiken*, 121 U. S. 444; *Robbins v. Shelby Tax Dist.*, 120 U. S. 489. If, however, an ordinance or statute imposing wharfage discriminates between vessels laden with the products of different states, it cannot be sustained; as where vessels laden with the products of the state are exempt from charges to which vessels bearing the products of other states are subject: *Guy v. Baltimore*, 100 U. S. 434. With the exception that discriminations will not be allowed which might in themselves operate as regulations of interstate or of foreign commerce, "wharfage, the matter now under consideration, is governed by the local state laws; no act of Congress has been passed to regulate it. By the state laws it is generally required to be reasonable, and by those laws its reasonableness must be judged. If it does not violate them, as before said, the United States courts cannot interfere to prevent its exaction. Of course, neither a state nor any municipal corporation under its authority can lay duties on tonnage; for that is expressly forbidden by the constitution; but charges for wharfage may be graduated by the tonnage of the vessels using a wharf, and that this is not a duty on tonnage within the meaning of the constitution has been distinctly held in several cases": *Ouachita P. Co. v. Aiken*, 121 U. S. 448.

Tonnage, What Forbidden as a Charge upon. — Although the decisions of the national courts sanction charges for wharfage, and the exaction of port charges for various services which may be rendered to vessels engaged in commerce, and receiving benefits from the facilities afforded to them by the erection of wharves and the like, it must not be forgotten that the national constitution declares that "no state shall, without the consent of Congress, lay any duty on tonnage," and that any state exaction which amounts to such a duty cannot be enforced. Any system of taxing vessels which, instead of taking their value as a basis of taxation, imposes a tax to be computed upon and according to their tonnage is unconstitutional: *State Tonnage Tax Cases*, 12 Wall. 204. Because the authorities show that where a vessel is chargeable with wharfage or for other services rendered to it such charge may be proportioned to its tonnage, it is often difficult to determine whether a charge to be ascertained from the tonnage of the vessel chargeable is invalid as an exaction of tonnage, or sustainable as a compensation due for services rendered. But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, and from the mere fact that it has arrived in a port of the state, it is a charge on tonnage, and therefore not collectible. "It is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the

capacity of the vessel, and is, in its essence, a contribution claimed for the privilege of arriving or departing from a port of the United States, is within the prohibition": *Cannon v. New Orleans*, 20 Wall. 581; *Inman Steamship Co. v. Tinker*, 94 U. S. 238. Nor can an exaction be enforced on the ground that it is intended as wharfage, and entitles the vessel charged with it to the use of a wharf, if it is equally chargeable whether a wharf is used by it or not. "A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of a stream or out in a bay, or landed at a natural river bank, cannot be treated as compensation for the use of the wharf": *Cannon v. New Orleans*, 20 Wall. 581; *Inman Steamship Co. v. Tinker*, 94 U. S. 238. While the states have power to establish quarantine laws and regulations, and to provide the revenue necessary for their enforcement, this power must be exercised in subordination to the constitution of the United States, and the requisite revenue cannot be raised by charges imposed upon vessels, to be computed upon their respective tonnages: *Peete v. Morgan*, 19 Wall. 581. The essential test of a tax on tonnage "is, that it is imposed, whatever be the subject, solely according to the rule of weight, either as to capacity to carry or the actual weight of the thing itself": *Inman Steamship Co. v. Tinker*, 94 U. S. 238.

Pilots and their Charges. — That the regulation of pilots and pilotage is a regulation of commerce is conceded. "A pilot is as much a part of the commercial marine as is the hold of the ship and the helm by which it is guided"; and there is no doubt that Congress may, whenever it chooses, take full control of the matter of regulating pilots and pilotage; and a statute of a state will not be permitted to make any exaction or discrimination in conflict with the national legislation: *The Alameda*, 31 Fed. Rep. 386; *Freeman v. The Undivided*, 37 Fed. Rep. 662. In the absence of any action on the part of Congress, each state has power to enforce regulations concerning pilots and pilotage in and approaching its harbors: *Cooley v. Board of Wardens*, 12 How. 299. Congress has sometimes expressly given its consent to such regulations, and at other times has made regulations of its own with respect to certain matters; but the decisions concur in declaring, that, except to the extent that Congress has acted, each state may act for itself: *Ex parte McNeil*, 13 Wall. 236; *Wilson v. McNamee*, 102 U. S. 572; *Sprague v. Thompson*, 118 U. S. 90. A statute, however, declaring that the master and port-wardens of a port within the state shall be entitled to demand and receive a specified sum, whether called upon to perform any service or not, from every vessel arriving in that port, has been held void, both as a regulation of commerce and as a duty on tonnage. This statute was thought to differ essentially from the statutes imposing charges for pilotage, because pilots are not by this statute allowed to recover compensation, except for services either performed or tendered, while the statutes declared void created a liability against vessels, whether services were performed or tendered, or not: *Steamship Co. v. Port-wardens*, 6 Wall. 31. A statute making it the duty of the master and wardens of a port to offer their services, and make a survey of the hatches of all sea-going vessels which should arrive at that port, and declaring that no persons other than such master or wardens, or their deputies, should make any such survey or any survey of damaged goods coming on board such vessels, or give certificates or orders for the sale of such goods at auction, was also adjudged to be void as a regulation both of foreign and interstate commerce: *Foster v. Master etc. of New Orleans*, 94 U. S. 246.

Discriminations in Favor of the Products or Manufactures of the State. —

One of the most natural attempts at the indirect regulation of commerce is to impose some restriction or prohibition, or to grant some privilege or exemption, which will probably or certainly especially encourage the manufactures or products of one state, or discourage the introduction, sale, or use of the products or manufactures of some other state. Instances of legislation of this character which have been held void include the following: Statutes prohibiting all persons from selling wine in the state, but excepting from their provisions persons who grow grapes or berries, and make wine therefrom, and sell it on the premises where such grapes or berries are grown, or in any other place where the sale of intoxicating liquors is licensed: *State v. Deschamp*, 53 Ark. 490; *Bogan v. State*, 84 Ala. 449; or imposing taxes on persons engaged in the business of selling liquors at wholesale, or taking orders for such liquors to be shipped into the state from any place out of the state not having their principal place of business in the state, and not imposing a like tax on persons engaged in a like business in reference to liquors manufactured within the state: *Wallung v. Michigan*, 116 U. S. 446; or levying taxes on persons selling liquors not manufactured within the state: *Tiernan v. Rinker*, 102 U. S. 123; or requiring any person who shall sell or offer for sale the manufactured articles or machines of other states or territories, unless he be the owner thereof and taxed as a merchant, to take out a license, and to pay a specified sum therefor: *Webber v. Virginia*, 103 U. S. 344.

Restrictions upon Transportation. — State legislation may also attempt to discourage or prohibit the transportation of articles of commerce into, out of, or across the state in professed exercise of the police power, or upon some other ground supposed to be tenable. Of course, any such interference with transportation necessarily interferes with commerce. There may be circumstances which will justify it as an exercise of the police power, and whether and when this is so we shall consider hereafter. But it is generally true, that the police power of the states will not be suffered, without the permission of Congress, to interpose any restriction amounting to a regulation of commerce, either among the states or with a foreign nation. A statute imposing a tax or charge on the landing of passengers: *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Smith v. Turner*, 7 How. 283; or a charge against persons or property going out of or coming within a state, or any prohibition against the arrival or departure of persons or property, or tending to prevent the receipt or sale of property while in the original packages in which it was imported, — is void, because it is an attempted regulation of commerce: *State v. Stilsing*, 52 N. J. L. 517; *Bowman v. Chicago & N. W. R'y*, 125 U. S. 465; *State v. Saunders*, 19 Kan. 127; *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774; *State v. Intoxicating Liquors*, 83 Me. 158. Natural gas is an article of commerce, subject to purchase and sale, and to be transported from one place to another. A statute, therefore, declaring it to be unlawful for any person "to pipe or conduct natural gas from any point within this state to any point or place without this state," and that any person or corporation permitting such gas to be carried through its pipes to any place without the state, shall forfeit all right, title, and interest in and to the real property used or held for the purpose of mining for natural gas, is unconstitutional: *State v. Indiana etc. Co.*, 120 Ind. 575.

The Regulation of Common Carriers necessarily includes transportation, and therefore commerce; and when such regulation is undertaken by a state, its operation cannot extend to interstate commerce or commerce with a foreign nation. Therefore, a statute fixing rates for the transportation of freight or passengers: *Wabash etc. R'y v. Illinois*, 118 U. S. 557; *Hardy v. Atkinson etc.*

R. R. Co., 32 Kan. 698; *State v. Chicago etc. R. R. Co.*, 40 Minn. 267; 12 Am. St. Rep. 730; *State v. Chicago etc. R. R. Co.*, 70 Iowa, 162; *S. C. R. R. Comm'rs v. R. R. Co.*, 22 S. C. 220; *Commonwealth v. Housatonic R. R. Co.*, 143 Mass. 264; *Gulf etc. Ry v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926; or declaring that certain discriminations shall or shall not be made between certain classes of passengers: *Hall v. De Cuir*, 95 U. S. 485, — is invalid if construed as applying to interstate commerce, and is valid if restricted by its terms or by the decision of the state court to commerce transacted wholly within the state: *Railroad Commission Cases*, 116 U. S. 307; *Downham v. Alexandria Council* 10 Wall. 173; *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587. But it is said that "where the state legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not acted, or has not the authority to afford so complete a remedy for the evil as the state legislature, there can be no question about the validity of such legislation, or the duty of the state courts to enforce it," and therefore, that a state may by statute impose a penalty upon all railway companies for a failure to ship freight within five days, though such statute operates alike upon freight to be shipped outside as well as inside the state: *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569.

"A *Telegraph Company* occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits": *Telegraph Co. v. Texas*, 105 U. S. 464; *Pensacola T. Co. v. Western Union Tel. Co.*, 96 U. S. 1. Therefore, a state cannot tax each message sent out of the state: *Telegraph Co. v. Texas*, 105 U. S. 460; nor can it regulate "the transmission or delivery of interstate telegrams, even within its own borders." "The whole subject of the transmission and delivery of interstate telegrams is, it seems, a subject national in its character and admits safely of only one uniform plan of regulation. But however it may be as to the regulation by a state of the transmission and delivery of such telegrams within its own boundaries, it seems certain that no power exists in a state to regulate the mode and order of transmission and delivery of interstate telegrams, starting from points within its own territory, after such telegrams have passed the state line and are within the boundaries of other states": *Western Union Tel. Co. v. Pendleton*, 122 U. S. 355. "These principles are as applicable to messages by telephone as to merchandise. There can be no reasonable distinction between the office of common carrier of telephone and the office of a common carrier of goods by railway or steamboat": *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; ante, p. 462.

Taxes on Subjects of Commerce. — A tax imposed upon the subjects of interstate or foreign commerce, or a license fee exacted of persons engaged in such commerce, might not merely discourage such commerce, but in extreme cases be equivalent to its prohibition. "The power to tax includes the power to destroy," and therefore the taxation of interstate or foreign commerce without restriction cannot be conceded without at the same time conceding the power to destroy it. Doubtless every form of taxation directly imposed upon interstate or foreign commerce, or its instrumentalities or operations, is prohibited to the states, and the only question is, how far it may be incidentally imposed without falling within the inhibition implied from the exclusive power of Congress to regulate such commerce. A tax cannot be laid by a

state on the amount of sales made by auctioneers, and requiring the sum payable to be greater in the case of articles grown or manufactured in other states than upon articles which are grown or manufactured in the state wherein they are sold: *Cook v. Pennsylvania*, 97 U. S. 566; nor upon passengers departing from (*Crandall v. Nevada*, 6 Wall. 35) or coming within the state: *People v. Compagnie Generale*, 107 U. S. 59; *Henderson v. Mayor of New York*, 92 U. S. 259; whether aliens or not; nor upon messages sent by a telegraph or telephone corporation out of the state or received within the state from another state: *Batterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *ante*, p. 462; nor can a statute imposing a tax upon the gross receipts of persons or corporations engaged in transportation be enforced against a corporation engaged in interstate commerce. If a railroad corporation transports goods from one portion of a state to another, but in so doing necessarily passes through part of another state, it is not engaged in interstate commerce, and a state tax levied upon such transportation is not invalid: *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192.

Taxes, when may be Levied on Subjects or Instrumentalities of Commerce. — On the other hand, it is no objection to a tax that it may fall upon subjects of interstate commerce, or affect persons engaged in such commerce, if these results are incidental, and do not flow from apparent attempts to regulate commerce or the persons transacting it, but from the fact that such subjects or persons are affected in the same way or to the same extent as other persons or subjects are affected. A tax upon all the sales of goods made within a state is valid, and may be enforced against persons who have sold goods imported from other states or territories, though such goods remain in the original packages in which they were imported, though such taxes are not enforceable against the importers themselves in making the first sale after importation: *Woodruff v. Parham*, 8 Wall. 123; *Waring v. Mayor*, 8 Wall. 110; *Hinson v. Lott*, 8 Wall. 148. A tax may be levied on all peddlers of sewing-machines, and one cannot escape such tax by proving that the machines which he sells were manufactured in another state: *Machine Co. v. Gage*, 100 U. S. 676. If a man has moneys on hand on the day when they are assessed, he cannot escape taxation on the ground that he uses his capital in interstate or foreign commerce by investing it in cotton for exportation to foreign countries: *People v. Commissioners*, 104 U. S. 466. The owners of property are not entitled to have it exempted from state or local taxation because of its employment in interstate commerce: *Delaware Railroad Tax*, 18 Wall. 206; *Horn S. M. Co. v. New York*, 143 U. S. 205. Taxes may be imposed on railroads though established by Congress: *Railroad Co. v. Peniston*, 18 Wall. 5; though not on franchises granted to such railroads by the United States: *California v. Central Pacific R. R. Co.*, 127 U. S. 1. "It is well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce, like other personal property within its jurisdiction. Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port at which they are registered under the laws of the United States at the domicile of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only

at their legal situs, **their home port and the domicile of their owners:** *Pullman Car Co. v. Pennsylvania*, 141 U. S. 23. In other words, property employed in interstate commerce is subject to taxation by the states, though there may be some difficulty in determining in what state it may be taxed, or the extent to which it may be taxed in several different states. The business in which it is employed makes necessary its frequent passage from one state to another, so that during each fiscal year it may be at different times in several states, or even in all the states of the Union. To tax it in each state might paralyze interstate commerce, and to altogether exempt it from taxation would be to exempt from the burdens of local government vast amounts of property well able to share such burdens, and constantly in need and receipt of protection afforded by the state and municipal governments, and paid for out of the fruits of state and municipal taxation. A subject of commerce, or an instrumentality of carrying it on, is not liable to taxation in the state from the mere fact that it happens to pass through, or even to rest for a short time therein, while in process of transportation: *State Freight Tax Cases*, 15 Wall. 232. But as to these instrumentalities of commerce which are constantly passing from state to state, whether they are wholly taxable in one state or not, some system may be employed which will subject them to taxation in the states through which they pass, so far as may be just under the circumstances. Thus, if a sleeping-car corporation is engaged in running its cars in, through, and out of a state, and has at all times a number of such cars within its territory, it is subject to a statute applicable to all corporations engaged in the transportation of freight or passengers, and requiring them to pay taxes based upon an assessment, the basis of which is, "such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment, and if it were adopted by all the states through which these cars ran, the company would be assessed upon the full amount of its capital stock, and no more": *Pullman Car Co. v. Pennsylvania*, 141 U. S. 23; *Pullman Car Co. v. Hayward*, 141 U. S. 36; *State v. Pullman Car Co.*, 64 Wis. 89. So a state may impose taxes upon each corporation doing business within the state, for the privilege of there exercising its franchise, to be determined, when the corporation is engaged in transportation, by the gross amount of its receipts, and that when the corporation is doing business partly within and partly without the state, the tax should be equal to the proportion of the gross receipts of the state, to be ascertained as follows: "The gross transportation receipts of such railroad line or system, as the case may be, over its whole extent within and without the state, shall be divided by the number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile multiplied by the number of miles operated in this state." This statute was sustained, on the ground that it was not a tax upon interstate commerce, and that the means adopted were intended solely for the purpose of determining the amount of business transacted within the state, and of levying a tax thereon: *Maine v. Grand Trunk R'y Co.*, 142 U. S. 217.

Licenses Which State may Exact. — The principles to which we have referred as applicable to taxation are equally applicable to license fees exacted for the privilege of doing business within a state. A state may exact a license fee from persons carrying on business within its territory, without rendering its action in so doing subject to the objection that it is attempting to regulate interstate or foreign commerce, provided it does not discriminate in favor of

its people, products, or manufactures, nor charge persons importing articles of commerce within the state for the privilege of there disposing of them. "No doubt can be entertained of the right of a state legislature to tax trades, professions, or occupations, in the absence of inhibitions in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partly in negotiating sales between resident and non-resident merchants of goods situated in another state, does not involve the taxation of interstate commerce, forbidden by the constitution": *Ficklen v. Shelby Co.*, 145 U. S. 1. A license tax may be exacted of persons buying and selling on commission or otherwise doing business within the state, and estimated, when they have no capital invested, on their gross yearly commissions or charges, though the business transacted by them was for principals residing in other states, and the goods sold by them for such principals were to be shipped into the state in which the brokers did business: *Ficklen v. Shelby Co.*, 145 U. S. 1. A tax imposed on merchants and other dealers, of one tenth of one per cent of their purchases, whether made within or without the state, except on purchases of farm products from the producer, has been sustained, on the ground that such tax was a valid license or occupation tax for the privilege of doing business within the state: *State v. French*, 109 N. C. 722; 26 Am. St. Rep. 590; *State v. Stevenson*, 109 N. C. 730; 26 Am. St. Rep. 595. So a tax may be imposed on the keepers of ferries, "although their boats ply between landings lying in two different states": *Wiggins F. Co. v. East St. Louis*, 107 U. S. 365. One who has imported goods from another state or a foreign country has, while they remain in the original packages, a right to sell them, and no state can require that he, as a condition precedent to the exercise of this right, shall take out any license or pay any license fee or other charge: *Brown v. Maryland*, 12 Wheat. 441, 442. It appears equally certain that such importers need not make their sales in person, and that no license may be exacted of persons whom they may employ to effect sales for them. Therefore a statute declaring that all drummers or persons not having a place of business in the taxing district, offering for sale or selling goods therein by sample, shall be required to pay a specific sum per week or month for that privilege cannot be enforced against one who was employed and acting for merchants doing business in another state, and for whom he exhibited samples for the purpose of effecting sales: *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502. So one who is acting as agent in one state of a line of railroad between points in two other states, for the purpose of inducing persons going from the point at which he acted as such agent to points in other states to take the road which he represented, but not selling tickets for the road nor receiving or disposing of moneys on account of it, is engaged in interstate commerce, and cannot be required to pay a license tax: *Norfolk etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114; *McCall v. California*, 136 U. S. 104. We are not sure that we apprehend the distinction between the cases of the class last cited and *Ficklen v. Shelby Co.*, 145 U. S. 1, but probably it is this, that a license tax imposed by a state upon an occupation may be enforced against persons engaged in that occupation and having the right under the license to transact all business falling within the line of their occupation, whether domestic, interstate, or foreign, though they, as a matter of fact, do not transact any business whatever, except such as constitutes interstate or foreign commerce, but that if they are employed by a person engaged solely in interstate or foreign commerce, and represent him to the extent that taxes upon them necessarily oper-

ate as taxes upon him and his transactions, then they cannot be required to take out and pay for a state or local license: *McLaughlin v. South Bend*, 126 Ind. 471; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *State v. Agee*, 83 Ala. 110; *Fort Scott v. Pelton*, 39 Kan. 764; *Fecheimer v. Louisville*, 84 Ky. 306; *State v. Bracco*, 103 N. C. 349; *Simmons Co. v. McGuire*, 39 La. Ann. 848; *Ex parte Rosenblutt*, 19 Nev. 439; *Ex parte Thomas*, 71 Cal. 204; *Corson v. Maryland*, 120 U. S. 502; *Crutcher v. Kentucky*, 141 U. S. 47.

Licenses, Discrimination in Favor of State Products. — Of course any system of license taxes which discriminates between the products or manufactures of different states: *Welton v. Missouri*, 91 U. S. 275; *Tiernan v. Rinker*, 102 U. S. 123; *Webber v. Virginia*, 103 U. S. 344; *Walling v. Michigan*, 116 U. S. 446; or gives a citizen or resident of the state a right to carry on commerce on more favorable terms than are accorded to citizens of other states, — cannot be sustained: *Ward v. Maryland*, 12 Wall. 418; *State v. Wiggin*, 64 N. H. 508. A statute imposing a license tax upon peddlers of articles manufactured outside of the state is invalid, because it is an attempted discrimination in favor of the manufactures of the state: *Welton v. Missouri*, 91 U. S. 275; *State v. Pratt*, 59 Vt. 590; *Rodgers v. McCoy*, 6 Dak. 238; *Wrought Iron Co. v. Johnson*, 84 Ga. 754; *Marshalltown v. Blum*, 58 Iowa, 184; 43 Am. Rep. 115; *Vines v. State*, 67 Ala. 73; *State v. Browning*, 62 Mo. 591; but a license tax may be imposed upon all peddlers, or upon peddlers of a particular class of goods, and when imposed, no peddler can escape from its payment on the ground that the articles he happens to sell were wholly or partly manufactured or produced in another state: *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874; *State v. Smithson*, 106 Mo. 149; *Ex parte Butin*, 28 Tex. App. 304; and it has been held that a state may prohibit all sales by peddling within its limits: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

License Fee Exacted of Interstate Commerce. — A state cannot first declare that the carrying on of some portion of interstate commerce is a privilege, and then impose a license tax for the exercise of such privilege. It is obvious that to do this is equivalent to the power to tax all interstate commerce out of existence. Therefore a statute imposing a license tax on each sleeping-car not owned by the road upon which it is run within the state is unconstitutional: *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Car Co.*, 117 U. S. 51. A license tax cannot be imposed upon persons owning and running tow-boats to and from the Gulf of Mexico and the city of New Orleans, because to permit its imposition might enable the state to regulate interstate commerce, and the license fee is in effect a charge upon "the price of the privilege of navigating the Mississippi River between New Orleans and the gulf, in the coastwise trade": *Moran v. New Orleans*, 112 U. S. 74.

According to the ordinary course of business, a bill of lading "is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty upon the article imported." A statute imposing a stamp duty on bills of lading for gold or silver transported from a port within to a port without the state is therefore void: *Almy v. California*, 24 How. 169. If a statute of a state imposes an excise tax upon tobacco, but exempts from such tax tobacco intended for export, and requires every package intended for export to have affixed to it an engraved stamp indicative of such intention, and allows the sum of twenty-five cents to be charged for affixing each of such stamps, such statute merely provides a mode of identifying the articles intended for export, and of securing their exemption from the tax to which they would otherwise

be liable, and is therefore constitutional: *Pace v. Burgess*, 92 U. S. 372; *Turpin v. Burgess*, 117 U. S. 504; *Coe v. Errol*, 116 U. S. 517.

Corporations. — In the note to *State v. Goodwill*, 25 Am. St. Rep. 873, we considered the right of a state to discriminate against corporations formed in other states, and reached the conclusion that a state might exclude them from doing business within its territory, or impose upon them such restrictions as it thought proper: See also *Pembina M. Co. v. Pennsylvania*, 125 U. S. 181; *Pacific E. Co. v. Seibert*, 142 U. S. 339. From this general rule must be excepted corporations formed for the purpose of engaging in interstate commerce. The state has no power to prevent their doing such business within its territory, nor can it impose upon them restrictions or obligations beyond its power to impose upon natural persons engaged in the same business under like circumstances: *Pensacola T. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Paul v. Virginia*, 8 Wall. 183; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Leloup v. Mobile*, 127 U. S. 640; *Norfolk & W. R. R. v. Pennsylvania*, 136 U. S. 114.

The Police Power and Interstate Commerce. — The implied prohibition against the regulation of interstate and foreign commerce by any state, like most other constitutional inhibitions, cannot be properly considered without remembering the police power vested in the several states, though the more recent decisions of the national courts affirm that no exercise of this power can be sustained which results in the regulation of such commerce: *Railroad Co. v. Husen*, 95 U. S. 465; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Relman*, 138 U. S. 78; *Bowman v. Chicago*, 125 U. S. 460; *Leisy v. Hardin*, 135 U. S. 100. "By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government": *Patterson v. Kentucky*, 97 U. S. 504; *License Cases*, 5 How. 583. "But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the states shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the state. Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: 'The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.' Chief Justice Taney, in the *License Cases*, 5 How. 504, 576, took the same distinction when he said: 'It has, indeed, been suggested, that if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce

immorality, vice, and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, and pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists.' But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders, — to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing, or anything else that the legislature may deem opposed to the public welfare: *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Company v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678; *Kidd v. Pearson*, 128 U. S. 1; *Kinnish v. Ball*, 129 U. S. 217. It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally, with regard to all operations in which the lives and health of the people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid": *Crutcher v. Kentucky*, 141 U. S. 59.

One of the undoubted subjects of the police power is the protection of the public from imposition and fraud, and a state may, therefore, in the exercise of that power, ordinarily provide against the manufacture or sale of adulterated articles of food, or articles manufactured and put up in such a form as to impose upon purchasers, and lead them to believe they are purchasing a different article from that in fact sold to them. Principally, upon this ground, statutes prohibiting the manufacture and sale of oleomargarine have been sustained by the national courts; but in the case in which the question was presented, the court did not consider whether such a statute might not be objectionable as a regulation of interstate commerce: *Powell v. Pennsylvania*, 127 U. S. 678. In two states in which the question has arisen, their courts have affirmed the power of the state to protect the public against deception, and have therefore denied the right to sell oleomargarine when in such a form as to deceive purchasers into the belief that it was butter, though it had been imported from another state and remained in the original packages: *Commonwealth v. Huntley*, 30 N. E. Rep. 1127 (Mass., May 2, 1892); *Waterbury v. Newton*, 50 N. J. L. 534; *contra, State v. Gooch*, 44 Fed. Rep. 276.

Inspection Laws. — Some of the states have, from time to time, passed inspection laws, the purpose of which generally was to prepare products of the

state for exportation, and to this extent the validity of inspection laws has not been seriously contested, and when contested, has been affirmed: *Turner v. Maryland*, 107 U. S. 38. Perhaps there may also be state inspection laws applicable to property imported into the state, but if so, they must apply to all property of the same class, and not subject to inspection the products or manufactures of other states, while those of the state are exempt: *Voight v. Wright*, 141 U. S. 62. A statute of Kentucky required the guaging and inspection of all oils and fluids, the products of coal, petroleum, or other bituminous substances intended for use for illuminating purposes, and provided that such oils as ignite or permanently burn at a less temperature than 130 degrees Fahrenheit should be condemned as unsafe for such purposes, and the casks or barrels in which they were contained should be branded as unsafe, and all persons selling oils the casks or barrels of which were so branded should be subject to a penalty prescribed by the statute. A particular oil, the exclusive right to manufacture which was protected by letters patent, having been condemned, and notwithstanding the condemnation sold, a conviction of the vendor was sustained, on the ground that the statute was an ordinary police regulation providing a proper inspection for the purpose of determining whether articles were dangerous, and therefore unfit for use; and the court affirmed the general authority of each state to protect its citizens against the introduction within its limits of infected merchandise, paupers, convicts, or persons likely to become a public charge, or animals having contagious diseases, and "the necessity growing out of the fundamental conditions of civil society of upholding such state regulations enacted in good faith, and which had appropriate and direct connection with that protection to life, health, and property which each state owes to its citizens": *Patterson v. Kentucky*, 97 U. S. 501. No inspection law can be sustained if its operation must be to exclude from one state the products of another by imposing conditions with which it is not possible to comply without incurring such inconvenience or expense as no importer could afford to incur. Therefore, a statute providing that no fresh meats shall be sold within the state unless from animals inspected therein within twenty-four hours before being killed, or from animals slaughtered within a hundred miles from the place where their meat is exposed for sale, unless such meat is inspected, and a charge of one cent per pound is paid for such inspection, is invalid, because its practical operation must be to exclude from sale the flesh of all cattle, whether healthy or not, not killed within the state in the one case, or slaughtered within one hundred miles from the place of sale in the other: *Minnesota v. Barber*, 136 U. S. 313; *State v. Klein*, 126 Ind. 68; *Brimmer v. Rehman*, 138 U. S. 78.

Health, Regulations to Secure and Protect. — Regulations imposed in good faith by a state, for the purpose of promoting and better securing the health of its citizens and protecting them from contagion, may doubtless incidently affect or regulate interstate or foreign commerce without being unconstitutional. This is one of the subjects upon which the local authorities may act, at least until Congress has taken some action. Thus a dam on a navigable stream "passing through a deep, level marsh" may be authorized by the state when "the value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those reserved to the states": *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

The Enactment of Quarantine Laws is confessedly "within the province of the states of the Union." Whether an enactment of this character can prevail against any act of Congress regulating commerce it has not yet been necessary to determine, but we have no doubt that the national courts will sustain and enforce national regulation of this subject, whenever it comes in conflict with any state regulation. A statute of Louisiana, requiring the examination of all vessels passing a certain quarantine station, and allowing the examining officer, for making the inspection and granting a certificate, certain fees, designated in the statute, was sustained, on the ground that "quarantine laws belong to that class of legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which is valid until displaced or contravened by some legislation of Congress." *Morgan etc. Co. v. Louisiana etc. Board of Health*, 118 U. S. 455.

Live-stock, forming part of the property of citizens of a state, may, as well as their owners, be liable to contract contagious diseases brought from other states or countries. May this property be protected by appropriate state regulations tending to exclude contagion, or at least to render its introduction into the state less probable? A state cannot prohibit the introduction within its lines of all cattle from certain other states during certain specified months during the year, for this is exclusion rather than protection, and is an indiscriminate condemnation of healthy as well as diseased cattle: *Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465; *Urton v. Sherlock*, 75 Mo. 247; *Salzenstein v. Mavis*, 91 Ill. 391. A different result would probably have been reached, had it been shown that all cattle coming from the localities named, "during the months mentioned, were infected with disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased"; and it is settled that there is no constitutional objection to a state statute making a person having in his possession Texas cattle liable for any damage accruing from their running at large, and thereby spreading the disease known as "Texas fever": *Kinnish v. Ball*, 129 U. S. 217.

Regulations for the Observance of Common Carriers may also be prescribed by the state, and enforced against persons and corporations engaged in interstate commerce, where they are intended merely to secure good and prompt service, and to diminish the danger to which passengers and others are exposed. Hence locomotive engineers may be required to pass examinations designed to test their competency for the duties which their employment devolves upon them, and to take out a license showing that they have successfully passed such examination, and to pay a reasonable charge for the services rendered in making the examination and issuing the license: *Smith v. Alabama*, 124 U. S. 465; *Dent v. West Virginia*, 129 U. S. 114; *Nashville etc. R. R. Co. v. Alabama*, 128 U. S. 96. On the ground that natural gas, under a high pressure, is dangerous, it has been held that a statute prohibiting its being subjected to a pressure of more than three hundred pounds to the square inch is valid, and may be enforced against a corporation subjecting gas to a greater pressure while being carried out of the state in pipes: *Jamieson v. Indiana etc. Co.*, 128 Ind. 555. Many other regulations of common carriers have been upheld by the state courts, though undoubtedly affecting commerce, of which the following are instances: Making railroads liable for fires started by sparks from their locomotives: *Smith v. Boston & M. R. R. Co.*, 63 N. H. 25; prescribing the times when ticket offices shall be open: *Hall v. S. C. R. R. Co.*, 25 S. C. 564; imposing a penalty for refusing to deliver freight: *Gulf etc. R. R. Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep.

926; requiring connecting railroads to transfer freight and passengers: *Council Bluffs v. Kansas etc. R. R. Co.*, 45 Iowa, 338; 24 Am. Rep. 773; or through-trains to stop within the state: *Chicago etc. R. R. Co. v. People*, 105 Ill. 657; or separate accommodations to be provided for white and colored persons, but not attempting to apply this rule to interstate passengers: *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587; 66 Miss. 662; 14 Am. St. Rep. 599; but a state statute undertaking to prescribe what accommodations shall be furnished for either freight or passengers is inapplicable to interstate commerce: *Stanley v. Wabash etc. R. R. Co.*, 100 Mo. 435.

Statutes Forbidding the Manufacture or Sale of Intoxicating Liquors within a state do not ordinarily directly interfere with interstate commerce, and when they do not, are sustainable: *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623. It was finally held by the supreme court of the United States, three justices dissenting, that a state could not, in the exercise of its police power, prevent the importing of intoxicating liquors from another state: *Bowman v. Chicago etc. R. R. Co.*, 125 U. S. 465; nor deny to the importer the right, after such importation, to sell them while in the original packages: *Leisy v. Hardin*, 135 U. S. 100. So great was the dissatisfaction created by this decision that Congress interposed, and by a statute, enacted August 8, 1890, subjected all fermented, distilled, or other intoxicating liquors imported into any state or territory to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though produced in such state or territory, and this congressional legislation has been pronounced constitutional: *In re Rahrer*, 140 U. S. 545. Before the enactment of this statute the supreme court of Pennsylvania had sustained a statute forbidding the sale of intoxicating liquors, though still in the original packages, to persons of known intemperate habits: *Commonwealth v. Zell*, 138 Pa. St. 615; *Commonwealth v. Swihart*, 138 Pa. St. 629; *Commonwealth v. Bishman*, 138 Pa. St. 639; *Commonwealth v. Silverman*, 138 Pa. St. 642; *Commonwealth v. Pendergast*, 138 Pa. St. 633.

Commerce within the State. — It seems proper to here remind the reader that as to that commerce which is neither interstate nor foreign, each state has complete control of so much of it as takes place within its territorial limits, or at least, that whenever state control is limited it must be by some constitutional inhibition different from any we have been considering. "We proceed to remark, that a glance at the commerce clause of the constitution discloses at once, what has often been a source of comment in this court and out of it, that the power to regulate there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes; and while bearing in mind the liberal construction that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and that commerce among the states means commerce between individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress": *Trade-mark Cases*, 100 U. S. 82; *Moor v. Veazie*, 32 Me. 343; 52 Am. Dec. 655; affirmed, 14 How. 568.

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CHES. & C. TEL. CO. *v.* MACKENZIE.

[74 MARYLAND, 36.]

Telegraph and Telephone poles across private
property.



CASES
IN THE
SUPREME COURT
OF
MARYLAND.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
v. MACKENZIE.

[74 MARYLAND, 36.]

TELEPHONE COMPANY — ERECTION OF POLE IN STREET — INJUNCTION. — A declaration alleging that plaintiff is possessed of a valuable warehouse, and that defendant, a telephone company, without his authority or consent, and without making or offering to make compensation therefor, has planted a large and unsightly pole in front of such warehouse, which obstructs and prevents the comfortable, reasonable, and beneficial enjoyment and use of such premises, without alleging the mode and manner of such obstruction and interference, states a cause of action, and may properly include a prayer for injunction.

PLEADING — DEMURRER — INJUNCTION. — The question as to whether the additional relief asked by way of injunction is appropriate or not, under the facts disclosed by the declaration, must be raised by special demurrer, and a general demurrer, whether interposed directly to the declaration or to some subsequent pleading, will not be sufficient to raise that question.

TELEPHONE COMPANY — AUTHORITY TO PLANT POLES CANNOT BE ENLARGED BY ORDINANCE. — The planting of a telegraph or telephone pole in a highway or street is not a public nuisance when sanctioned by statute; but the right to so plant such pole is derived from and depends solely on such statute, and cannot be enlarged by municipal ordinance.

TELEPHONE COMPANY — PLANTING POLE IN STREET — ADDITIONAL SERVITUDE. — When the fee in the bed of a street or highway is in the abutting land-owner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation of which he cannot be deprived by statute.

TELEPHONE COMPANY — PLANTING POLE IN STREET — DAMAGES FOR SPECIAL INJURY — INJUNCTION. — When land has been acquired for streets by the exercise of the right of eminent domain, and has been appropriated by a corporation for the planting of telegraph or telephone poles, under legislative and municipal sanction, so as to unreasonably abridge

the right of adjacent lot-owners to the use of the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation, and may maintain an action against such corporation for the recovery of the immediate and direct damages sustained by them. In an appropriate case an injunction may be procured to prevent a continuance of the interference with the use of the street.

TELEPHONE COMPANY — PLANTING POLE IN STREET — MEASURE OF DAMAGES. — In an action by an abutting owner on a street or highway to recover of a telephone company for placing a pole in front of his premises, the measure of damages is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purpose of his business; but when plaintiff's land is not actually taken nor his soil invaded, the measure of damages is the extent to which the rental or usable value of the particular property has been diminished by the erection of the pole, or the difference in the value of the property before the erection of the pole and afterwards, if the depreciation has been caused by its erection.

PLEADINGS — INSTRUCTION. — When a complaint alleges the possession by plaintiff of a warehouse, and an interference with his use and enjoyment thereof by the erection of a telephone pole, without alleging a reversionary interest in the warehouse, and the proof shows that the premises were in the possession of a tenant of the plaintiff, a prayer for an instruction that plaintiff is not entitled to recover damages for the erection of the pole, without making any reference to the pleadings, is properly refused, if the evidence is sufficient to sustain any action by plaintiff as the owner of the reversion in the warehouse.

Charles J. M. Gwinn, for the appellant.

George Norbury Mackenzie and John V. L. Findlay, for the appellee.

McSHERRY, J. The declaration in this case alleges "that the plaintiff is possessed of a lot of ground, with the improvements thereon, being valuable warehouse property, known as No. 22 South Charles Street, and while so possessed the defendant, without her authority or consent, and without making or offering to make compensation therefor, planted a large and unsightly pole in the footway in front of said premises, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the said premises, and though repeatedly notified to remove the said pole, refuses so to do, although a reasonable time for the removal of the same has elapsed," etc. There is added an application for an injunction under section 117 of article 75 of the code. The defendant filed three pleas. The second was the plea of not guilty, and the first and third are as follows, viz.: "That the defendant, at the time of the alleged trespass, was duly incorporated as a telephone company under the laws of the state of Maryland, and

was entitled as a corporation so formed, in the prosecution of its business, and for the purpose thereof, to erect and maintain the pole upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff, complained of in the declaration of the plaintiff, without making, or offering to make, compensation therefor to the plaintiff; and that the alleged trespass complained of in the declaration of the plaintiff was a use by the defendant of its said right"; 3. "That the plaintiff ought not further to have or maintain her aforesaid action against it, because it says that by a certain ordinance of the mayor and city council of Baltimore, approved on the ninth day of May in the year 1889, and since the institution of the suit in this cause, it, the said defendant, was and is authorized to maintain its said pole in and upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff complained of in the declaration of the plaintiff, for the period of two years after the said date of the approval of said ordinance, and so long as said pole is necessary to be maintained by the defendant for the purpose of making distribution of and forming connections between any wire or wires forming part of the underground wire cables authorized by said ordinance to be laid within the limits of the city of Baltimore." To these pleas,—the first and third,—the plaintiff demurred, and the court of common pleas sustained the demurrer. It is insisted by the appellant, the defendant below, that as the demurrer mounted to the first fault in the pleading, the court ought to have ruled the declaration to be bad, and its failure to do so is assigned as the first error for review on this appeal. We are, of course, confined to the declaration itself in determining its legal sufficiency. Neither the averments of the pleas nor the evidence in the record can be looked to or considered in passing upon that question. The forms of pleading have been materially changed by legislation, and since the adoption of the simplification act, which is substantially incorporated in the code, nothing more is needed in a declaration than a plain statement of the facts which are relied on to sustain a recovery: Code, art. 75, sec. 3. Whilst it does not appear from the *narr.* whether the footway in front of the warehouse premises is a public thoroughfare or not, or whether the title to it is in the plaintiff, it is distinctly alleged that the plaintiff is possessed of a valuable warehouse property, and that without her authority or consent the defendant planted a large and unsightly pole in front

thereof, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the premises. As framed, the *narr.* alleges a direct interference by the defendant with the use and enjoyment by the plaintiff of her property. And it further alleges that this interference was without her authority or consent. If these facts be true, why do they not furnish a ground of action? That the appellee had the right to the comfortable, reasonable, and beneficial use and enjoyment of her property is undeniably true, unless the contrary be averred and shown. That the unauthorized obstruction of or interference with that right is a wrong which will support an action for damages cannot be open to controversy. Though it might have been more artificial pleading had the mode and manner of the obstruction and interference been set forth in the declaration, they were not necessarily elements of the injury complained of, but rather matters of proof, showing the character and extent of that injury. The *narr.*, on its face, does not declare for an obstruction of the footway or the street; and it was, therefore, not necessary to allege that, by reason of the plaintiff's possession of the premises, she was entitled to the way, in the exercise of which she was interfered with by the defendant. The averment is, that the pole thus planted in the footway obstructed, not the footway, but the plaintiff's use and enjoyment of the property in her possession,—her warehouse; and that averment, it seems to us, is, under the code, sufficient, if proved, to sustain an action. This conclusion is founded, of course, exclusively and solely upon the face of the declaration, without any reference to other parts of the record.

It has been further insisted, as a reason for holding the declaration bad, that the prayer for an injunction was improperly included therein, because, so it is alleged, the facts disclosed by the *narr.* do not justify the application of that remedy. Sections 116 to and including 128 of article 75 of the code make provision for the issuing of writs of injunction and *mandamus* by courts of law in certain actions instituted in these courts. Under these provisions, the prayer for an injunction to restrain the appellant from continuing the pole in its place, and to order the removal thereof, was added to the declaration. By section 119 it is provided that "the defendant may demur to so much of the plaintiff's declaration as claims such writ, and such demurrer shall raise the question whether the facts stated as the ground of such claim disclose

any such legal duty as that so sought to be enforced, but shall be subject to all rules governing general demurrers at law, both as to the proceedings thereon and thereafter." Now, it was argued that the general demurrer filed by the plaintiff to the defendant's first and third pleas mounted, according to the well-settled rule, not only to the declaration proper, but also to the prayer for relief by injunction. Whether this view is correct or not depends upon the meaning of the section from which we have just quoted. The remedy by injunction from a court of law is a purely statutory remedy. The mode to be pursued for obtaining it is defined and pointed out in the code. If the facts stated in the declaration do not disclose a case which will justify the issuing of such a writ, the defendant may demur "to so much of the plaintiff's declaration as claims such writ," and the statute expressly declares what question that demurrer shall raise. It is consequently a special demurrer that is thus provided for, notwithstanding the antecedent provision in section 6 of the same article that no special demurrer shall be allowed in civil cases. Can a general demurrer be treated as equivalent to or the same as this special demurrer? If so, then the general demurrer to the pleas would reach any defect in the prayer for injunctive relief in the *narr*. Inasmuch as the demurrer prescribed by the statute is a special demurrer, it seems to us quite apparent that a general demurrer would not answer, if interposed by the defendant directly to the *narr*. Of course, therefore, a general demurrer interposed by the plaintiff to pleas of the defendant could not serve any other or wider purpose, or raise any other question, than a general demurrer filed by the defendant to the declaration would itself have done, unless the clause declaring that the special demurrer "shall be subject to all rules governing general demurrers at law, both as to the proceedings thereon and thereafter," was intended to convert the special into a general demurrer. No such intention is manifested by the language used as we read it. The special demurrer is declared to be subject to the rules governing general demurrers, only so far as respects the proceedings on a general demurrer, and the proceedings after a ruling is made thereon. In other words, when a special demurrer under this statute is interposed to the declaration, the same proceedings shall be had as are provided by the rules of law with reference to proceedings on and after a general demurrer. That is to say, the right to amend if the demurrer be sustained, and the

right to plead over if it be overruled, are preserved, precisely as in the case of similar rulings on a general demurrer. This, and this only, is the effect of the clause just quoted from the code. Our interpretation of the statute, then, is this: If a defendant desires to raise a question as to whether the additional relief by way of injunction or *mandamus* is appropriate under the facts disclosed by the declaration, he must do so by special demurrer, and a general demurrer, whether interposed directly to the declaration or to some subsequent pleading, will not be sufficient to raise that question.

We now come to the consideration of the ruling of the court sustaining the demurrer to the first and third pleas filed by the defendant. These pleas present some of the principal questions discussed in the argument at the bar. They rely, as a defense to the action, upon an authority which the appellant claims to have under the code, and under an ordinance of the mayor and city council of Baltimore, to plant in its present position the pole complained of, without making or offering to make compensation to the appellee. By sections 224 and 232 of article 23 of the code, telegraph and telephone companies, incorporated under the general corporation law of this state, are empowered to construct their lines along and upon any postal roads and postal routes, roads, streets, and highways, provided their fixtures, posts, and wires do not "interfere with the convenience of any land-owner more than is unavoidable." It is expressly provided in section 224 that "the said corporation shall be responsible for any damages which any person or corporation may sustain by the erection, continuance, and use of such fixtures." It is further provided, that in any action brought for the recovery of damages, the company may elect to have included the damages for allowing the said fixtures permanently to continue. The following proviso is then added: "Provided, that no person or body politic shall be entitled to sue for or recover damages, as aforesaid, until the said corporation, after due notice, shall have failed or refused to remove, in reasonable time, the fixtures complained of." It is not necessary to allude to the ordinance of the mayor and city council of Baltimore, for the reason that whatever authority the appellant possesses, in reference to the planting and maintenance of the pole in question, must be derived from and depend on the act of assembly. The ordinance could not enlarge that authority. To what extent, then, does the statute justify the action of the appellant, and

protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the legislature has declared that it shall not be; but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude, without making appropriate provision for just compensation to the owner: *Phipps v. Western Maryland R. R. Co.*, 66 Md. 319; *American Telephone and Telegraph Co. v. Pearce*, 71 Md. 535. In the case last referred to, this court held that planting telephone poles upon the right of way acquired by a railroad company was, when the telephones were used for purposes other than the operation of the road, an additional servitude imposed upon the soil, which entitled the owner of the reversion to an injunction against the telephone company to restrain it from so appropriating the land until compensation, to be ascertained in the method prescribed in section 40, article 3, of the constitution of the state, should be first paid or tendered. And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee: *Thomas v. Ford*, 63 Md. 346; 52 Am. Rep. 513. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful unless the right to do so is acquired by contract or condemnation: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; *Broome v. New York and New Jersey Tel. Co.*, 42 N. J. Eq. 141.

The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains, and sewers upon or under the surface. Pipes may also be laid under the sur-

face when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam, and other things capable of that mode of distribution: 2 Dillon on Municipal Corporations, secs. 656 a, 688. Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee in the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of assembly could not deprive her of it. But in many instances the beds of the streets are owned in fee by the city, and in others the fee is vested in the original owners of the land or their heirs, and does not belong to the owners of the lots abutting on the streets. If the fee be in the city, or in some third person, then, — 1. What are the rights, in a case like this, of the owner of a lot abutting on the street? and 2. How are those rights affected by the provisions of the code relied on in the pleas? There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far, — and we are not required to go any farther in deciding this appeal, — that where the fee or legal title has passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain: *Elizabeth etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; affirmed in 7 Wall. 272; *Cooley on Constitutional Limitations*, 556. Indeed, this is merely the application of familiar principles of the common law.

Whether, then, the appellee be the owner of the reversion in

the bed of the street, or only entitled to the rights of an abutter on the street, the pleas demurred to set forth no facts which furnish a defense to the action; because, as against the owner of the fee, the provisions of the code relied on in the pleas are inoperative for the reasons we have given; and as respects the owner of a lot abutting on the street, they expressly reserve, and they could not have validly denied, his right to recover for such direct and immediate injuries as he might sustain by the construction of a line of telegraph and telephones upon a public street or thoroughfare. Whether the damages to be recovered shall be upon the basis of the permanent occupation of the premises, or only for the period up to the bringing of the suit, is left to the election of the company; and it would necessarily follow, if the recovery should be limited at its instance to the latter period, that subsequent suits could be brought; and in an appropriate case an injunction could be procured to prevent a continuance of the interference. It results, then, that neither the rights of the owner of the reversion nor those of the abutter upon a street are abridged by the statute, and that, in so far as that statute attempts or was intended to effect that result, it is nugatory and inoperative. As a consequence, whatever rights the appellant did acquire under the statute are subordinate to the property rights of the appellee, and the pleas which rely upon the statute and the ordinance as giving the appellant authority to plant and maintain its posts and wires, without regard to the injury caused the appellee, were very properly declared to be no answer to the action.

The remaining questions involved are presented by the exceptions taken to the admission of evidence, and to the rulings of the court on the prayers for instructions to the jury. There are twelve of these exceptions. Eleven of them relate to the admissibility of evidence adduced by the appellee upon the question of damages, and the twelfth to the granting of the appellee's second prayer, and the rejection of the appellant's first.

It is not necessary to discuss separately the exceptions which relate to the measure of damages, for they all present the same question, substantially. The appellee proved by several witnesses the amount which, if they owned the property, they would, in their opinion, give not to have the pole placed where it is, and the amount they would give to have it taken away. She further proved by another witness that,

with the pole removed, he would be willing to pay more rent for the property than he would with the pole standing where it is; and by still another, that for the purposes of his business he would make a difference of five hundred dollars in the rental value of the premises. None of this testimony was admissible. The true measure of damages in such a case as this is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the land of the plaintiff is not taken nor his soil actually invaded, the measure of damages, as adjudged in many cases, is either,—1. The extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of: *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 41; 1 Am. St. Rep. 362; *Wood v. State*, 66 Md. 61; or 2. The difference in the value of the property before the construction of the pole and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the pole: *Shepherd v. Baltimore etc. R. R. Co.*, 130 U. S. 426.

Lastly, with regard to the prayers. There was no error in rejecting the first prayer of the appellant, because the prayer failed to refer or point to the pleadings. The correctness of this ruling must depend, not upon the state of the pleadings, but upon the evidence to which alone the prayer makes reference: *Giles v. Fauntleroy*, 13 Md. 136. The declaration counts upon a possession, by the plaintiff, of the warehouse, and an interference with her use and enjoyment thereof, and the proof shows that the premises were in the occupancy and possession of a tenant of the plaintiff, and not in the possession of the plaintiff, who was only entitled to the reversion. For an injury to the possession, the tenant in possession alone can sue, though if the same injury affects the reversion, the reversioner may sue in case: 1 Ch. Pl. 63. The evidence in the record shows that the appellee does not own the reversion in the bed of Charles Street; and it further shows that no damage was done to the plaintiff's possession, because she was not in possession. The *narr.* does not declare for an injury to the reversionary interest in the warehouse, as it might have done, and the prayer did not point to the pleadings; but if the evidence adduced was sufficient to sustain any action by the appellee, it would have been error in the court to grant a prayer declaring that there was no evidence that the plaintiff had sustained

damage by the erection of the pole, unless the prayer had made reference to the pleadings.

There is nothing in the appellee's granted prayer of which the appellant can complain. Taken in connection with the appellant's third instruction, the recovery was limited to the time that suit was brought.

For the error in admitting the evidence objected to in the first eleven exceptions, the judgment must be reversed, and a new trial must be awarded.

Telegraph and Telephone Poles and Wires in Streets and Highways and Across Private Property.*

Poles, Erection of, without Authority.—The principle is universally recognized, that in the absence of legislative or municipal sanction, the erection of telegraph or telephone poles, and the stringing of wires thereon, in the public streets or highways is a public nuisance, which may be abated at the instance of an abutting land-owner, if the poles obstruct or prevent the free passage of carriages, horses, or foot-passengers: *Regina v. United Kingdom Electric Tel. Co.*, 31 L. J. M. C. 156; 2 Best & S. 647; 9 Cox C. C. 174.

Legislative Power to Authorize Use of Highways.—Although the legislature has authority, in the exercise of the police power of the state, to determine that the erection of poles and the stringing of wires of telegraph or telephone corporations is a public use, not inconsistent with the use of the street for street purposes, yet the interesting, perplexing, and doubtful proposition is involved, as to whether the legislature may authorize such use of the street or highway without providing for compensation to the abutting land-owner. In other words, the question is necessarily involved as to whether or not, when the public has acquired an easement in land for a street or highway, by taking it under the right of eminent domain, or by dedication, prescription, or grant, a new use and an additional servitude is to be deemed as imposed by appropriating the street or highway, under legislative sanction, for the use of a line of electric telegraph or telephone, by the erection of poles and wires above the surface of the ground, so that the owner of an abutting estate, or of the soil to the center of the street, is entitled to further compensation therefor, or is such use included by implication in the purposes for which the land was condemned, dedicated, or granted.

Compensation, whether Legislature may Deprive Land-owner of Right to.—The adjudged cases upon this subject present an irreconcilable conflict of authority, and seem to be about equally divided. The topic is new, and although it may not be safe to hazard an opinion as to how it will be finally settled, still it may be stated that the later cases, and it seems the weight of authority, sustain the doctrine, without qualification, that a telegraph or telephone line along a public street or highway is no part of the equipment of the street, but is foreign to its use, and the imposition of an additional servitude, for which the abutting owner must be compensated; and also that the legislature has no power to authorize the imposition of such servitude,

* REFERENCE TO MONOGRAPHIC NOTES.

Telegraph and telephone companies, right to erect and maintain poles and wires in public streets and highways, and proceedings to abate the same: 54 Am. Rep. 290, 293; 67 Am. Rep. 409-412; 10 Am. St. Rep. 130, 131; 16 Am. St. Rep. 614.

except on condition that due compensation shall be made therefor to such abutting owner. Under this rule the abutting owner is entitled to an injunction restraining the maintenance or erection of a line of telegraph or telephone poles and wires in front of his premises, unless he is first compensated therefor, or his consent thereto is in some manner obtained.

Cases Holding that Abutting Owner is not Entitled to Additional Compensation.—The courts of Missouri have uniformly maintained that the erection of telegraph and telephone poles and wires in public streets or highways does not impose a new and additional servitude thereon; that this is simply a new use to which the street may be put, under legislative sanction, without the consent of the abutter; that he has no right to restrain such use by injunction, or to have the poles removed as a nuisance; and that the legislature has power to authorize such use without providing for compensation therefor to the abutting land-owners. This doctrine was first announced in *Gay v. Mutual Union Telegraph Co.*, 12 Mo. App. 485, followed and affirmed in *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398, and in *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; and *State v. Flad*, 23 Mo. App. 185. The court, in *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398, based its decision on the following reasons: "These streets are required by the public to promote trade, and facilitate communications in the daily transaction of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth Street wishes to communicate with a citizen living and doing business on the other end or at any intermediate point, he is entitled to the use of the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously, and with more dispatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose which would otherwise require its use, either by a thousand footmen, horsemen, or carriages, to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for the transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage. If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant, or condemnation, the municipality has the power to appropriate it, not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest as conducive to the public good, the conclusion is inevitable, that the use of Sixth Street in the manner and for the purposes proposed is allowable, for it cannot, with any show of reason, be denied that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be conducive to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated. But it is argued that the erection

of two telephone poles, each eighteen inches at the bottom, with a gradual taper to the top, would obstruct the street, and deny to the public the complete and unrestricted use of the street. This argument, I think, is more specious than sound. It is true that to the extent of the space of eighteen inches, each of the poles proposed to be erected would be an obstruction, but the same could be said of lamp-posts erected on the streets of a city, the necessities of which might require its streets to be lighted with oil, gas, or electric lights; and yet no one would be heard to complain that the lamp-posts constituted such an obstruction or impediment to the free use of the streets as to demand their removal. . . . If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone-poles as proposed is one of these uses, and that in digging holes through the stone slabs and stone walks in which to plant them, there is no taking of private property of the abutting lot-owner entitling him to compensation, are correct, it would seem logically to follow that damages resulting from such use need not be compensated for. If, by reason of the dedication, the public have the right to apply the private property of the plaintiff to the use proposed without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages flowing as an incident from an act which the dedicator by his dedication has authorized to be done? If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If, by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to a use which, by his dedication, he authorized it to be put?"

The views above announced are ably and forcibly refuted by Mr. Justice Henry, in a dissenting opinion, which is reported in a note to the principal case in 57 Am. Rep. 409. In *McCormick v. District of Columbia*, 4 Mackay, 396, 54 Am. Rep. 284, it was also decided that the erection of telegraph poles and wires in the street was not such a private nuisance as would be restrained by injunction at the suit of an abutting lot-owner. And in *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, it was determined that the above rule was law, and that the legislature might authorize their erection on the line of a public highway without providing for compensation to the owner of the fee therein. In this case the court said: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods for either the conveyance of property or transmission of intelligence. . . . The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. . . . We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the

highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation. . . . That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads, upon the locations assigned them by the officers of the municipalities wherein such ways are situated, cannot be doubted. . . . There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. . . . The only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one." The same rule is announced in *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63, where it was decided that the state and municipal corporations, in the exercise of the right of eminent domain and of the police power, may authorize telephone companies to use the streets and sidewalks of a city for the purpose of erecting poles and other works necessary for the transmission of intelligence, and can impose terms and conditions for the enjoyment of the privilege; but the adjoining owners in front of whose premises such poles have been so erected have no right to require the removal of the same as nuisances, when the poles do not materially obstruct them in the free use of their property, or inflict on them some injury which is not common to all other persons.

In *Rouke v. American Telephone etc. Co.*, 41 N. J. Eq. 35, an injunction was refused an abutting owner to restrain a telegraph and telephone company from stretching its wires over the land in the street in front of his property. The court said: "The city claims the right to use the streets for the purpose of telegraphic or telephonic communication; that such use is part of the public uses to which the streets of a city may lawfully be put by the city authorities, without the consent of the owners of lots abutting on the streets, or making compensation to them. The legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for while it recognizes such rights as to the erection of poles, it does not do so as to the wires. It is laid down that if telegraph posts be erected within the limits of a street or highway without legislative authority, they are nuisances, but if the erection be thus authorized they are not. In the case in hand the company does not, as before stated, intend to erect poles on the land in front of complainant's lot, but means merely to stretch its wires along the front, at least twenty-five feet above the ground, on poles erected on adjacent or neighboring property. The present injury from such use cannot be great. It certainly is not so great as to warrant a preliminary injunction."

A railroad company may, for its own use in operating its road, construct a telegraph or telephone line over and along its right of way, and in so doing may cut down trees, if necessary, thereon standing, or in any other way use its right of way for such purpose, without subjecting itself to any additional claim by the original land-owner for compensation. But if the line is not constructed for such purpose, it will be a new servitude, putting an additional burden on the land, for which the original owners of the land are entitled to

be compensated: *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159; *American Telephone etc. Co. v. Pearce*, 71 Md. 535.

Cases Holding Abutting Owner Entitled to Additional Compensation. — The cases which maintain that the erection of a line of telegraph or telephone poles and wires on a street or highway is foreign to its use, and the imposition of a new and additional servitude, which the adjoining owner has the right to restrain by injunction, unless his consent is first obtained or he is compensated therefor, may be grouped as follows: *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Broome v. New York etc. Telephone Co.*, 42 N. J. Eq. 141; *State etc. Telephone Co. v. Mayor of Newark*, 49 N. J. L. 344; *Western Union Telegraph Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; *Willis v. Erie Telegraph etc. Co.*, 37 Minn. 347; *Stowers v. Postal Telegraph etc. Co.*, 68 Miss. 559; 24 Am. St. Rep. 290; *Dusenbury v. Mutual Telegraph Co.*, 11 Abb. N. C. 440; *Metropolitan Telephone etc. Co. v. Colwell Lead Co.*, 67 How. Pr. 365; 50 N. Y. Sup. Ct. 488; *Pacific Postal Telegraph etc. Co. v. Irvine*, 49 Fed. Rep. 113. The majority of these cases maintain that neither the legislature nor any municipal corporation can authorize the erection of a line of posts and wires in a street or highway without providing for compensation to the abutting owner, whether the fee is in him or in the public: *Stowers v. Postal Telegraph etc. Co.*, 68 Miss. 559; 24 Am. St. Rep. 290, and cases cited. But there is some difference of opinion on this point, although it may be questionable if any sound reason therefor exists. This distinction is shown by the case of *Pacific Postal Telegraph Co. v. Irvine*, 49 Fed. Rep. 113, where it was said: "It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there is no valid legal objection to the grant by the public of a right to erect such poles and wires, without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law." In *Western Union Telegraph Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 916, the court said: "That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases cited above. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post, in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another. It is true that the use of the telegraph company is a public use; that the company is a public corporation, as to which the public has right which the law will enforce. But the public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally; it

is for the private profit of the corporation. It is its business enterprise, engaged in for gain. Its services can only be obtained upon their being paid for. There is no reason, either in law or common justice, why it should not pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say, the *axis* of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation." In *Broome v. New York etc. Telephone Co.*, 42 N. J. Eq. 141, a mandatory injunction requiring a telephone company to remove its poles from the highway in front of complainant's premises, and forbidding it to erect others there, was granted, and in this case the court said: "The defendants, a telephone company, without any leave or license from or consent by the complainant, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that end, set up their poles upon his land. . . . It is enough to say that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned. What has been said is sufficient, of itself, to establish the right of the complainant to relief; for in order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or by condemnation from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." In *Board of Trade Telegraph Co. v. Burnett*, 107 Ill. 507, 47 Am. Rep. 453, it was announced that legislative authority to telegraph companies to erect poles in the public street is subject to the liability to make just compensation to the adjacent land-owners for the use, and the court said: "The position taken by the defendant is, that the state can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without the consent of the abutting land-owner, that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully paid, the public obtain all the rights the land-owner had, and the state may authorize any use of it not inconsistent with its use as a highway. On the other hand, it is insisted the proprietary rights of plaintiff had been interfered with in a manner detrimental to his interests as the owner of the fee, and that the action of defendant in taking possession of his land forcibly and against his will comes within the constitutional inhibition, 'private property shall not be taken or damaged without just compensation.' The latter position is the one best sustained by authority, and rests on sounder principles. It is for the reason the construction and maintenance of a telegraph line upon the highway is a new and additional burden upon the fee to which it was not contemplated it should be subjected, and for which the owner is entitled to additional compensation. The principle is, neither the state nor a municipal corporation has any rightful authority, under the constitution, to grant away the private property of the citizen; and if corporations *quasi* public, in the exercise of the right of eminent domain with which

they are clothed by the sovereign power of the state, seek to appropriate it, so that they may have a benefit therefrom, every principle of justice demands they should make just compensation, whether the property taken or damaged is of little or great value." A railway upon a highway is an additional servitude, and "in the same sense, the construction of a line of telegraph on the highway is an additional servitude, to which the fee of the land had not before been subject. The servitude differs more in degree than in character, and whether the damages are great or small, the corporation asking for or appropriating to itself the benefit of such new servitude must make just compensation to the owner of the fee."

Invasion of Private Property is Unlawful, and may be Enjoined. — The invasion of private property in which the public has obtained no easement, for the purpose of erecting telegraph or telephone poles, or for stringing wires, is unquestionably unlawful, and may be restrained by injunction. This question is decided in *American Telephone etc. Co. v. Pearce*, 71 Md. 535, where it was determined that a telegraph or telephone company is, with respect to the right to construct its lines over private property, just as much subject to the constitutional prohibition against taking private property for public use without just compensation as is a railway or any other corporation clothed with the power of taking private property for public use; and the averment that such company is proceeding, or threatens to proceed, to construct its line of poles or wires on and over the complainant's land without his leave or license, and without paying or tendering him compensation for the use of his land for this purpose, is sufficient to entitle him to an injunction. Under a license from a municipal corporation for the erection of a telephone line, or a fire-alarm telegraph, there is no authority to enter private property and cut off the limbs of trees, although they project over the line of the sidewalk on the street; *Tissot v. Great Southern Telegraph etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248; *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; 57 Am. Rep. 237.

ELECTRIC-CAR POLES AND WIRES ON STREETS AND HIGHWAYS NOT AN ADDITIONAL SERVITUDE. — A question closely allied to the one above considered is, whether or not the erection of poles and stringing wires in the street for the purpose of propelling electric street-cars imposes an additional servitude for which the adjoining owner is entitled to compensation; and whether or not a failure to obtain such compensation, and an attempt to appropriate the street to such use without his consent and against his expressed wish, will entitle him to an injunction. The authorities seem to be unanimous in answering this question in the negative, and to the effect that the placing of poles and wires in the street for the purpose of using electricity for street-car propulsion does not impose a new servitude on the land in the street, and may be authorized by legislative or municipal authority without compensation to the abutting owner of the land: *Detroit City Railway v. Mills*, 85 Mich. 634; *Hulsey v. Rapid Transit etc. Ry Co.*, 47 N. J. Eq. 380; *Potter v. Saginaw Union etc. Railway*, 83 Mich. 285; *Barber v. Saginaw Union etc. Railway*, 83 Mich. 299; *Taggart v. Newport Street Ry Co.*, 16 R. I. 668; *Williams v. City Electric Street Ry Co.*, 41 Fed. Rep. 556, in which the following syllabus was prepared by the court. "The operation of a street-railroad by mechanical power, when authorized by law, on a public street is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use only of the street as a public highway, and affords to the owner of the abutting property, though he may own the fee of

the street, no legal ground of complaint." In *Taggart v. Newport Street R'y Co.*, 16 R. I. 668, the court said: "The street railway here complained of is operated by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse power. The answer avers that 'electricity, besides being as safe and as easily managed as horse power for the propulsion of street-cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets used by said cars for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street-cars of which horses are the motive power.' These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a dangerous force, and that the court will take judicial notice of its dangerousness. The court will take notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this danger is so great that on account of it the railway should be regarded as an additional servitude. The answer alleges that many street-railways, operated by electricity in the same manner as the defendant's, are in use in different states, and that many more are in process of construction. Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation, and from these cases it is argued that the railway here complained of is an additional servitude by reason of the poles and wires which communicate its motive power. There are cases which hold as stated, and there are cases which hold otherwise. But assuming that telegraph and telephone poles and wires do add a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street-railway likewise add one. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street-cars are propelled."

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**GODDARD *v.* INHABITANTS OF HARPS-
WELL.**

[84 MAINE, 499.]

Municipal Corporations, liability of.



GODDARD v. INHABITANTS OF HARPSWELL.

[81 MAINE, 499.]

MUNICIPAL CORPORATIONS — LIABILITY OF. — When a public officer, in the line of his duties, does a public work within a town, for the public benefit or use, the town, in the absence of any direction to him, is not liable for his misconduct in such work, though it appointed him, and is obliged to pay the costs of the work, and therefore a town is not answerable to one whose property was taken and used in the construction of a highway by a highway surveyor, charged with the duty of opening and keeping in repair all public highways, and who is appointed and paid by the town.

C. W. Larrabee, for the plaintiff.

Weston Thompson, for the defendants.

EMERY, J. The county commissioners of Cumberland County, upon an appeal from the refusal of the selectmen, laid out a town road in Harpswell. This action of the commissioners was, upon appeal, affirmed by this court, and the certificate of affirmance sent down May 31, 1886. Within the limits of the road thus located, the plaintiff had, prior to the location, placed some amount of stone, timber, and earth, with the consent of the owners of the land, for the purpose of constructing a road and bridge, along the same line afterward located by the commissioners.

After the location and establishment of the road by the commissioners, as affirmed by this court, the road and the necessary bridge therein were constructed, and the stone, timber, and earth of the plaintiff, found within the limits of the location, were used in such construction. The plaintiff, assuming that this taking and using of his material were by the direction of the town, or by its authorized agents, brought this action of trover against the town for such conversion. He recovered a verdict, which the town has moved the court to set aside as against law and evidence.

There is no evidence in the case that the town ever voted to open or build the road or bridge, or appropriated any money or appointed any agents for that purpose, or gave any instructions to any officers, or in any way ever even considered the question. Nor is there any evidence that the municipal officers ever in any way took any direction or cognizance of the matter. Counsel and witnesses spoke incidentally of the road and bridge having been built by the town, and now the plaintiff asks us to assume that the town built the

road and bridge, inasmuch as it was the town's duty to do so, and we may assume that it did its duty. He means for us to assume that the town directly, by vote, assumed charge, appointed agents, and gave directions in the matter.

But in the absence of any evidence showing any action of the town or its municipal officers in the premises, we cannot assume anything more than that the road and bridge were built by the usual public officer (in this case the highway surveyor of the district), in accordance with the directions of the statute and the commissioners. This assumption gives full effect to any presumption of duty done, and indeed such acts of public officers are commonly spoken of as acts of the town, though not technically or legally so.

Giving the plaintiff the full benefit of this assumption, is the town proven guilty of the unlawful conversion of his material?

It is settled law that when a public officer, in the line of his duty, does a public work within a town, for the public benefit or use, the town, in the absence of any directions to him, is not liable for his misconduct in such work, even though it appointed him, and is obliged to pay the cost of the work: *Small v. Danville*, 51 Me. 359; *Mitchell v. Rockland*, 52 Me. 118; *Cobb v. Portland*, 55 Me. 381; 92 Am. Dec. 598; *Woodcock v. Calais*, 66 Me. 234; *Farrington v. Anson*, 77 Me. 406; *Bulger v. Eden*, 82 Me. 352.

A highway surveyor is a public officer, charged with a public duty "to open and keep in repair" public ways legally established within his district. He is appointed and paid by the town, and the town supplies him with the necessary funds for the performance of his duty. But the town does all this as a public duty, not for its own peculiar gain. It has no proprietorship in the roads and bridges built and maintained by taxes upon its inhabitants. The roads and bridges belong to the public.

In appointing highway surveyors, in raising and expending money for roads and bridges, the town acts simply as the political agent of the state, and should have no more pecuniary liability for the misconduct of such officer than should the governor for the misconduct of a public officer bearing his commission. Of course, the statute may impose such a liability on a town, as it may on the governor, but no such statute is invoked or cited in this case.

It was in accordance with these principles that *Small v.*

Danville, 51 Me. 359, was decided. In that case the plaintiff had some split stones lying upon the land taken for a highway when the way was located. In building a culvert in this highway, the highway surveyor of the town used this split stone, and the plaintiff brought an action of trespass against the town. It was conceded that the using of the stone constituted a trespass, but it was held that the town was not liable. That case was very like this in its facts. The surveyor was evidently opening and making a road just located. The principle there established is decisive of this case.

The plaintiff cites several cases from Massachusetts, which should be noticed. In *Hawks v. Charlemont*, 107 Mass. 414, the town voted to take charge, and appointed its selectmen as agents with full discretion. It did not leave the work to the highway surveyors. In *Deane v. Randolph*, 132 Mass. 475, the town voted to put the selectmen in charge of the work, and they assumed such charge, hiring men, etc. In *Waldron v. Haverhill*, 143 Mass. 582, the city, "instead of leaving the duty of keeping the highways in repair to be performed by the officers and in the methods provided by the general laws," assumed to perform it by means of its own agents. In *Doherty v. Braintree*, 148 Mass. 495, the town voted to take charge of the work, and appointed a committee of five to act with the selectmen, all as agents of the town.

On the other hand, in the later case in the same state, *Prince v. Lynn*, 149 Mass. 193, the same court reiterated the doctrine that the municipality was not liable for the misconduct of its highway surveyors while engaged in their public duties. In the still later case of *Hennessey v. New Bedford*, 153 Mass. 260, the city voted a specific sum of money for the improvement of a particular street. The mayor and street commissioner, without special instructions, assumed the care of the work. Held, that the city was not liable for their misconduct in the premises.

The distinction between the two classes of cases is clear. In the one class, the municipality has interfered by giving directions, or taking charge of the work by its own agents, as in *Woodcock v. Calais*, 66 Me. 234. In the other class, the municipality has not interfered, "but has left the work to be performed by the proper public officers, in the methods provided by the general laws."

Upon a new trial the plaintiff may be able to adduce evidence which will bring the case within the former class, but

upon the evidence now before us, the case is clearly within the latter class.

The exceptions do not need to be considered.

Motion sustained. New trial granted.

Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents.*

The Purpose of This Note is to consider the liability of municipal corporations for the wrongful acts and omissions of their servants and agents. These corporations, like other corporations aggregate, cannot act or omit to act except through and by their officers and agents, and therefore, in every instance in which they have been held answerable for any wrongful act or omission, it must necessarily have been a wrongful act or omission on the part of one or more of their officers or agents, or of some person who, though not strictly occupying the relation of an officer or agent, yet is one to whom the municipality has deputed the performance of some duty, and has thus made itself answerable for his wrongful act or omission relating thereto.

With Respect to the General Principles by which the liability of municipal corporations must be determined, the divergence of judicial opinion is not greater than might naturally be expected, where the subject is so difficult and important, and the circumstances to which the principles are to be applied are so variant. These corporations are regarded, with reference to some of their duties and functions, as representing and acting for the state or sovereign, and with reference to others, as acting for themselves, somewhat as private corporations, and, generally, when acting in the former capacity they are not answerable for the acts or omission of their officers or agents, while when acting in the latter capacity their liability is ordinarily the same as that of a private person or corporation. The great difficulty and the great divergence of judicial opinion arise from the fact that no test has been formulated by which to decide with unerring accuracy whether a particular act or omission occurred in the discharge of governmental or of *quasi* private duties.

General Test of Municipal Liability. — If the duty in respect to which there has been a wrongful act or omission is one resting primarily upon the municipality, and is not a mere governmental duty, the performance of which has been delegated to the municipality by competent legislative authority, then the liability of the municipality is substantially that of a private corporation. Hence one of the tests formulated and applied by the courts of New York is as follows: "To determine whether there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or non-feasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality": *Ehrgott v. Mayor*, 96 N. Y. 273; 48 Am. Rep. 622; *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442. "Whenever," said the supreme court of

* REFERENCE TO MONOGRAPHIC NOTES.

Liability of cities for neglect to repair streets: 63 Am. Dec. 350-357.

Liability of cities for unauthorized acts of their officers: 100 Am. Dec. 358-360

Liability of cities for defects in and want of repair of sewers: 29 Am. St. Rep. 737-741.

Tests for determining city's liability for damages occasioned in the execution of governmental or sovereign powers: 66 Am. Dec. 434-442.

Georgia, "the negligence or non-feasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation is exercising, as a corporation, its private franchise powers and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers precisely as are individuals": *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256, 258. In an action against the representatives of the city of New York to recover for injuries resulting from alleged negligence in keeping open an excavation in the street unguarded and unlighted at night, the court of appeals of that state said: "The corporation of the city of New York possesses two kinds of powers,—one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual. The distinction between these two classes of powers is obvious, and has been frequently recognized and established in our courts: *Wilson v. Mayor etc. of New York*, 1 Denio, 595; 43 Am. Dec. 719; *Bailey v. Mayor etc. of New York*, 3 Hill, 531; 38 Am. Dec. 669; *Mayor etc. of New York v. Bailey*, 2 Denio, 450, opinion of Hand, S.; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316. Although the difference between the two kinds of powers is plain and marked, yet, as they approximate each other, it is oftentimes difficult to ascertain the exact line of distinction. When that line is ascertained, it is not difficult to determine the rights of parties; for the rules of law are clear and explicit which establish the rights, immunities, and liabilities of the appellants when in the exercise of each class of powers. All that can be done, probably, with safety is to determine, as each case arises, under which class it falls": *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369; 55 Am. Dec. 347.

Liable in Respect to Municipal Duties only.—Doubtless many decisions may be found in which the liability of municipal corporations for the acts or omissions of their officers or agents is compared to that of private persons or corporations, and language is used from which the inference might be drawn that whenever the latter are liable the former are equally so: *Cline v. Crescent City R. R. Co.*, 41 La. Ann. 1031; *Ross v. Madison*, 1 Ind. 281; 48 Am. Dec. 361; *Wallace v. Muscatine*, 4 G. Greene, 373; 61 Am. Dec. 131; *Templin v. Iowa City*, 14 Iowa, 59; 81 Am. Dec. 455; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Cotes v. City of Davenport*, 9 Iowa, 227; *Mayor of Helena v. Thompson*, 29 Ark. 569, 573; *Denver v. Dunsmore*, 7 Col. 328; *Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Greencastle v. Martin*, 74 Ind. 449; 39 Am. Rep. 93; *Plutz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286. These decisions, like all others, must, however, be considered and construed in connection with the attendant facts, and then they will generally not be found inconsistent with the principle hereinbefore stated, and which restricts the liability of municipalities to acts or omissions relating to the discharge of *quasi* private duties. It is true that nearly every duty that a municipality is by law called upon to discharge affects, or may affect, many persons, and may without impropriety be

styled "a public duty"; and the fact that the duty is to some extent a public one may not exclude municipal liability, if the city, in contemplation of law, has undertaken the performance of the duty in consideration of the privileges and emoluments granted by its charter, or for the purpose of gain or profit for itself. Hence, if a public improvement is maintained by a municipality, for the use of which it has the right to exact tolls, there is no question of its liability to respond in damages for injuries resulting from the negligence of its officers or agents in respect to such improvement; and though no profit is to be realized by the municipality from the performance of a duty confided to it, there are many authorities supporting the view that its acceptance of the charter imposing such duty is equivalent to an agreement on its part that it will perform it, and hence, that liability results from its non-performance or negligent performance, and is enforceable by any one injured thereby: *City of Denver v. Dunsmore*, 7 Col. 332; *Henly v. Mayor of Lyme*, 5 Bing. 91; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Scott v. Manchester*, 2 Hurl. & N. 204; 26 L. J. Ex. 406; *Cowley v. Sunderland*, 6 Hurl. & N. 565; 30 L. J. Ex. 127. "These decisions proceed on the ground that where a municipal corporation acts in the exercise of powers or the discharge of duties, in no wise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common-law liability for the acts of its servants; and that it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burden accepted under the charter in consideration of its privileges": *City of Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 464; *Barton v. Syracuse*, 36 N. Y. 54; *City of Galveston v. Posmain-sky*, 62 Tex. 118, 128; 50 Am. Rep. 517; *Baugus v. Atlanta*, 74 Tex. 629; *Klein v. Dallas*, 71 Tex. 280. If the duty imposed by the charter is clearly defined, and the municipality has no discretion to do or to omit it, as in the judgment of its officers may seem proper, it is generally characterized as a ministerial duty, and the city is held answerable for wrongful acts or omissions in its performance: *Barton v. Syracuse*, 36 N. Y. 55; *Clayburgh v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *City of Elgin v. Eaton*, 83 Ill. 537; 25 Am. Rep. 412; *Clark v. Washington*, 12 Wheat. 40; *Weightman v. Washington*, 1 Black, 40; *Orme v. Richmond*, 79 Va. 86. And unless the duty of the corporation is in this sense ministerial, no municipal liability can result from its non-performance, or from its performance in a negligent or insufficient manner: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35. Therefore, in ascertaining whether a city is liable for a given wrongful act or omission, the inquiry must be, whether the duty of the municipality was, within the meaning of the decisions upon the subject, ministerial or not. In this connection it should be remembered that the officers of a city may be charged with many duties which are not duties of the municipality, by the non-performance or negligent performance of which it and some or all of its citizens may be damaged. When such is the case, the city is not in default, though its officer may be, and he, instead of it, is liable to indemnify persons injured by his misfeasance or non-feasance. "If the act of the officer or the subordinate of the officer is done in the attempted performance of a duty laid by law upon him, and not upon the municipality, then the municipality is not liable for his negligence therein": *Mazmilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468.

Classification of Cases of Non-liability. — The cases in which municipalities are not answerable for injuries resulting from their wrongful acts or omissions, or that of their officers or agents acting by their sanction, resolve

themselves into three classes, to wit: 1. Cases in which the alleged duty was discretionary, and its performance could not be compelled or controlled at the instance of a citizen, tax-payer, or other person, but might or might not be undertaken, as the governing authorities of the municipality should determine; 2. Cases in which, while it was the duty of the officers of the municipality to act in a mode prescribed by the law, yet in such action they were discharging a governmental duty delegated to the municipality by the legislature, out of which no liability could have arisen had such authority not been delegated, and its performance had been entered upon by some other governmental agency; 3. Cases in which the officer, though acting in his official capacity, is not discharging any municipal duty, as where a city surveyor is called upon to make a survey, or a city marshal or other officer to levy a writ. In respect to these duties he is no more the agent or servant of the city than if he were an officer of the county or state, or were a mere private person voluntarily undertaking their performance.

In the first class are included all those actions in which a recovery is sought upon the ground that the municipality, by adopting some ordinance or regulation, might have prevented the injury complained of. Thus when a plaintiff alleged that he was injured by the explosion of a manufactory of fire-works while assisting in extinguishing a fire, and that it was the duty of the city in which such works were operated to have suppressed them by exercising the power granted to it to prohibit the manufacture, sale, or exposure of fire-works, or other inflammable or dangerous articles, the allegation was, upon demurrer, held to be insufficient to establish any liability against the city, because no person had any right to demand that the power vested in the municipality be exercised in any particular way: *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681. When a discretion exists as to doing or omitting the performance of any alleged duty, or as to the manner in which it shall be performed, and the exercise of such discretion involves legislative or judicial action, there can be no recovery of the municipality because it failed to act, or acted in a particular manner. In one thing the authorities "all unite, and that is, in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method": *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Dooley v. Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *Kiley v. City of Kansas*, 87 Mo. 103; 56 Am. Rep. 443; *Moffitt v. Ashville*, 103 N. C. 237; 14 Am. St. Rep. 810. Therefore, in no instance can a recovery be sustained on the ground that the injuries complained of arose out of the failure of the municipality to enact an ordinance, the enactment of which was within the powers granted to its common council: *Wheeler v. Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837; *City of Lafayette v. Timberlake*, 88 Ind. 330. Nor on the ground that it had enacted an ordinance permitting the doing of the act complained of, unless such act was necessarily injurious or unlawful: *Burford v. Grand Rapids*, 53 Mich. 98; 51 Am. Rep. 105; *Forsyth v. Atlanta*, 45 Ga. 152; 12 Am. Rep. 576; *Rivers v. Augusta*, 65 Ga. 376; 38 Am. Rep. 787; *Hill v. Charlotte*, 72 N. C. 55; 21 Am. Rep. 451. As to licensing acts necessarily dangerous or unlawful, see *Little v. Madison*, 42 Wis. 643; 24 Am. Rep. 435; *Stanley v. Davenport*, 54 Iowa, 463; 37 Am. Rep. 216.

Plan of Work, Error in. — As a general rule, when to a municipality is delegated the authority of determining how a duty shall be performed, its erroneous determination cannot result in its liability. For instance, if

it determines to construct works of a public character and for the public benefit, and in deciding upon the plan for their construction errs, so that when they are constructed in accordance with such plan they are insufficient to accomplish the purpose intended, and from such insufficiency a private person is injured, he is without redress: *City of Denver v. Capelli*, 4 Col. 25; 34 Am. Rep. 62; *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Fair v. Philadelphia*, 88 Pa. St. 309; 32 Am. Rep. 455; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622; *Johnston v. District of Columbia*, 118 U. S. 19; *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450.

To the rule exempting municipalities from liability for injuries resulting from the plan of a public work, some limitation is essential, and must be conceded. For instance, if it is a part of the plan, or a necessary consequence of its execution, that private property must be invaded or destroyed, its owner is not without redress; for such invasion or destruction is not an object for the accomplishment of which the municipality is authorized to plan. So, doubtless, any plan of a public work which, if faithfully executed, must obviously result in the creation and maintenance of a nuisance cannot be so executed without creating a right of action in favor of one specially damaged thereby. Hence if the plan for a public sewer requires its contents to be discharged upon private property, the municipality must respond in damages: *Lehn v. San Francisco*, 66 Cal. 76; *Weis v. City of Madison*, 75 Ind. 241; 39 Am. Rep. 135. To hold otherwise would enable municipal authorities, under the pretense of exercising their discretion in planning a public improvement, to willfully destroy private rights of property. In some of the cases the liability is said to result from negligence in exercising the power of devising and adopting plans: *City of Evansville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86. But if the liability of the municipality can result from negligence in devising a plan, we apprehend that the negligence must be gross. In other words, that it must be such as to indicate a willful indifference to probable injurious consequences; and perhaps the liability of the city, however unskillfully devised and inadequate the plan may be, must be limited to cases where the execution of the plan "must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled." In such a case the right of the owner to redress by civil action must necessarily be affirmed: *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507; *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431; *Stoddard v. Saratoga Springs*, 127 N. Y. 261; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Seymour v. Cummins*, 119 Ind. 148.

Classification of Cases of Non-liability, though Duty is not Discretionary. — In the second and third class of cases are included those in which the municipality or its officers or agents have been guilty of some wrongful act or omission of which it cannot be truly said that they had a discretion to act or to omit to act, as in their judgment seemed best, but in respect to which the immunity from liability rests either upon the ground that the municipality was but a mere instrumentality of the state, or the officer whose wrongful act or omission has caused the injury was, though not acting in the discharge of any governmental function, charged with a duty prescribed and limited by law, and in respect to which he was the servant and agent of, and controlled by the law, and not the agent or servant of nor controlled by, the municipality. Speaking upon this subject, the supreme court of South Carolina said: "There is no statute in this state authorizing an action against a municipal corporation

for non-feasance as to a public duty. The general doctrine is, that civil or municipal corporations are public in their nature, but instrumentalities of the state which incorporates them to assist the state in more effectually discharging its duty. The powers conferred on such corporations are not always uniform, but they generally relate to the administration of justice, the support of the poor, the establishment and repairs of highways, etc., all of which are matters of state as distinguished from local concern. It seems to have been considered, that as the state cannot be sued, these governmental agents of the state should not be liable in an action of tort for either non-feasance or misfeasance; that they are not liable in case, or trespass, or other form of civil action for neglect of public duty, unless such liability be expressly declared by statute": *Black v. City of Columbia*, 19 S. C. 412; 45 Am. Rep. 785, 790; *Fowle v. Alexandria*, 3 Pet. 398.

Public Duties, Liability in Discharge of.—As already remarked, the fact that a duty is partly public does not necessarily exonerate the municipality from liability, for the reason that there are some public duties which municipalities are deemed to have assumed in consideration of the privileges conferred by their charters, and it is not probable that any test can be formulated upon which all the courts will agree, and from which one can always determine whether a duty is public in the sense that relieves a municipality from liability for negligence consisting either in its non-performance or its performance in a careless and injurious manner. If the duty of performance arises from the special provisions of the municipal charter, instead of from general laws applicable to all municipalities, this fact may sometimes be decisive, the inclination of the courts being to exonerate the municipality from liability where the duty is not imposed by its charter. The impossibility of the municipality receiving benefit from the performance of a duty is also entitled to great consideration. Perhaps the leading case upon this subject is *Hill v. City of Boston*, 122 Mass. 344; 23 Am. Rep. 332. The plaintiff in that case sought to recover for injuries suffered while attending a public school from the unsafe condition of a stairway in the school-house. There was no special provision in the charter of the city prescribing its duties in the construction, maintenance, and repair of school-houses, and whatever was due from it resulted from provisions in the general statutes of the state, equally applicable to all municipalities. The decision of the court was written by Chief Justice Gray, and in it municipal liability was more thoroughly considered than in any other opinion coming within our observation, and the conclusion which the learned judge reached, and the arguments used, and the authorities cited by him strongly tend to the denial of municipal liability in many instances in which such liability is conceded by the weight of authority upon the subject. Especially is this true in regard to liability for negligence in the maintenance and repair of public bridges and highways. The judge commenced by saying that "we had supposed it to be well settled in this commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." That the supposition with which the learned judge began his investigations was by them strengthened into immovable conviction is apparent from the following extract from the closing passages of his opinion: "We find it difficult to recouile the view that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon

it with the doctrine that the purpose of the creation of municipal corporation by the state is to exercise a part of its powers of government,—a doctrine universally recognized, and which has nowhere been more strongly asserted than by the supreme court of the United States in the opinions delivered by Mr. Justice Hunt in *United States v. Railroad Co.*, 17 Wall. 322, 329, and by Mr. Justice Clifford in *Laramie v. Albany*, 92 U. S. 307, 308. But however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

In New Hampshire, an action was brought by a person injured by reason of his horse taking fright at a stream of water thrown from a hydrant which was being tested by the fire department of a city for the purpose of ascertaining its capacity and utility in supplying water to extinguish fires. The duties of the officers whose negligence was complained of were prescribed by general laws, and not by special municipal charter, and the principles applicable to the case were manifestly identical to those applied to the case last cited, and so the court ruled, saying: "No private action, in the absence of a statute giving it, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties, in distinction from those done in a public capacity as a governing agency": *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533, 535; *Clark v. Manchester*, 62 N. H. 577. Upon the same principle the liability of municipalities for negligence in not providing suitable apparatus and a sufficient supply of water to extinguish fires is denied: *Wright v. City Council of Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256.

Public Duties Voluntarily Assumed.—In the cases to which we have referred, the duty was imposed by general law, and the municipality had no legal right to refuse to perform it. But if the duty is of a public nature, and is one from the performance of which the municipality can derive no gain, it is not material that, instead of being compelled by statute, it is voluntarily assumed by statutory permission. "The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law. To make such a distinction would not have the effect to encourage towns in making liberal provision for the public good. It is well known that many towns in Massachusetts, not bound to do so,

voluntarily maintain high schools. It is not to be supposed that the legislature have intended to make such towns liable to private actions, when towns required to maintain high schools would be exempt. On the other hand, it has been recognized in numerous cases, in this state and elsewhere, that the question of the liability of towns does not rest upon this distinction: *Bigelow v. Randolph*, 14 Gray, 541; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Clark v. Waltham*, 128 Mass. 567; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Wixon v. Newport*, 13 R. I. 454; 43 Am. Rep. 35; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289, 294. Hence if authority is given by statute to maintain workhouses or almshouses to relieve poor and indigent persons, the fact that the municipality, acting under the permission of the statute, maintains such workhouses does not make their maintenance any the less a public duty, and the city is exempt from liability to the same extent as if their maintenance had been compulsory instead of permissive; nor can the city be held answerable on the ground that some revenue is derived from the labor of the inmates, if the institution is not conducted with a view to pecuniary profit: *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465. Many other cases may be cited in which the general principle is declared, that a municipality is not answerable for the acts or neglects of its officers or agents intrusted with the discharge of a public duty: *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218; *County Comm'rs v. Duckett*, 20 Md. 468; 83 Am. Dec. 557; *Gibbes v. Beaufort*, 20 S. C. 213; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Brown v. Guyandotte*, 34 W. Va. 299; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Bailey v. New York*, 3 Hill, 531; 38 Am. Dec. 669; *Maxmilian v. New York*, 62 N. Y. 60; 20 Am. Rep. 468; *City of Lafayette v. Timberlake*, 88 Ind. 330.

Public Duties Imposed by Municipal Charters. — The fact that the duty was imposed by the charter instead of by a general law has not always been regarded as controlling. Thus where it was part of the policy of the state to secure the safety of steam-boilers within its limits, by providing for their inspection, and with respect to one municipality this duty was, by its charter, devolved upon it, and it was therefore contended that the city was answerable for damages alleged to have been occasioned by the negligence of an inspector appointed by it, the supreme court of the state, denying this liability, said: "The state has seen fit to attempt by legislation to secure the safety of steam-boilers within its limits, and for this purpose has provided for the appointment of inspectors in the several congressional districts into which the state is divided. If the legislature had provided for the appointment of inspectors by the several cities within their respective limits by the same statutes under which the governor acts in making similar appointments, it would be difficult to maintain that the city would be liable for the inspector's negligence without also maintaining that the governor would likewise be liable for the negligence of his appointees. Both the city and the governor would be acting in the discharge of a public duty, and the duties to be performed by the person appointed are also public. The duty of inspection of boilers is recognized by the statute as governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or who may be exposed in any way to danger from its unsafe condition. The city of New Haven, as such, has no pecuniary or individual or private interest in the matter, and although the power

of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence": *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14.

Public Streets, Cases Holding Duty in Respect to, is Public, and not Municipal. — In putting or keeping in proper condition and repair the streets of a municipality, its officers discharge or fail to discharge a duty public in its character, and from which it, in our judgment, receives no special benefit or profit. Doubtless, its residents use its streets more frequently than residents of other parts of the state, and in that sense reap a greater benefit from them. But this is more emphatically true of the public schools, and as to them we believe it is conceded that the municipality and its officers exercise governmental functions, for a mistaken or negligent exercise of which no liability can accrue against the municipality. In several of the states, therefore, where the law, whether contained in the charter or elsewhere, merely confers upon the municipality or certain of its officers authority to lay out, establish, or repair public streets, without expressly making the municipality answerable for negligence, no recovery can be sustained against it for injuries suffered by the failure to keep the streets in proper repair, or for any obstruction or defect in them. In California, an action was brought to recover compensation for injuries sustained in falling through a bridge which was part of the public street. The charter of the city provided that its common council should have power to cause the streets to be cleaned and repaired, and the plaintiff insisted "that, the power being conferred, a correlative duty is imposed, and a consequent liability for non-performance of such duty arises in favor of individuals who may have suffered injury by reason of its non-performance." But the court answered that the duty was by the terms of the statute imposed upon the officers, rather than upon the municipality, and that the result of the reasoning in favor of the plaintiff was to affirm the liability of the officers, rather than of the city, and further, that incorporated cities were, under the laws of the state, "mere governmental instruments formed under the state laws for the purposes of internal administration, . . . not distinguishable in principle from counties created by law for the same purpose," and as the latter were not liable, neither were the former: *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Chope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 113. The decisions of Arkansas, Connecticut, Massachusetts, Michigan, New Jersey, and Vermont are in harmony with those of California upon this subject, and, in the absence of any statute imposing liability upon the city, hold that a person injured by defects in or non-repair of public streets is without redress by action against the municipality: *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32; *Young v. City Council etc.*, 20 S. C. 116; 47 Am. Rep. 827; *Navasotoa v. Pearce*, 46 Tex. 525; 26 Am. Rep. 279; *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 250; *McCutcheon v. Homer*, 43 Mich. 483; 38 Am. Rep. 212; *Barry v. City of Lowell*, 8 Allen, 127; 85 Am. Dec. 690; *Young v. Commissioners*, 2 Nott & McC. 537; *Hill v. City of Boston*, 122 Mass. 344; 23 Am. Rep. 332; *French v. City of Boston*, 129 Mass. 592; 37 Am. Rep. 393; *Hewison v. City of New Haven*, 37 Conn. 475; 9 Am. Rep. 342; *Pray v. Mayor of Jersey City*, 32 N. J. L. 394; *Bates v. Rutland*, 62 Vt. 178; 22 Am. St. Rep. 95; though in some of these states there now exists municipal liability, expressly created by statute: *City of Grand Rapids v. Wyman*, 46 Mich. 516; *Dotton v. Village of Albion*, 50 Mich. 129; *Cromarty v. Boston*, 127 Mass. 329; 34 Am. Rep. 381.

Public Streets, Cases Affirming Municipal Liability for Negligence in Respect to. — The ground upon which municipal liability is denied is the obvious one that the duty of keeping the streets in repair is a public duty, from the performance of which the municipality derives no emolument or special advantage; and the mere fact that it was created in and by the charter does not result in any implied contract on the part of the city that it will exercise it without error or negligence. While, in our judgment, these reasons are both pertinent and convincing, there is no doubt that such is not the judgment of a decisive majority of the courts of this country, both state and national. They proceed upon the ground that the duty of keeping in repair and in proper and safe condition all highways within a city is peculiarly a municipal duty, — one which is rarely, if ever, confided to any other than municipal authority, — and that the existence of this duty implies that redress shall be accorded in the courts to any one injured by its non-performance or misperformance. While in many of the cases the power of the municipality is conferred by its charter, this does not appear to be essential, and the liability of the municipality has been affirmed when the statute imposing the duty was to be found in the general laws of the state, as well as where it was implied from the terms of the charter: *Cleveland v. King*, 132 U. S. 295; *Curdington v. Fredericks*, 46 Ohio St. 442. Nor does it seem to be essential that the duty shall rest upon an express legislative command. It is sufficient that the power to control, improve, and repair the streets within its boundaries is conferred upon the municipality, and it is provided with means which, if exercised, will enable it to execute the power granted: *Hutson v. Mayor etc.*, 9 N. Y. 163; 59 Am. Dec. 526; *Albrittin v. Huntsville*, 60 Ala. 486; 31 Am. Rep. 46; *Noble v. Richmond*, 31 Gratt. 271; 31 Am. Rep. 726; *Erie v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87; *O'Neill v. New Orleans*, 30 La. Ann. 220; 31 Am. Rep. 221; *Hitchins v. Mayor of Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422. The duty of the municipality with respect to its streets is treated as ministerial, and it is therefore held liable for any injuries resulting from negligence in the performance or non-performance of such duty, whether it results in a defect in a street or sidewalk from which injury follows to a person using it with due care, provided the defect is one of which the municipality and its officers had notice, or of which they could not be ignorant without being negligent in the discharge of their duties: *Bradford v. Mayor of Aniston*, 92 Ala. 349; 25 Am. St. Rep. 60; *Baltimore City v. Marriott*, 9 Md. 160; 66 Am. Dec. 326; *Taylor v. Cumberland*, 64 Md. 68; *Cline v. Crescent City R'y Co. and City of New Orleans*, 43 La. Ann. 327; 26 Am. St. Rep. 187; note to *Browning v. City of Springfield*, 63 Am. Dec. 350-357; *Weisenberg v. Appleton*, 26 Wis. 56; 7 Am. Rep. 39; *Saulsbury v. Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122; *Peoria v. Simpson*, 110 Ill. 294; 51 Am. Rep. 683; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Cleveland v. King*, 132 U. S. 295, 303; *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Farquar v. Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732; *Manderschid v. City of Dubuque*, 29 Iowa 73; 4 Am. Rep. 196; *Board of Comm'rs v. Topeka*, 39 Kan. 197; *Young v. Village of Waterville*, 39 Minn. 196; *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144; *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Olson v. City of Chippewa Falls*, 71 Wis. 558; *Whitfield v. City of Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596; *City of Olathe v. Mizee*, 48 Kan. 435; *ante*, p. 308. In some of the states, the liability of municipalities for injuries suffered in the public streets has been affirmed in exceptional cases, to which the application of well-settled

legal principles ought to have led to a different result. Thus where a city adopted an ordinance prohibiting, under the penalty of a fine, "any sport, play, or exercise that might produce bodily injury, or endanger property on any street, square, or alley within the city limits," it was held that the city might be answerable for injuries suffered by plaintiff while crossing a sidewalk, "inflicted by a sled on which a number of boys were coasting on the snow, which at the time covered the streets and the sidewalks," unless it appeared that vigorous efforts were made to enforce the ordinance: *Taylor v. Mayor of Cumberland*, 64 Md. 68; 54 Am. Rep. 759. But it is manifest that the enforcement of an ordinance of this character must depend on the skill and vigilance of the police; and as the city is never answerable for their negligence of inaction, it ought not to be held liable for their not enforcing its ordinance against coasting: *City of Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. City of Aurora*, 85 Ind. 130; 44 Am. Rep. 1; *Schultz v. City of Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779.

If a city undertakes to repair or improve a street, it is also liable for the neglect of its officers or agents in leaving the street in dangerous condition without proper guards or signals to prevent accidents or warn travelers of danger: *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243; *Barney Dumping-boat Co. v. New York*, 40 Fed. Rep. 50. Negligence may consist of permitting a dangerous object or obstruction to remain in a street, as well as permitting it to become or continue out of repair. Hence a city is answerable for injuries suffered by a child of tender years from dangerous machinery, which was permitted to be and remained unguarded for many years in a public highway: *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186. Furthermore, the safety of persons lawfully and prudently upon a public street may be endangered without the street itself being out of repair, as where there are dangerous excavations by the side of it, or walls or other objects in it from the falling of which travelers may probably be injured. In such a case, if the wall or other standing object is in a dangerous condition, and therefore liable to fall, or the excavation is one into which a prudent traveler may probably fall, and the city has notice of the danger, it may become answerable to one injured from its failure to erect barriers by the side of the excavation or to have the insecure wall demolished or strengthened: *Bassett v. City of St. Joseph*, 53 Mo. 290; *Kiley v. Kansas*, 87 Mo. 103; 56 Am. Rep. 443; *Parker v. City of Macon*, 39 Ga. 129; 99 Am. Dec. 486; *City of Olathe v. Mizze*, 48 Kan. 435; *ante*, p. 308.

The cases to which we have referred as maintaining the liability of cities for damages resulting from the non-repair of streets related to injuries received by persons, or from their or their animals being hurt while passing over such streets, from some defect therein. In the states where municipal liability is conceded for negligence in maintaining streets, such liability may also arise where real property is injured or damaged. Thus embankments may be so constructed as to prevent the natural flow of water, and the culverts in such embankments may be altogether insufficient to permit the passage through them of such water as must reasonably be expected, or drains or gutters may be insufficient or so negligently constructed that they will cause the overflow of water upon the premises of property-holders. The liability of municipalities for defects in and want of repair of sewers was considered in the note to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737-741, and therefore will not here be treated in detail. It is sufficient here to state that for negligence in their construction, maintenance, or repair, every city is answer-

able to the same extent as for negligence in respect to other parts of the street, whether such negligence results in personal injury, as where a sewer is left open without guard or signal, or in injuries to property by flooding or by depositing offensive material upon or in such close proximity to it as to depreciate its value by rendering it unhealthful or highly disagreeable to the senses: *City Council v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562; *Fort Wayne v. Coombs*, 107 Ind. 75; 57 Am. Rep. 82; *Chalkley v. Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and note; *Cooper v. City of Dallas*, 83 Tex. 239; 29 Am. St. Rep. 645; *Mayor of Frostburg v. Dufty*, 70 Md. 47; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158; *Frostburg v. Hitchins*, 70 Md. 56; *Hardy v. Brooklyn*, 90 N. Y. 435; 43 Am. Rep. 182. The same rule applies to embankments, culverts, dams, drains, and reservoirs, when, through negligence or carelessness in their maintenance, lands are flooded or otherwise damaged: *Ross v. Madison*, 1 Ind. 281; 48 Am. Dec. 361; *Wallace v. City of Muscatine*, 4 G. Greene, 373; 61 Am. Dec. 131; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431; *Cooper v. City of Dallas*, 83 Tex. 239; 29 Am. St. Rep. 645; *Aldworth v. Lynn*, 153 Mass. 53; 25 Am. St. Rep. 608.

Public Streets, Defects in Plan of Improvement. — Negligence or carelessness in respect to streets and sewers of which we have spoken as leading to municipal liability relates rather to the mode in which a plan or system is carried out than to the system itself. In determining whether a street shall be laid out or improved, or the manner of its improvement, the municipality exercises quasi legislative or judicial functions, and from error or mistake therein, as a general rule, no liability results. Hence the statement is frequently made in the opinions of the courts, that while liability may exist for negligence in the execution of a plan, it cannot arise from a defect in the plan itself. This rule, while of general, is not of universal application. For a mere error of judgment on the part of the officers of a municipality not so gross as to support the inference of imbecility or willful inattention, a city is not answerable, though as a result of such error public works are constructed from which injury results to persons or property: Note to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737, 738; *Urquhart v. Ogdensburg*, 91 N. Y. 67; 43 Am. Rep. 655. The tendency of the more recent decisions is to affirm that "any particular plan that may be adopted must be a reasonable one": *Hitchins v. Mayor*, 68 Md. 100; 6 Am. St. Rep. 422. This subject was carefully examined in *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, and the following conclusions reached: "The control of the streets of cities was not put into their hands for the purpose that they might plan or order that the streets should be made dangerous or unsafe for the public to travel thereon, nor was such control put into their hands for the purpose that they might plan or order that the streets should remain in an unsafe or dangerous condition if previously dangerous, but such control was given to them for the sole purpose that they should make and keep the streets safe and convenient for the traveling public; and we think it was put into their hands as a mandatory duty, which they have no right or discretion to evade or avoid. If a city should plan or arrange that a street should be made unsafe and dangerous, we should be inclined to think that it would so transcend its powers as given to it by the legislature, and so violate its duties as imposed upon it by the legislature, that it would be liable for any injury which might occur to any individual by reason of such unwise action. Such action would be substantially the same as planning and creating a public nuisance. Can a city, by planning that a cistern should be left uncovered in the middle of a public street, avoid all

liability for injuries that may occur by reason of some person's falling into it in the night-time, without fault on his part, when, on the other hand, it would be liable if the cistern were left uncovered by the person who constructed it, or was afterward uncovered by some other person, and notice of its condition had been given to the city officers? Is such a distinction founded in reason? 2 Thompson on Negligence, pp. 734, 735, 836, secs. 2, 3, and notes; pp. 766, 767, 768, and notes. After a careful consideration of this entire question, we have come to the conclusion that where a street as planned or ordered by the governing board of a city is so manifestly dangerous that a court, upon the facts, can say as a matter of law that it was dangerous and unsafe, the rule contended for by the defendant should not have any application, and the city should be held liable; but where, upon the facts, it would be so doubtful whether the street as planned or ordered by the governing board of the city was dangerous or unsafe or not, — that different minds might entertain different opinions with respect thereto, — the benefit of the doubt might properly be given to the city, or rather to its governing board that planned or ordered that the street should be placed in such a condition, and the rule should be held to apply, and the city should not be held to be liable."

The plan adopted need not be such as to prove adequate in extraordinary emergencies, which a prudent man might fail to anticipate without being guilty of want of reasonable care and forethought. Thus in an action to recover for injuries suffered from an embankment and culvert, and the flooding of the plaintiff's premises by water from the inadequacy of the culvert, the defendant asked that the jury be instructed as follows: "If the jury shall find that the damage complained of was occasioned by a flood of water so much more extraordinary than usual that ordinarily careful and thoughtful men and ordinarily skillful engineers would not contemplate that such a flood would ever come, and such embankment and culvert did prove sufficient for all purposes for about three years, the jury should find the damage to have happened by what, in law, is called the 'act of God,' and should find for the defendant." This instruction was refused, and the inference to be drawn from the instructions given, taken as a whole, was to the effect that "if the damage to the plaintiff happened in consequence of the improvement, the city is liable." The judgment of the trial court was reversed on the ground that the instruction asked for "was within the law, and should have been given": *City of Madison v. Ross*, 3 Ind. 236; 54 Am. Dec. 481; *Mayor of New York v. Bailey*, 2 Denio, 433; *City of Evansville v. Decker*, 84 Ind. 328; 43 Am. Rep. 86. Though a flood or fall of rain is so extraordinary that the municipality might have been exonerated from liability had the plan of its sewers proved inadequate for the discharge of all the water falling into them, yet if such plan was not in fact inadequate even for the extraordinary emergency which arose, the municipality is answerable to one whose property is damaged by the failure to keep the sewer as originally planned and constructed in proper repair; for whether the municipality was in law bound to plan and construct the sewer, and it did or not, after, if it was constructed, every property holder affected by it had the right to assume that it would be kept in repair, and that its capacity would not be materially diminished by the negligence of the municipal authorities: *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158.

Public Streets — Negligence, and not Injury, is the Test of Liability. — The mere fact that injury was occasioned by a street being out of repair, or sewer being inadequate, or not in proper condition, does not result in municipal

liability, unless it further appears from the attendant circumstances that the condition leading to the injury was a consequence of negligence. Thus where it was shown that a sewer had become obstructed during or immediately succeeding a heavy fall of rain, so that it could not carry off the waters running into it, and that, as a consequence, plaintiff's premises were flooded and damaged, it was held that he was not entitled to recover without some evidence of negligence or omission of duty on the part of the municipality. The ruling upon the subject and the reasons for it were thus expressed by the court: "It is found upon sufficient evidence that the overflow was caused by a stoppage of the sewer with sand, dirt, and refuse matter washed in from the street, and that at or just before the flooding of the plaintiff's premises there was an unusually heavy shower of rain. There is no proof of any obstruction before that time. There being no fault in the construction of the sewer, causing the overflow, it was incumbent upon the plaintiff to show a neglect by the defendants to remove the obstruction after notice of its existence, or some omission of duty on the part of the city officers in looking after it and seeing that no obstruction occurred. There was no evidence, and there is no finding, that the sewer was liable to become obstructed under ordinary circumstances, so as to require the watch and care of the officials to prevent its becoming filled and choked with the wash of the street, or that it had been obstructed for any time and under circumstances from which it might be assumed that the officers of the city did know or ought to have known the fact. The city does not insure the citizen against damage from works of its construction, but is only liable, as other proprietors, for negligence or willful misconduct. The principles upon which municipal corporations are held liable for damages occasioned by defects in streets and sewers and other public works are well settled by numerous cases, and the liability is made to rest, in any case, upon some neglect or omission of duty: *Barton v. Syracuse*, 37 Barb. 202; 36 N. Y. 54; *Griffin v. Mayor etc. of New York*, 9 N. Y. 456; 61 Am. Dec. 700; *McCarthy v. Syracuse*, 46 N. Y. 194; *Nims v. Troy*, 59 N. Y. 500": *Smith v. Mayor*; 66 N. Y. 295; 23 Am. Rep. 53.

In the Grading of a Street, a city is liable for negligence or unskillfulness from which injury results, to the same extent as if such injury had arisen, after the grading was completed, from a failure to keep the street in a safe condition: *Meares v. Commissioners*, 9 Ired. 73; 49 Am. Dec. 412; *Commissioners v. Wood*, 10 Pa. St. 93; 49 Am. Dec. 582. Where such negligence or unskillfulness does not exist, a municipality, having power to establish or change grades, and to improve streets in accordance with grades as established or changed by its common council or other competent authority, is not answerable for consequential damages resulting to property by means of such grading: *Green v. Borough of Reuling*, 9 Watts, 382; 36 Am. Dec. 127; *Smith v. Corporation of Washington*, 20 How. 135; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Shaw v. Crocker*, 42 Cal. 438; *Wilson v. Mayor of New York*, 1 Denio, 595; 43 Am. Dec. 719; *Mayor of Philadelphia v. Randolph*, 4 Watts & S. 514; 39 Am. Dec. 102; except in states whose constitutions prohibit the damaging of private property for public use without first making just compensation to its owner. The liability of cities for injuries resulting from the grading of streets, and from changes in the grades thereof, is considered in the note to *O'Brien v. Philadelphia*, 150 Pa. St. 589; *post*, p. 835; except that such note does not treat of claims for damages occasioned by the grading of streets in such a manner as to interfere with the flow of water.

Watercourses, Grading Streets so as to Interfere with. — It is often difficult to

determine whether a depression in which water flows is or is not a watercourse within the legal signification of that term, and it is not within the purpose of this note to furnish definitions or authorities to aid in the decision of that question. Whenever there exists in a city a natural watercourse, the authority given to the municipality to grade streets does not carry with it the right, by such grading, to deprive persons of their rights in such stream, by preventing its flow to or through their property, nor does it entitle the municipality to so grade its streets as to hold back the waters of the stream, or to collect them into new channels and throw them upon the lands of private proprietors who were not injured by it in its natural state. If a street extends across a watercourse, the municipality is not at liberty by grading the street to prevent or obstruct the flow of the water, and it must therefore provide, by culverts or other appropriate means, for the escape of the water, so that the rights of riparian proprietors shall not be substantially impaired and the adjacent lands shall not be flooded to a greater extent than would occur if such watercourse were left in its natural condition. If by reason of the failure of the municipality to provide proper culverts, injuries result, it must respond in damages therefor: *Helene v. Thompson*, 29 Ark. 569; *Noonan v. City of Albany*, 79 N. Y. 470; 35 Am. Rep. 540; *Burden v. Portage*, 79 Wis. 126; *Rose v. St. Charles*, 49 Mo. 509; *Barns v. Hannibal*, 71 Mo. 449; *Haynes v. Burlington*, 38 Vt. 350; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Wheeler v. Worcester*, 10 Allen, 591; *Kellogg v. Thompson*, 66 N. Y. 88; *Mootry v. Danbury*, 45 Conn. 550; 29 Am. Rep. 703; *Parker v. Lowell*, 11 Gray, 353; *Morse v. Worcester*, 139 Mass. 389; *Stanchfield v. Newton*, 142 Mass. 110; *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; *Powers v. Council Bluffs*, 50 Iowa, 197; *Richardson v. Eureka*, 96 Cal. 443. If, however, a city has undertaken to provide sufficient culverts, and to aid it in accomplishing that purpose has consulted an engineer of skill and of good repute, whose advice it has followed in good faith, it is doubtful whether it is liable for injuries resulting from his error of judgment: *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622.

Surface Waters, Interference with, by Grading Streets. — Two opposing rules regarding the right to dispose of surface waters are still contending for supremacy in this country. According to one of them, the land-owner whose property is injured has a right to defend and protect his property by such means as to him shall seem fit, and may, therefore, by embankments, restrain such waters from flowing upon his land, or may, by drains, hasten their departure from his lands, though in either event injury may result to the land of another, unless he, in turn, takes some measure either to prevent the waters coming upon his land or to cast them off upon the lands of a third person. The other rule is sanctioned by the civil law, and is thus stated by Pothier: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he do not injure the neighboring heritage." The application of this rule requires the owner of the lower heritage to receive such waters as naturally flow upon his land, whether by a natural watercourse or not, and not to resist their flow by embankments or other defenses tending to overflow and injure the lands of his neighbor above him, who, in turn, is prohibited from collecting the waters into new channels and casting them in unusual amounts or places upon the land of the neighbor below him: See note to *Martin v. Jett*, 32 Am. Dec. 123-127; note to *Shane v. Kansas City etc. R. R. Co.*, 36 Am. Rep. 490-492.

A somewhat similar divergence exists respecting the right of municipalities to deal with surface waters in grading and otherwise improving streets.

The weight of authority probably inclines to the view that as long as the grading is done under the sanction of the law, and pursuant to a power authorizing the municipality to adopt grades and to improve streets in accordance therewith, no liability can arise against it from the fact that the grading results in an injury to some private proprietor, either by damming up and detaining surface waters on his land or by throwing thereon surface waters from which it was before exempt; but this immunity of the city from claims for damages does not extend to its wrongful and intentional acts in concentrating surface waters and discharging them upon the lands of private proprietors to their injury: *Pye v. City of Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *O'Brien v. City of St. Paul*, 25 Minn. 331; 33 Am. Rep. 470.

Where there is no natural watercourse, but the surface waters, owing to the slope of the land, draw off in a particular direction, and by the grading of the street an embankment is made, which prevents this flow of waters, whereby they are held back upon and caused to overflow adjacent premises, the persons damaged are, in the majority of the states, without redress, though by the construction of culverts or drains injury might have been prevented: *Wilson v. Mayor of New York*, 1 Denio, 595; 43 Am. Dec. 719. In a case in New York the general principle was declared that the city had the same right to grade a street, and in so doing to erect an embankment that the owner of a lot would have to fill it in and raise it to such height as might make it more desirable, and therefore that the city cannot be held answerable, where a private proprietor would not be liable had he done a similar act. It is true that in this case there was no ground whatever for holding the municipality liable, and there was nothing to show that any injury had resulted to any one from any cause, and the opinion of the court, so far as it dealt with general principles, was therefore a *dictum*. Nevertheless, as it has been much relied upon in other cases, we quote it, so far as material: "The defendant had, at least, as much right to fill up and raise this avenue as a private owner of a city lot has to fill up and improve his lot; and there can be no question that such an owner may fill up his lot and build upon it, and the surface water of adjoining lots may thus be prevented from flowing upon it, or the surface water may be thrown from it upon adjoining lots, and flow upon them in a different way and in larger quantities than before, and yet no liability would arise. If it were otherwise, it would be quite difficult to improve city lots and build up a city. Each owner may improve his lot and protect it from surface water. He may not collect such water into a channel, and throw it upon his neighbor's lot. But he is not bound, for his neighbor's protection, to collect the surface water which falls upon his lot, and lead it into a sewer: *Vanderwiele v. Taylor*, 65 N. Y. 341; *Gannon v. Hargadon*, 10 Allen, 106; 87 Am. Dec. 625"; *Lynch v. Mayor of New York*, 76 N. Y. 60; 32 Am. Rep. 271. These views are in harmony with those pronounced in many other courts in which the question was necessarily involved: *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Flagg v. Worcester*, 13 Gray, 601; *Corcoran v. City of Benecia*, 96 Cal. 1; 31 Am. St. Rep.; *Waters v. Bay View*, 61 Wis. 644; *Henderson v. City*, 32 Minn. 319; and are perhaps a logical consequence of many other cases, which, while not involving the question of damages resulting from surface waters, affirm the general principle that in no event can a municipality be held liable for consequential damages resulting from the exercise, without negligence on its part, of an authority confided to it by law: *Wakefield v. Newell*, 12 R. I. 75; 34 Am. Rep. 598; *Smith v. Tripp*, 13 R. I. 152; *Gilfeather v. Council Bluffs*, 69 Iowa, 310; *Simmons v. City of*

Camden, 26 Ark. 276; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253; *Keasy v. Louisville*, 4 Dana, 154; 29 Am. Dec. 395; *City of Delphi v. Evans*, 36 Ind. 90; 12 Am. Rep. 12; *Smith v. Corporation of Washington*, 20 How. 135; *Lee v. Minneapolis*, 22 Minn. 13; *Humes v. Mayor of Knoxville*, 1 Humph. 403; 34 Am. Dec. 657; *White v. Yazoo City*, 27 Miss. 357; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342.

In some instances the waters whose flow was arrested by the grading of a street had before that time been drawn off by depressions or ravines, and the contention was, that the city had become liable as for interference with a natural watercourse; but this liability was denied, unless the depression "in question had the proper qualities of, and constituted what is known in law as, a watercourse, as distinguished from a ravine, hollow, or other depression in land through which, in times of rains, heavy showers, and melting snows, the surface water is accustomed to escape. The term 'watercourse' is well defined. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses: *Shields v. Arndt*, 4 N. J. Eq. 234; *Luther v. Winnisimmet Co.*, 9 Cnsh. 171; Washburn on Easements, 209, 210": *Hoyt v. City of Hudson*, 27 Wis. 656; 9 Am. Rep. 473.

On the other hand, there are cases which proceed upon the theory that while a city has the right to grade its streets, and is not answerable for injuries resulting from a prudent exercise of that right, yet that it is negligence on its part for it to close up drains or gutters which have been used to protect lands from the accumulation of surface waters, and that where, by grading a street, it fills up such drains without providing others, it is guilty of negligence, and therefore liable for resulting damages: *Smith v. City Council of Alexandria*, 33 Gratt. 208; 36 Am. Rep. 788. We find a number of other cases which we are unable to reconcile with the general principle that municipalities are not answerable for surface waters being held back or restrained upon lands from which, before the grading of the street, they escaped by natural or other depressions. In most of these, some attempt had been made by means of culverts or other appliances to carry off the waters otherwise retained by the grade, and damages were recovered for the insufficiency of such appliances, or negligence in not keeping them in proper repair; and perhaps it may be truly said that the liability of the city was not founded upon its obstruction by grading the street, and thereby arresting the flow of surface waters, but upon its negligence in not keeping in proper repair culverts and sewers planned and constructed by it: *Ross v. Clinton*, 46 Iowa, 606; 26 Am. Rep. 169; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reid*, 57 Ill. 30; 11 Am. Rep. 1; *Bloomington v. Brokaw*, 77 Ill. 194; *Elgin v. Kimball*, 90 Ill. 356; *Maguire v. Cartersville*, 76 Ga. 84; *Reid v. City of Atlanta*, 73 Ga. 523. The general language employed by the court in *City of Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591, does not, it is true, place the decision on the ground of the insufficiency of the sewers, though it is clear from the opinion that such

was the real cause of the injury. The court here said: "This was an action of trespass on the case, brought against the city, to recover damages for flowing surface water upon the lot of plaintiff, by the raising of the grade of the street and sidewalk. The proof shows that by the elevation of the grade of the street, on the part of the city, surface water flowed into the basement of the house of the plaintiff, and thereby the building was injured and the walls cracked. The broad ground is taken, that municipal corporations are not liable for damages caused by such flowage of the surface water, that the damages are incidental, and they are not liable for incidental damages. Before the change of the grade, the building of the plaintiff was two feet above the grade, and the gutters carried off all the surface water. After the change, the water ran over the sidewalk and into the cellar of the plaintiff. From the evidence, this might have been prevented by proper sewerage. If municipal corporations can raise the grade of streets at discretion, and not provide suitable gutters to carry off the surface water, and thus overflow the lands abutting upon the streets with impunity, then the owners of lots in our towns and cities are entirely at the mercy of the authorities of the municipality. They may make the premises unhealthful, or may compel the owners of the lots to incur great expense in raising the building to the grade established, or may wholly destroy the property for use. One owner of land has no right, by artificial structures, to turn the surface water from his land upon the land of another, when, without such structures, the flowage never would have taken place. The same principle which controls individuals must control as between towns and cities and individual proprietors. Municipalities hold the streets of towns in trust for the public, and may regulate and establish their grade, but this must be done so as to do no serious injury to owners of abutting lots. In *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392, this question was fully considered and the authorities reviewed. It was there held that while a city has the absolute control over the grade of its streets, and may elevate or lower it at pleasure, yet it has no more power over the streets than a private individual has over his own land, and that its liability for injury to the property of another is the same as that of the private individual. It was further held that if, in the elevation of its streets, it turned water upon the ground and into the cellar of one of its citizens, it must respond in damages for the injury thus occasioned. That case is decisive of the plaintiff's right in this case, and there was no error in giving the plaintiff's first instruction. Error is assigned upon the refusal of the court to instruct the jury, in behalf of the city, that it was not liable for injuries resulting from error in judgment of the common council as to the size of the sewers necessary for the passage of the surface water. The evidence is overwhelming that the sewers were insufficient, and the common council might and ought to have known the fact. The city did not exercise reasonable care in their construction, and the instruction was properly refused": *City of Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591.

The Throwing of Surface Waters upon Lands, where they did not flow before, or though upon lands where they before ran, at a different place, or with increased velocity, or in much greater quantities, presents a case substantially different from the merely restraining of water by street embankments. When, as a result of the grading of a street, surface waters which before ran off upon the natural surface of the soil are collected together in one channel and thrown upon the lands of a private proprietor, who is damaged thereby, he may recover compensation therefor from the city: *Young v. Highway Comm'rs*, 134 Ill. 569; *Whipple v. Fairhaven*, 63 Vt. 221; *Pye v. City*

of *Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Nerins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Follmann v. Mankato*, 45 Minn. 457; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Miller v. Morristown*, 47 N. J. Eq. 62; 48 N. J. Eq. 645; *Scifert v. City of Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664; *Gillson v. City of Charleston*, 16 W. Va. 282; 37 Am. Rep. 763; *Hitchins v. Mayor of Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *West Orange v. Field*, 37 N. J. Eq. 600; 45 Am. Rep. 670; *Field v. West Orange*, 46 N. J. Eq. 183; *Davis v. City of Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361; *Turner v. Dartmouth*, 13 Allen, 291; *Young v. Leedom*, 67 Pa. St. 351; *Blakey v. Devine*, 36 Minn. 53. Hence where a city causes the grade of a street to be changed by cutting it down, whereby surface water which had collected in a pond or natural reservoir was released and carried upon the premises of the plaintiff, flooding his cellar and well, and otherwise damaging him, he was entitled to recover: *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520; *Pettigrew v. Village of Evansville*, 25 Wis. 223; 3 Am. Rep. 50. The fact that waters were concentrated by means of a culvert cannot sustain a recovery by a lot-owner upon whose lands they afterwards flowed, unless it appeared that by an increase in their quantity or force he suffered injury in excess of that he would have sustained had the waters been left in their natural condition: *Noble v. St. Albans*, 56 Vt. 522; *Rutherford v. Village of Holley*, 105 N. Y. 632. In Missouri we understood the decisions of the supreme court as declaring that no liability can accrue against a city for increasing the flow of surface waters by means of grading a public street as long as the plan adopted is carried out without negligence or want of skill, and therefore that if it is a part of such plan that waters shall be concentrated and thrown upon the lands of private proprietors, they are without legal redress: *Lambar v. St. Louis*, 15 Mo. 610; *St. Louis v. Gurno*, 12 Mo. 414. Speaking of evidence offered in support of a claim for damages, and determining that it did not support such claim, the court said: "It not only tended to show, but conclusively established, the fact that the work of grading and opening the said street in accordance with the plan was well and carefully, and not negligently, done, and that the injury to plaintiff's lots was not occasioned by any careless or negligent execution of the work in grading and opening said street which the ordinance authorized, but resulted from an error of judgment on the part of the city council in ordering the opening of a street at a certain grade without providing, in the plan and specifications for doing the work, some method of drainage for the disposition of the surface water. The passage of the ordinance establishing the grade of said street, directing it to be opened according to the plan and specifications, was *quasi* judicial, and the city is not liable for consequential damages arising from a defect in the plan adopted, but can only be held liable for damages resulting from the negligent execution of the work done in compliance with such plan": *Foster v. St. Louis*, 71 Mo. 157. Few, if any, of the courts of this country at the present time concur with these views. Their inclination would rather be to affirm that the fact that the plan necessarily involved the invasion of private rights of property was an unanswerable reason for holding the municipality liable for its execution. Even the supreme court of Missouri, as we understand its most recent opinion, has receded from the position formerly taken by it upon this question. In *Rychlicki v. City of St. Louis*, 98 Mo. 497, 14 Am. St. Rep. 651, the plaintiff, in his opening statement in the trial court, declared that he expected to prove that he was the owner of certain lands in the city of St. Louis, on the north side of which was a block of land separated from plaintiff's land by Page Avenue; that in opening and grading certain

streets, defendant diverted large quantities of surface water at the north line of the block referred to, and after conducting it by culverts and drains under the the road-bed of Page Avenue, discharged it upon plaintiff's property, by reason of which six acres of such property was turned into a morass, and ruined for the purposes of cultivation; that the improvement upon the streets from which this damage resulted was done by virtue of city ordinances duly enacted. Upon this statement the plaintiff was nonsuited. Without attempting any explanation of the cases we have just cited, and also without expressly overruling them, the majority of the court reversed the judgment of nonsuit, declaring that "the question presented by this record is, whether the defendant may, in the construction of its streets, collect surface water, and then, by means of drains and conduits, discharge it in volume upon the land of an adjoining proprietor. From the authorities before cited, it makes no difference whether this particular question is tried by the rules of the civil law or by what is called the common-law rule. The result is the same; for either line of decisions rules this question against defendant."

Doubtless the grading of a street may to some extent increase the flow of surface waters upon contiguous premises without involving municipal liability, as where the waters flowing from a street as graded run upon and over premises which they did not before reach, or a street embankment or cut caused waters to escape somewhat more or less rapidly than before, or at a different point; but the proposition that waters may lawfully be concentrated and thrown upon the lands of private proprietors is no longer tenable. If a street is cut through a hill to conform it to the grade as established by a municipality, and by reason of such cut and corresponding cuts in other streets waters are discharged upon lands which they did not before reach, and in greatly increased quantities, the city is not answerable, for the reason that it has but pursued the authority vested in it by law, and has not concentrated surface waters by means of any culvert, artificial drain, or other appliance, and then cast them upon private property; but the rule is otherwise if the streets as cut reach a swamp or reservoir into which a natural watercourse flows, and thus result in draining its waters upon lands within the city: *Town of Union v. Durkes*, 38 N. J. L. 21. And, generally, when surface waters have not been concentrated by bringing them together in culvert or drains, and any change or increase in the flow thereof resulted solely from the grading of the streets, whether such grading consists of an embankment or cut, and not from a plan or device having in view the concentration or change in the place of discharge of surface waters, such injury as results is incidental and consequential, for which there is no redress by action against the city: *Miller v. Morristown*, 47 N. J. Eq. 62; affirmed 48 N. J. Eq. 645; *Field v. West Orange*, 46 N. J. Eq. 183; *Rychlicki v. St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651.

The Liability of a Municipality for a Nuisance created by its act or neglect is well established. In most of the cases in which any attempt has been made to prevent the enforcement of this liability, the immunity of the city has been placed upon the ground that the alleged nuisance arose from a defect in the plan of a street or of a sewer therein, and that as the adoption of such plan involved the exercise of judicial or legislative functions, no liability could result from an error in exercising them. Whenever the nuisance complained of results in the direct injury of property, the liability of the city cannot be escaped on the ground that the injury arose from a defect or error in the plan of the work, and not from negligence in its execu-

tion. Thus in New York, a sewer was planned and constructed with various lateral sewers connected with it, and the capacity of the main sewer was entirely inadequate to "carry off the accumulations of water and matter drawn into it, and the result was, that at times of heavy rain and melting snow, the collected sewerage, being obstructed in its flow, was forced through the man-hole, and inundated the district, involving serious injury to property." An action was brought by a person whose property was injured, and by way of defense it was insisted that as the damage complained of was occasioned by a defect in the plan of the sewer, the plaintiff was without redress. In overruling this defense, the court of appeals said: "We entertain no doubt as to the liability of the defendant for the damages occasioned by the defects of the sewer, and think it rests upon principles not conflicting with those announced in any reported case, but substantially in harmony with all of them. Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property had been occasioned: *Baltimore etc. R. R. Co., v. Fifth Baptist Church*, 108 U. S. 317. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains, and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body, and thus precipitated upon the premises of an individual, occasioning damage thereto: *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; 72 N. Y. 64; *Noonan v. City of Albany*, 79 N. Y. 470, 475; 35 Am. Rep. 540; *Beach v. City of Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 183; on appeal, 37 N. J. Eq. 609; 45 Am. Rep. 670. We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper: *Wood on Nuisances*, sec. 752. While in the present case the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so, and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance, and obviate damage: *Phinizy v. City of Augusta*, 47 Ga. 260, 263; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; 72 N. Y. 64. It is a principle of the fundamental law of the state, that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require

the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences: *Radcliff v. Mayor etc.*, 4 N. Y. 195; 53 Am. Dec. 357"; *Seifert v. City of Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664, 668. So in Missouri, where a system of sewers was so planned that it discharged the contents of the sewer into a small running stream of water near the plaintiff's residence, producing a sickening stench upon his premises, the city was held liable, the court saying: "Conceding full effect to the authority conferred by the city's charter to establish the system, yet it falls far short of legalizing the municipal acts here in question. The power granted was general. It did not expressly indicate and sanction the particular arrangement or plan adopted. Hence the power it has must be regarded as subject to the just limitation forbidding its exercise in such manner as to create a nuisance injurious to private rights of property, where such a consequence is not a necessary result of exercising the power": *Edmondson v. Moberly*, 98 Mo. 523; *Hughes v. Fond du Lac*, 73 Wis. 380; *Stoddard v. Saratoga Springs*, 127 N. Y. 261. Though a municipality in its control of school-houses and school property for most purposes exercises governmental functions, and for a negligence in their exercise cannot be held answerable, yet if it so fills in a school lot as to inflict injury upon the property of a private proprietor, it is answerable to him therefor: *Miles v. Worcester*, 154 Mass. 511; 26 Am. St. Rep. 264.

Though a city is liable for creating a nuisance whereby injury results to a citizen, a different result attends its failure to exercise powers which, if exercised, might have resulted in the prevention or abatement of a nuisance created within its limits and maintained upon private property, but to which neither it nor its officers contributed. Thus municipalities are usually given power to abate nuisances, and from the failure to assert such power nuisances may continue, and their continuance involve, either directly or indirectly, serious injury to private proprietors. The latter, however, are without means of redress by civil action against a city. The power of abating a nuisance, or of determining whether it shall be abated, is judicial, and the failure to exercise it, if not corrupt, cannot give any right of action to a person suffering injury therefrom: *James v. Harrodsburg*, 85 Ky. 191; 7 Am. St. Rep. 589; *Davis v. City Council of Montgomery*, 51 Ala. 139; 23 Am. Rep. 545; *Hill v. Charlotte*, 72 N. C. 55; 21 Am. Rep. 451; *Forsyth v. Atlanta*, 45 Ga. 152; 12 Am. Rep. 576; *Rivers v. Augusta*, 65 Ga. 376; 38 Am. Rep. 787. We are not able to reconcile with the principles here stated the decision in *Taylor v. Mayor of Cumberland*, 64 Md. 68, 54 Am. Rep. 759, affirming that the using of public streets for "coasting on the snow" is a nuisance, and that for want of diligence and vigor in suppressing it a city may be answerable. Possibly the judgment in this case, and that in *Mayor of Baltimore v. Marriott*, 9 Md. 160, upon which it was founded, may be sustained upon the principle that the city had assumed the duty of keeping the public streets within its limits free from danger, through its negligence, to persons lawfully using them, and that it had not performed this duty in those cases. In *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, a city was sought to be held liable for injuries resulting to plaintiff from his horse being run into and injured by a vehicle "used in coasting, and called a bob," the use of such vehicle at the place where the injury occurred having been sanctioned

by a municipal ordinance permitting coasting on certain designated streets. Judge Cooley, in an able opinion, referring to the authorities upon the subject, reached the conclusion that as coasting was not necessarily a nuisance, the municipality might exercise a discretion in respect to permitting it, and could not be held liable, even though the discretion had been erroneously exercised.

Schools and School Property. — Cities, in holding and maintaining property used for public schools, as well as in performing all other duties imposed upon them in respect to such schools, are regarded as acting "with a sole view to the general benefit, and under the requirement or authority of general laws. In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service": *Howard v. Worcester*, 153 Mass. 426; 25 Am. St. Rep. 651. Hence no recovery can be had against a city for injuries received by a child who attended a public school, by reason of the unsafe condition of a staircase or other part of a school-house: *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332; *Wixon v. Newport*, 13 R. I. 454; 43 Am. Rep. 35; or from a dangerous excavation in a school lot: *Finch v. Toledo Board of Education*, 30 Ohio St. 37; 27 Am. Rep. 414; *Flori v. St. Louis*, 69 Mo. 341; 33 Am. Rep. 504; *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541; or for negligence in blasting rocks in excavating for the foundation of a school-house, by which a traveler was injured while lawfully using the public highway: *Howard v. City of Worcester*, 153 Mass. 426; 25 Am. St. Rep. 461. If the commissioners or other persons having the control of the public schools or of school property, though appointed by the mayor of the city, were "vested with full power and authority to manage and control the educational interests of the entire municipality, and to appoint all subordinate officers and employees, who were subject to their government and control exclusively, and were their servants and subordinates," and in the discharge of their duties are not amenable to the municipality in any respect, its liability may also be denied on that ground. Hence where the educational department is under the control of commissioners, and a part of a building leased by them, and occupied for a normal school, is allowed to get out of repair, by reason of which foul, dirty water is permitted to run down into the lower part of the building and to injure property there situated, there cannot be any recovery against the city: *Ham v. New York*, 70 N. Y. 459.

Fire Department. — Nearly all cities take some measures intended for the better protection of property from destruction by fire. These measures generally consist partly of means adapted to keeping on hand and furnishing an adequate supply of water, and partly in having a fire department with appliances to be used by it in extinguishing fires. The claim is often made that the plaintiff has suffered loss from the destruction of his property by fire which would not have occurred had the supply of water been adequate, or had the fire department, or some officer thereof, not been guilty of some negligence, and therefore that the city should be held answerable for the loss resulting from the negligence of itself or its officers or servants; and so far as we are aware, this claim has always been successfully met by the claim on the part of the city that in what it did it exercised discretionary governmental functions for the benefit of the public, and not for its private advantage, and therefore that it could not incur any liability. Hence its liability cannot be established by proof that loss resulted to plaintiff from its neglect in not providing a sufficient supply of water, or from shutting off the water

and not turning it on when required, or in failing to furnish proper cisterns, engines, or other appliances, or from any failure to assert or employ any power or authority vested in it by law: *Mendel v. Wheeling*, 28 W. Va. 233; 57 Am. Rep. 664; *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Black v. City of Columbia*, 19 S. C. 412; 45 Am. Rep. 785; *Robinson v. Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *Nickerson v. Bridgeport H. Co.*, 46 Conn. 24; 33 Am. Rep. 1; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Foster v. Lookout Water Co.*, 3 Lea, 42; nor by showing any negligent act on the part of an officer of the fire department resulting in loss, either by contributing to the destruction of property by fire or the damage of the plaintiff in other respects: *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; *Wild v. Paterson*, 47 N. J. L. 406; *Burrill v. Augusta*, 78 Me. 118; 57 Am. Rep. 788; *Grube v. St. Paul*, 34 Minn. 402. Therefore he cannot recover on the ground that, through negligence of a person acting in the department, a collision occurred between a vehicle controlled by such person and a vehicle in which plaintiff was riding, or because plaintiff was negligently run over, and thereby suffered personal injuries: *Alexander v. Vicksburg*, 68 Miss. 564; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; or was hurt by the bursting of a hose: *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; or by slipping and falling upon ice, resulting from water being permitted to escape from a hydrant: *Welsh v. Rutland*, 56 Vt. 228; 48 Am. Rep. 762; or by negligently maintaining a door in an engine-house, so that it opened upon and struck passing pedestrians: *Kies v. Erie*, 135 Pa. St. 144; 20 Am. St. Rep. 867. So municipal liability cannot be established by proof that the fire department, or some member thereof, needlessly or negligently caused the destruction of plaintiff's property, whether such destruction arose from the negligent management of some appliance or from a mistaken judgment in ordering the destruction of property to arrest an existing conflagration: *Dunbar v. San Francisco*, 1 Cal. 355; *Fiehl v. Des Moines*, 39 Iowa, 575; 18 Am. Rep. 46; *Taylor v. Plymouth*, 8 Met. 462; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *White v. Charleston*, 2 Hill (S. C.) 571; *McDonald v. Red Wing*, 13 Minn. 33.

Water-works. — It may be that water-works were owned by the city, and that it furnished water to its inhabitants for a compensation, and assumed in connection with such works the duty of having on hand an adequate supply of water and suitable hydrants and other appliances for use in extinguishing fires, and then the question arises whether the municipality, because of its deriving profit from its water-supply system, is answerable for the negligence or other wrong of its officers and servants acting within the scope of their duties. In performing the duty of supplying water for use in extinguishing fires, we think the authorities agree in denying municipal liability for negligence, whether it results in an inadequate supply of water or in causing the supply to be unavailing, owing to the absence or non-repair of some necessary appliance. This duty is governmental in its character, not undertaken for the benefit of the municipality, and cannot be performed without exercising *quasi* judicial or legislative functions out of the wrongful or negligent exercise of which it is universally conceded no liability, to a civil action can arise: *Mendel v. Wheeling*, 28 Va. 233; 57 Am. Rep. 664; *Black v. Columbia*, 19 S. C. 412; 45 Am. Rep. 785; *Robinson v. City of Evans-*

ville, 87 Ind. 334; 44 Am. Rep. 770. If, however, through the neglect of an officer having control of the water-supply system, other injuries result, of a private nature, the authorities do not agree as to whether a city is answerable therefor or not. Thus in New Hampshire, where a horse was frightened by a stream of water thrown from a hydrant which was being tested by firemen, and an action was afterwards commenced to recover compensation for injuries received, and the claim was made that the persons in charge of the hydrant had been guilty of negligence which was the proximate cause of the injury to plaintiff, the right to recover was denied, partly upon the ground that the officers in charge of the hydrant "were public officers, amenable to law for their conduct, and not under control and direction of the city," and partly upon the ground that they were in the discharge of a public duty from which the city received no advantage. Upon this latter topic the court said: "It is claimed by the plaintiff that the act empowering the city to introduce water conferred special privileges on the defendants and their inhabitants, and is one from which the city, in its corporate character receives special benefits in the way of rents and tolls for the use of the water, and thereby the duty is imposed of protecting individuals from injury arising from a negligent use of the privileges so conferred. Conceding this to be so, it does not appear that the doctrine has any application to this case. The act from which the injury arose was the use of a hydrant with hose attached, constructed for use in extinguishing fires, and under the control of the fire department, an independent branch of the city government. No toll, or rent, or special advantage accrues to the defendants in their corporate capacity for the use of the hydrants for such purposes, but a tax is laid for supporting the use. For the use of the water by individuals, for domestic and other purposes, an annual rent is paid or may be exacted. The use of the water from the hydrants is a public use, enjoyed in common by the people, and from which the city in its corporate capacity receives no special advantage; and in the absence of a statute giving the action, the defendants cannot be made liable for any neglect of duty in respect to such public use": *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533. Perhaps, however, the weight of authority with respect to the liability of a city for negligence of its water commissioners, or other officers or agents intrusted with the duty of planning and keeping in repair a system of water, is affirmed and enforced under substantially the same circumstances as is the liability for negligence in performing the duty of keeping safe in condition the public streets, and therefore whosoever is injured in person or property by negligence in maintaining or operating such works, or in the use of water therefrom, or for negligence or want of skill in their construction or operation, may recover of the city for such injuries, unless they merely arise from negligence in relation to the public duty of furnishing water to extinguish fires. Hence an action may be maintained when injury has resulted from negligence of the water commissioners, whereby a public highway was made unsafe: *Aldrich v. Trip*, 11 R. I. 141; 23 Am. Rep. 434; *Hand v. Brookline*, 126 Mass. 324; or land was flooded by a dam breaking, through want of skill in its construction: *Bailey v. Mayor of New York*, 3 Hill, 531; 38 Am. Dec. 669; or workmen were injured by negligently omitting precautions for their safety: *Connolly v. Waltham*, Mass., May 10, 1892; 31 N. E. Rep. 302. In a case in which a city was sued to recover for damages arising from the death of plaintiff's intestate from drinking impure and unhealthful water from a public well belonging to the defendant, and in which its liability was denied on the ground that it had not been guilty of negligence, the court assumed that had

negligence existed, liability to respond in damages might have resulted, saying "The city was not an insurer of the quality of the water, and bound under all circumstances to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks, and public buildings; and it owed the duty of reasonable diligence to care for it as it was bound to care for such other property": *Dunaher v. City of Brooklyn*, 119 N. Y. 250.

Police Department. — Municipal corporations are usually required by their charters or by general law, and sometimes by both, to have a police department, and by its aid to promote public health and morals, to better provide for personal security and the preservation of rights of property, and to suppress crime by watchfulness and skill, both by preventing its commission and by apprehending and punishing those who commit it. All these duties are clearly of a public character, and so far as we are aware, no city has ever been held answerable for any wrong or negligence on the part of the officers to whom their performance is deputed. The city is not liable for injuries suffered from the inadequacy of its police force, whether resulting from its not calling into its service a sufficient number of men, or from the negligence or inattention of those whom it engages in such services: *Hannon v. Agnew*, 96 N. Y. 439; *Dewey v. Detroit*, 15 Mich. 307; *Odell v. Schroeder*, 58 Ill. 353; *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585; *Worley v. Columbia*, 88 Mo. 106; *Lafayette v. Timberlake*, 88 Ind. 330. Nor is a municipality answerable for any wantonness, recklessness, or other wrong committed by a policeman while in the discharge of his duty. He is regarded as an agent or servant of the law, or of the state, rather than of the city, and hence it is not responsible for his acts. "Police-officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police-officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties, the city or town cannot be held liable": *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Burch v. Hardwicke*, 30 Gratt. 24; 32 Am. Rep. 640; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Bowditch v. Boston*, 101 U. S. 16; *Atwater v. Baltimore*, 31 Md. 462; *Elliott v. Philadelphia*, 75 Pa. St. 347; 15 Am. Rep. 591; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; 39 Am. Rep. 771; *Campbell v. Montgomery*, 53 Ala. 527; 25 Am. Rep. 656; *Peters v. Lindsborg*, 40 Kan. 654. Therefore, a city is not liable for the use of excessive force by its policemen, or for their assault or battery upon, or shooting, or other abuse of, a prisoner or other person: *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Whitfield v. Paris*, 84 Tex. 431; 31 Am. St. Rep.; nor for their unlawful seizure of property, whereby, or through their negligence, it is lost or misappropriated: *Elliott v. City of Philadelphia*, 75 Pa. St. 547; 15 Am. Rep. 591; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Dargan v. Mayor of Mobile*, 31 Ala. 469; 70 Am. Dec. 505; *Stewart v. City of New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218. Nor is it material that the policeman for whose wrongful act compensation is sought was acting under a municipal ordinance, and in an attempt to enforce its provisions, or to apprehend one

accused of violating them. "The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police-officers act in their public capacity, and not as agents or servants of the city": *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810.

A *City Jail or Other Prison* is usually in charge of policemen, and in providing and keeping it in repair a municipality manifestly exercises duties of the same public character as when it provides a police department. If any policeman or officer should be guilty of mistreatment of a prisoner, the city must be exonerated from liability, under the authorities already cited granting it immunity from liability for acts of policemen. So in providing a prison and keeping it in repair, and furnishing supplies for its inmates, it exercises discretionary governmental functions, and is therefore not answerable to one who is injured in health or otherwise by the condition of the prison or the failure to furnish proper supplies to the persons confined therein: *Le Clef v. Concordia*, 41 Kan. 323; 13 Am. St. Rep. 285; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Governor v. Clark Co.*, 19 Ga. 97.

In the *Maintaining of Almshouses, Hospitals, and Workhouses*, and in providing for the welfare and support of indigent persons, and for the advancement of public health, municipalities also exercise discretionary governmental functions, and are therefore not answerable in a civil action for their negligence, nor for that of their officer or agents. Hence there can be no recovery against a city on the ground that its health-officers negligently exposed plaintiff to a contagious disease: *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Brown v. Vinahaven*, 65 Me. 402; 20 Am. Rep. 709; or after cleaning a vault on private premises, left it open, in consequence of which plaintiff, without fault on his part, fell into it and was injured: *Bryant v. St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; or without authority took possession of a dwelling-house, to the exclusion of its owner, and used it as a hospital: *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334; *Lynde v. Rockland*, 66 Me. 309, 314. A municipality, not guilty of negligence in selecting a physician or surgeon for the poor, or for the inmates of a hospital or other public institution, is not answerable to one injured by his negligent or unskillful treatment: *Summers v. Board of Comm'rs*, 103 Ind. 262; 53 Am. Rep. 512; *Sherbourne v. Yuba Co.*, 21 Cal. 113; 81 Am. Dec. 151. And, generally, for any wrongful act or neglect of an officer or employee in any city hospital, almshouse, or other charitable institution, there can be no recovery except against him personally: *Mulcairns v. Janesville*, 67 Wis. 24; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Murtaugh v. St. Louis*, 44 Mo. 479, 481; *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13; 54 Am. Rep. 436; *Perry v. House of Refuge*, 63 Md. 20; 52 Am. Rep. 495; *Maximilian v. New York*, 62 N. Y. 160; 20 Am. Rep. 468; *Haight v. New York*, 24 Fed. Rep. 93; *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465.

If a City has Property, or Engages in an Undertaking the Object of Which is Profit to itself, its liability with respect to such property or business is the same as if it were a private corporation: *Bailey v. Mayor*, 3 Hill, 531; 38 Am. Dec. 669; *Clark v. Manchester*, 62 N. H. 577. Hence if it rents a building or some

portion thereof, it becomes answerable for negligence in respect to the building and its appurtenances, and the streets and approaches thereto, to the same extent as the owner of other property used for private purposes: *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185; *Mayor of Savannah v. Culens*, 38 Ga. 334; 95 Am. Dec. 398. If it owns water-works, and undertakes to supply an inhabitant with water for some specified purpose, and uncovers a pipe by which he receives such water, so that it is frozen and his supply cut off, the city is answerable in damages: *Stock v. Boston*, 149 Mass. 410; 14 Am. St. Rep. 430; though, in one state at least, such damage is limited to the amount paid for the use of the water: *Smith v. Philadelphia*, 81 Pa. St. 38; 22 Am. Rep. 731.

Wharves, Piers, etc., Negligence in Management of. — A city owning or in possession of a wharf or pier, for the use of which it is authorized to collect, and does collect, tolls, is charged with the duty of keeping it in proper and safe condition and repair in its capacity of owner and manager of private property, and is answerable to any one injured by its failure to perform such duty, in all cases in which its non-performance is attributable to negligence: *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65; *Shinkle v. Covington*, 1 Bush, 617; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Allegheny v. Campbell*, 107 Pa. St. 530; 52 Am. Rep. 478; *City of Petersburg v. Applegarth*, 28 Gratt. 521; 26 Am. Rep. 357; *Memphis v. Kimbrough*, 12 Heisk. 133.

In South Carolina, a municipality was authorized to issue, and did issue, certain certificates of stock, each of which contained a provision "that the demand evidenced thereby was recorded in and transferable only at the office of the city treasurer by appearance in person or by attorney according to the rules and forms instituted for that purpose," and it was held that the municipality had, in effect, entered into a contract with persons interested in the stock that the same should not be illegally transferred, and was therefore answerable to any one injured through its violation of such contract by its permitting an unauthorized transfer of the stock to be made: *Chapman v. Charleston*, 28 S. C. 373; 13 Am. St. Rep. 681.

Test of Liability is, Was the Duty Municipal? — The negligence or omissions which we have referred to, and for which municipalities have been held answerable, occurred in performing or failing to perform some duty which the city had taken upon itself, or which had been imposed upon it, and with the performance of which it became charged as a corporate duty, rather than as an instrumentality of the sovereign power acting for the benefit of the public. We confess that it is not always possible to determine from the decisions when a municipality is acting in one capacity, rather than in the other, but the only principle upon which it can in any instance be held answerable is, we submit, that it has, by its voluntary act, in accepting its charter, or by some general law, become answerable for the performance of some duty, and that from its proper performance it cannot escape on the ground that, by its own act, or by the law, such performance has been delegated to some officer or agent. If a duty is not a duty of the municipality, but merely of some of its officers, then no liability can attach against it. Thus if a city surveyor is called upon to make a survey for a private proprietor, and to establish the boundary line of his lot, the officer, though the charter of the city may give him authority to act, does not act for it, nor in the discharge of a corporate duty, and it cannot be held liable for damages resulting from his error or want of skill: *Alcorn v. Philadelphia*, 44 Pa. St. 348. If, on the other hand, the officer from whose negligence injury has resulted was acting in the discharge of a corporate duty, as distinguished

from a discretionary governmental duty, the city is liable. This is an essential test. The fact that the officer was not appointed by the municipality, or cannot be discharged or controlled by it, is often spoken of as material; but if material, it is so only because it may aid in determining whether or not the duty was a corporate one; but if it be conceded to be of the latter character, the liability of the city is generally enforced, though it has not appointed and cannot control him. Thus in an action against the city of New York to recover for damages suffered from the unsafe condition of a public street, it resisted recovery, on the ground that the injury complained of arose from the negligence of the commissioners of public parks. To this defense the court responded, that, conceding the duty to have been devolved upon these commissioners, it was still a municipal duty; that "the city must act through its officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. It matters not how independently they may act, nor how they are chosen. If they are provided by law and authorized to discharge a corporate duty which rests upon the municipality, then in the discharge of that duty they represent the municipality, and it may be chargeable with their misfeasance or non-feasance. The exclusive control of the streets may by law be confided to the mayor or the street commissioner, free from the control of the common council, and yet the care of the streets would remain a municipal duty, discharged by the officers designated for and in behalf of the city": *Elrygott v. New York*, 96 N. Y. 264, 273; 48 Am. Rep. 622. In another case in the same state, the defense was, that the dangerous condition of the street from which plaintiff suffered injury was due to the act of the board of water commissioners of the city, created by a special statute defining their duties. In overruling this defense, the court of appeals said: "The board exists solely for the benefit of the city. It can own no property, and do no act that has not reference to the well-being of the city. It is given the power to purchase and acquire land, but the title, when acquired, vests in the city. For its contracts the city is liable, and judgments recovered against it are judgments against the city. When the water rents collected by it are more than sufficient to meet its expenses, the surplus must go to the benefit of the city. It is denominated the 'board of water commissioners of the city of Yonkers.' It is not an independent body acting for itself, but is a department of the city, and one of the instruments of the municipal government. Being such, when engaged in digging the trench for the purpose of laying water-pipe in Yonkers Avenue, it was engaged in the discharge of a municipal duty, and it was obligatory upon it, in so doing, to so protect and guard the work that it should not endanger persons using the street, and if that was impossible, with a due and diligent prosecution of the work, the street should, by suitable barrier, have been closed against the public. For its failure so to do, and for injuries resulting from such failure, the defendant is liable": *Pettenyill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 412. The leading case upon this subject is *Barnes v. District of Columbia*, 91 U. S. 540. The question there involved was, whether the plaintiff could recover for injuries resulting "in consequence of the defective condition of one of the streets of the city of Washington." The statute creating the defendant a municipal corporation, after giving it power to sue and be sued, and to exercise all other powers of a municipal corporation not inconsistent with the laws and constitution of the United States, and the provisions of the statute authorized the President, with the consent of the Senate, to appoint a board of public works, who should have entire control of and make all needful regulations which should be necessary for

keeping in repair the streets, avenues, alleys, and sewers of the city. After affirming that the duty of keeping the streets in repair was essentially a municipal duty, and that its negligent performance usually resulted in municipal liability, the supreme court of the United States proceeded to consider whether or not the fact that the duty was by a statute intrusted to a board of public works exonerated the municipality from negligence in its performance. "A municipal corporation," said that court, "may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their position, — whether they are elected by the people of the municipality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal, and to this authority it must come at last, whether immediately or by a circuitous process."

Torts, Generally. — We have heretofore considered the liability of municipal corporations for negligence in the performance or non-performance of some corporate duty. We now wish to treat of their liability for torts of a more active and intentional character. Sometimes doubt has been expressed concerning the liability of municipal corporations for torts, but if any doubt upon this subject ever existed, its existence has long since ceased: *Anthony v. Inhabitants of Adams*, 1 Met. 284; *Sewall v. St. Paul*, 20 Minn. 511; *Allen v. Decatur*, 23 Ill. 332; 76 Am. Dec. 692; *Wilde v. New Orleans*, 12 La. Ann. 15; *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Thayer v. City of Boston*, 19 Pick. 511; 31 Am. Dec. 157. Whenever liability exists, it must necessarily be for the act of an officer or agent, for except through officers or agents, a municipality cannot act at all. In an action against a city for a tort it may defend with success, — 1. By showing that the act complained of was as to it *ultra vires*, and therefore, in contemplation of law, could not have been its act; and 2. By proving that the officer or other person by whom it was done was not, in doing it, the agent of the city.

Torts, Ultra Vires. — The defense of *ultra vires* exists when the act complained of as wrongful was wholly beyond the powers of the corporation, or in other words, when it was not possible for the corporation, under any circumstance, to have authorized the doing of the act. Thus if a city, having no power to enact, under any circumstance, a valid ordinance giving a firm a monopoly of the slaughtering of animals, attempts to enact such ordinance, and its officers undertake to enforce it, no municipal liability can result: *City of Chicago v. Turner*, 80 Ill. 420. A law which is void because it conflicts with the constitution of the state, and a municipal ordinance which is void because the laws of the state do not permit the municipal authorities to enact and enforce it, stand upon the same ground, and any act done in the attempted enforcement of either is *ultra vires*, and the only liability resulting is against the persons who did or attempted to do it: *Mayor of Albany v. Cunliff*, 2 N. Y. 165; *Worley v. Inhabitants of Columbia*, 88 Mo. 106; *Brown v. City of Cape Girardeau*, 90 Mo. 377; 59 Am. Rep. 28; *Cuyler v. Rochester*, 12 Wend. 165; *Lemon v. Newton*, 134 Mass. 476; *Trammell v. Russellville*, 34 Ark. 105; 36 Am. Rep. 1. Hence where the common council of a city, by its vote, directed that a dam be erected on the land of a private citizen for the purpose of flooding it, and thereby abating an alleged nuisance, and such dam was

accordingly built, it was held that the municipality was not liable for the consequent damages to the owner of the land, because "the acts done having been beyond the authority and power of the city to do, the city cannot be held answerable in damages for that which was done under the supposed authority of illegal and void votes": *Cavanagh v. Boston*, 139 Mass. 426; 52 Am. Rep. 716; *Seele v. Deering*, 79 Me. 343; 1 Am. St. Rep. 314. If the officers or employees of a municipality, whether pursuant to a vote of its common council or not, engage in an act which the latter had no power to authorize, they are not, while so engaged, the representatives of the municipality, and it is therefore not liable for their negligence or misconduct. Therefore, if the fire department is directed to participate in a celebration when there is no authority to so direct it, or a vote to raise a committee to celebrate a holiday is so taken as to be void, no municipal liability can result from the misconduct or negligence of persons acting under the void order of the city council: *Smith v. City of Rochester*, 76 N. Y. 506; *Morrison v. City of Lawrence*, 98 Mass. 219. Where an act, because it is *ultra vires*, cannot be authorized in advance of the doing of it, it is impossible to ratify it, and therefore the liability of a city cannot be sustained for injuries growing out of such act by showing that it was ratified subsequently to its commission: *Horn v. Baltimore*, 30 Md. 218. There are a few cases apparently in conflict with the principles we have stated. Thus municipalities undertaking, by the resolutions of their common councils, to authorize the placing and keeping of obstructions or dangerous objects in a public street have been held liable for resulting damages: *Cohen v. Mayor of New York*, 113 N. Y. 532; 10 Am. St. Rep. 506; *Stanley v. Davenport*, 54 Iowa, 463; 37 Am. Rep. 216. But these decisions are defensible on the ground that it was the duty of the municipality to keep the streets in a safe condition, and it was equally answerable for their condition after notice thereof, whether it attempted to license their obstruction or not. A case decided in Georgia we are unable to reconcile with the other authorities upon this subject. It was an action against a city, the complaint in which alleged that the mayor and common council had passed a resolution declaring that plaintiffs were itinerant and non-resident speculators and traders within the meaning of a certain tax ordinance of the city, and had directed the clerk of the city council to issue execution to collect taxes claimed to be due from plaintiffs as such non-residents, and that the purpose of such resolution was to protect merchants of the city from competition in business, and that execution was accordingly issued and levied upon plaintiffs' property. There was no claim that in passing the resolution the common council were acting within the limits of any authority delegated to them, and yet it was held that the complaint stated a cause of action. The court, however, in its opinion, did not consider any question except that of the right of the plaintiffs "to transact business in Atlanta without any hostile proceedings against them founded upon the mere fact of non-residence": *Gould v. Atlanta*, 60 Ga. 164.

Unlawful Acts Which are not Ultra Vires. — If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*, though done in different circumstances or in a different manner; and if authorized by the city, a recovery may be had at the instance of one injured thereby, as where a road is authorized to be constructed in a particular manner and out of designated materials, but it is constructed in a different mode and with other materials: *Pekin v. Newell*, 26 Ill. 320; 79 Am. Dec. 378. If a city has invaded the rights of private proprietors by a trespass upon their property or by any

other actionable tort, it is not always, nor usually, a sufficient answer to say that if the act was wrongful and unlawful, then the city was not authorized to do it, and it is not the act of the city. If such were the case, municipal liability for tort could not exist. If a municipality, acting by its common council or other governing body, determines to do an act, and commits the duty of doing it to some officer or agent, and the act was one which it had power to authorize, he and the municipality occupy substantially the relation of principal and agent, and hence it is answerable at least for such torts as he commits while acting in good faith, in the exercise of the power confided to him: *Soulard v. St. Louis*, 36 Mo. 546. "When officers of a town, acting as its agents, do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done. The contrary doctrine would be injurious to the person damaged and to the agents employed by the town. It would also be injurious to the town, by paralyzing the energies of such agents or officers, as they would be likely to refuse to act when prompt action is important": *Hawks v. Charlemont*, 107 Mass. 417. Therefore a municipality is liable if it authorizes its selectmen to repair a highway, and in so doing they enter upon private property without the consent of the owner, and take away stone to be used in repairing a bridge: *Hawks v. Charlemont*, 107 Mass. 417; or if a warden or other officer, acting under a vote of the burgesses or town council requiring him to remove an encroachment from a public highway, causes a fence, which he in good faith believed to be on such highway, to be removed therefrom, when it was not thereupon, nor was it an encroachment: *Weed v. Greenwich*, 45 Conn. 170; *Woodcock v. City of Calais*, 66 Me. 234; *Lee v. Sandy Hill*, 40 N. Y. 442; *Sheldon v. Kalamazoo*, 24 Mich. 383. And whenever a city directs a street to be opened, or other public work to be done, and sends a force to do it, and in so doing enters upon private property, without first acquiring the right to do so by proceedings in the exercise of the right of eminent domain, or by some other appropriate proceeding, it is guilty of a trespass for which it must respond in damages: *Hildreth v. Lowell*, 11 Gray, 349; *Hickerson v. Mexico*, 58 Mo. 61; *Soulard v. City of St. Louis*, 36 Mo. 546; *Allen v. City of Decatur*, 23 Ill. 332; 76 Am. Dec. 692; *Sewell v. St. Paul*, 20 Minn. 511. The result of the authorities upon this subject was thus forcibly stated by Judge Cooley: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility, where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon its land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction": *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Rhodes v. City of Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Goodloe v. City of Cincinnati*, 4 Ohio, 500; 22 Am. Dec. 764. Hence where a city, authorized to change the grade of a street upon certain contingencies only, and upon making compensation to

any lot-owner damaged thereby, proceeds to change the grade, and to grade the street accordingly, in the absence of such a contingency, and without complying with the requirements of the law or compensating the owner, he may recover damages from the city by an appropriate action: *Trustees of Diocese of Iowa v. City of Anamosa*, 76 Iowa, 538. A city, acting by its agents, purchased certain broken rock, and entered upon the land where it was lying and removed it. The vendor of the city, however, had no title to the property, and hence an action was brought against the city by the true owner of the rock. It was argued for the defendant "that as the city had no authority under its charter to commit a trespass, or to order the commission of a trespass, an order to its servants to do an act which, when performed, constituted a trespass, would not make the city liable, as both the order and the act would be *ultra vires*." To this the court replied: "This argument fails to distinguish between the doing of an act in its nature unlawful or prohibited, and the doing of an act in its nature lawful and authorized at an unauthorized place or in an unlawful manner. On the defendant's theory, municipal corporations could never be held liable for negligent or tortious acts of their agents and servants. As they have no authority to do wrong, and cannot authorize their officers or servants to do wrong, therefore it is argued they can never be held liable for injuries inflicted by them. This is an unwholesome doctrine, and is not supported either by reason or authority": *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299. Another case in the same state is somewhat more extreme in character. A city being authorized to purchase a pest-house, its physician and police took possession of plaintiff's premises without authority, and used them for the purposes of the pest-house for the period of two months, after which an action was brought for the trespass involved in this seizure and use of the property. The defendant contended that as it was not authorized to acquire property for use as a pest-house except by purchase, its occupancy of plaintiff's premises was *ultra vires*. The court replied that as the property was taken for a purpose sanctioned by the charter, and as everything was done in accordance with the charter, except the acquisition of the title, the act was not *ultra vires* in such a sense as excluded municipal liability: *Dooley v. City of Kansas*, 82 Mo. 444; 52 Am. Rep. 380; *Sheldon v. Kalamazoo*, 24 Mich. 383.

Wrongful Acts not Authorized by the Municipality.—In all the cases cited in the preceding paragraph, the wrongful acts were committed under such circumstances as showed them to have been authorized or ratified by the city council, and they were therefore, to all intents and purposes, the acts of the city, done in good faith under a claim of right. We are now to consider that class of cases in which it appears that the wrongful act was committed by an officer of the city acting in good faith, but nevertheless not authorized by law to do what he did, nor authorized by the city itself, unless the fact that he was its officer, acting in good faith, may be treated as equivalent to such authorization. If the common council deposes the performance of certain work to specified persons, whether they happen to be officers of the corporation or not, and those persons in doing such work, but acting in good faith, commit a trespass upon the lands of a private proprietor, they may still be regarded as the agents of the city, and it is responsible for the trespass, though it did not authorize the particular unlawful act in controversy: *Platter v. Seymour*, 86 Ind. 323; *Conniff v. San Francisco*, 67 Cal. 45; *Waldron v. Haverhill*, 143 Mass. 582. When an officer of a municipality has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort, whereby a citizen is injured either in person or

property, the tort is the act of the officer only, and ordinarily no recovery of damages can be had, except against him: *Board of Trustees v. Schroeder*, 53 Ill. 353; *Cooney v. Town of Hartland*, 95 Ill. 516; *Horn v. Mayor of Baltimore*, 30 Md. 218; *Sherman v. City of Grenada*, 51 Miss. 186; *Danovan v. Jones*, 36 N. H. 248; *New York etc. Co. v. City of Brooklyn*, 71 N. Y. 580; *Donnelly v. Tripp*, 12 R. I. 97; *Pierce v. Tripp*, 13 R. I. 181; *Rowland v. City of Gallatin*, 75 Mo. 134; 42 Am. Rep. 395; *Walling v. Shreveport*, 5 La. Ann. 660; 52 Am. Dec. 608. The rule upon this subject was thus formulated by Chief Justice Shaw in a leading case: "As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate, or that, in either case, the act was adopted and ratified by the corporation": *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Mitchell v. Rockland*, 41 Me. 363; 66 Am. Dec. 252; *Caspary v. Portland*, 19 Or. 496; 20 Am. St. Rep. 842. Therefore, if the mayor of a city, having no power to contract for the removal of dead animals, enters into a contract for the removal of such animals, the municipality cannot be held liable for damages arising from the depositing by the contractor of carcasses upon private property: *Hilsdorf v. City of St. Louis*, 45 Mo. 94; 100 Am. Dec. 352.

In attempting to specify the cases in which municipalities are not answerable for the torts of their officers, Judge Shaw, in the extract quoted in the last paragraph, mentioned as among the contingencies in which cities are liable, those in which torts are committed by their officers or agents, acting *bona fide*, "in pursuance of a general authority to act for the city on the subject to which they relate." This limitation, while perhaps not inaccurately expressed, is, we think, misleading, because it is likely to create the impression that every officer, as to matters falling within his department, acts in pursuance of a general authority to act for the city; or in other words, that if a street superintendent does anything in relation to public streets, or a tax collector in relation to the collection of taxes, the city must be answerable therefor, because of the general authority over the streets in the one case and the collection of taxes in the other. Such is not the law, nor is it within the meaning of the learned jurist we have quoted. For unless by law or the action of the city discretion is vested in the officer or agent to determine how he shall act, his act, though apparently falling within his department, is but his personal act, for which he alone is answerable if it is contrary to law. We have already shown that officers of the street department have no authority to go upon private property and take material therefrom, though for the purpose of using it upon the public streets, and that therefore such officers alone are liable: *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395. But if the city, by a resolution of its common council, had authorized them to do what they did, the result would be otherwise: *Buffalo etc. T. Co. v. Buffalo*, 58 N. Y. 639. The clerk of a common council may by law be vested with authority to issue warrants to persons for such sums as may be allowed by such council or by law, but this authority can in no way inculcate the city in or make it liable for his wrongful act in issuing warrants for other sums, or in altering them after they are issued: *Chandler v. Bay St. Louis*, 57 Miss. 327. If an officer or employee is charged by law or the municipality with the duty of serving writs or warrants under which, in proper cases, he is entitled to seize property or arrest persons, his seizure or arrest,

without authority and without the previous direction or subsequent ratification of the city, does not create any liability against it: *Fox v. Northern Liberties*, 3 Watts & S. 103; *Everson v. Syracuse*, 100 N. Y. 577; *Corsicana v. White*, 57 Tex. 382; *Thomas v. Grafton*, 34 W. Va. 282; 26 Am. St. Rep. 924. So for the acts of an assessor or collector of taxes, as where the latter levies upon property not subject to levy under his warrant, the municipality is not answerable, unless it directed him to do what he did: *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Wallace v. Menasha*, 48 Wis. 79; 33 Am. Rep. 804. If, however, the common council of the city undertakes to make an assessment for damages and benefits in a case where they are authorized to do so, but the assessment is void for some reason, and the collector in what he does is, in effect, acting by the authority of the city, then it is answerable for his acts: *Horton v. Newell*, R. I. Jan. 2, 1892; 17 R. I.; *Durkee v. Kenosha*, 59 Wis. 123; 48 Am. Rep. 480; *Howell v. Buffalo*, 15 N. Y. 512; *Bank of Commonwealth v. New York*, 43 N. Y. 184. If, on the other hand, certain officers are by law authorized or required to abate nuisances, and they proceed in good faith to abate an alleged nuisance, any person injured by their acts may recover of the municipality, if he can show that no nuisance in fact existed, because the officers in what they did were acting under a general authority to act for the city: *Americus v. Mitchell*, 79 Ga. 807. So where the officers of the executive department of a city prevented the laying of a railway track under a claim that the time allowed by the ordinance within which to lay it had expired, and it was claimed that the city was not answerable for their acts because they were not authorized, the court said: "We recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as acts of the municipal corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular acts relate. In the present case, the mayor, the superintendent of police, and the superintendent of streets were engaged in doing the acts which prevented the railroad company from constructing its road. The mayor is the general executive officer of the city. He and others under his control are the executive department of the city, and we cannot doubt that the city was by law liable for those wrongful acts done by the officers of the executive department within the sphere of their authority, though not authorized by the common council to do them, as by its (the city's) own acts": *Chicago v. Chicago etc. R. R. Co.*, 105 Ill. 73. This language was probably a correct statement of the law applicable to the particular case to which the court applied it, but the inference which might be drawn from it — that the municipality is, as a general rule, liable for the wrongful acts or omissions of its officers — is not at all true. We have already called attention to the fact that a municipality is not answerable for the performance of duties confided to it or its officers of a governmental, discretionary character, for the performance of which neither the state nor its officers would have been answerable had the duty remained with them, and its performance not been delegated to the municipality or its officers. Besides these duties are many others devolved upon the officers of a municipality for the performance of which it is not answerable. Thus while the law may require a city treasurer to keep certain moneys, or a city clerk or auditor to keep certain accounts and records, or a city surveyor to make surveys, the city is not answerable for the default of either in performing his duties. The reason is, that he is not an agent of the city, nor carrying out its orders, nor doing anything which the law requires it to do. If a duty is one which the law requires the city to perform, and it is not a public

governmental duty, then the city is answerable for the manner of its performance, and for such injuries as result from its omission or its negligent performance. If, on the other hand, the law requires some officer to perform a duty, then its omission or negligent performance is a matter for which he alone is answerable: *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468. "The officers of a city are *quasi* civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or non-feasance in office, but for neither is the corporation responsible. Omissions of a duty imposed upon them by law, productive of prejudice to an individual, is not a corporate injury. The duty of the officers of the city is prescribed by the statute, from which, also, they derive their power. The corporation appoints them to office, but does not in that act sanction their official delinquencies nor render itself liable for their official misconduct": *Prather v. City of Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585. Even with respect to matters for which the corporation is liable for the negligence of its officers, such liability cannot be enhanced by showing that they were actuated by malice: *City Council v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562. Whenever the duty of keeping in repair the highways is not regarded as a municipal duty which the city or town must, at its peril, perform, it is not liable for the neglect of its highway surveyors or overseers of highways: *Pratt v. Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691; *Goddard v. Harpswell*, 84 Me. 499; *ante*, p. 373 (the principal case); *People v. Board etc. of Esopus*, 74 N. Y. 310.

Contractors, Liability for. — When a municipality contracts for the doing of a work, and injury results to private persons from the wrongful or negligent act or acts of the contractor or his employees, and the city is sought to be made liable for such injury, the inquiry should be, — 1. Was the work one which it was the duty of the city to do, and for negligent acts in the doing of which it must necessarily be answerable? and 2. If the work was not of this class, were the circumstances under which it was done and the control of the city over it by the terms of the contract or by law such that whatever was done must be regarded as its act accomplished by its contractor acting as its agent? As we have already shown, certain duties are by many of the courts regarded as private municipal duties, the negligent performance or omission of which is at the peril of the municipality. The principal of these is keeping in safe condition and repair the public streets. It seems obvious to us that a municipality cannot escape liability with respect to these duties by contracting for their performance by some one who is not an officer of the city. It cannot contract away its liability, and thus delegate its responsibility to another, so that a person injured by his putting or leaving a street in a dangerous condition must look to him alone for recompense. Thus where a city owing to the public the duty of keeping its streets in a safe condition for travel contracted for the construction of a sewer in one of such streets, and the contractor, in making an excavation for the sewer, permitted it to remain open and unguarded at night without any light or other signal of danger, and a person using due care fell into the excavation and was injured, and a city denies its liability on the ground that the work was executed under a contract which contained no stipulation that the contractor should take any precautions to prevent injury to travelers, but the court decided that "although the work may be let out by contract, the corporation still remains charged with the care and control of the streets in which the improvement is carried on," and therefore that the city was liable. Some stress was, however, in the opinion of the court, placed upon the fact that

the work was such that its performance necessarily left the street unsafe for travelers at night: *Storrs v. City of Utica*, 17 N. Y. 104; 72 Am. Dec. 437. See also *Water Company v. Ware*, 16 Wall. 566; *Robbins v. Chicago*, 4 Wall. 657. Nor is it material in such case that the municipality provided in its contract that the contractor should take such precautions as would have prevented injury to persons using the street had he complied with his agreement: *McAllister v. City of Albany*, 18 Or. 426. The decided weight of authority at the present time is to the effect that where it is the duty of the municipality to keep its streets in safe condition for travel, it must respond in damages to any person injured by the streets being left in an unsafe or dangerous condition, though they were so left through the act or neglect of an independent contractor, or of his servants or agents over whom it had no direct control: *Mayor etc. of Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395; *Mayor of Birmingham v. McCary*, 84 Ala. 469; *Nashville v. Brown*, 9 Heisk. 1; 24 Am. Rep. 289; *Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Circleville v. Neuding*, 41 Ohio St. 465; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780; Dillon on Municipal Corporations, 4th ed., sec. 1027. In a few of the states the rule as we have stated it is not recognized, and the contractor alone is answerable for his negligence in leaving the streets in a dangerous condition, where the city reserves no control over him and his work, other than the right to have done it according to the plans and specifications: *Barry v. St. Louis*, 17 Mo. 121; *Painter v. Pittsburgh*, 46 Pa. St. 213; *City of Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642. If an injury occurred, not from the condition in which the street is left by the contractor, but by his doing, while engaged in the performance of his contract, some act in a negligent manner, then the authorities are more equally divided concerning the liability of the city. Thus if he blasts rocks without giving warning of danger, and a person using a street in the vicinity is struck by a fragment of such rock, some of the courts affirm (*Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166) and others deny (*Blumb v. Kansas*, 84 Mo. 112; 54 Am. Rep. 87; *Herrington v. Lansingburgh*, 110 N. Y. 145; 6 Am. St. Rep. 348) the liability of the city, while others make the liability depend on whether or not the work for which it contracted was such that in the doing of it blasting was necessary, holding that liability exists if the blasting was a necessary consequence of the doing of the work according to the contract: *Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17. Where the injury for which recovery is sought resulted from the act or neglect of a contractor, and does not consist in the leaving of the street or other public place in an unsafe or dangerous condition, nor in the doing of work which, if done according to the contract, is necessarily and intrinsically dangerous, than the liability of the city exists only when it occupies with the contractor the relation of principal and agent. Thus if it retains full control over the mode and manner of performing the work, or if the wrong or injury was a necessary consequence of the work, or occurred in doing something which the contract gave the contractor a right to do, then the municipality must be regarded as itself guilty, and held answerable accordingly: *Harper v. City of Milwaukee*, 30 Wis. 375; *Cincinnati v. Stone*, 5 Ohio St. 38; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392. Hence if a contract provides that as part of the consideration for doing the work, the contractor may receive and use all stone in a street, and he accordingly takes and uses such stone, when it belonged to the owner of the fee of the street, the latter may recover of the city therefor: *Rich v. Minneapolis*, 37 Minn. 423; 5 Am. St. Rep. 861. If the work which the municipality employs the

contractor to do is "intrinsically dangerous, however skillfully performed," then a municipality, like any other employer, is responsible for damages inflicted in the doing of the work: *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Erie v. Calkins*, 85 Pa. St. 187; 27 Am. Rep. 642; Dillon on Municipal Corporations, secs. 1029, 1030. "But employers not personally giving directions respecting the manner of the work, but contracting with a third person to do it, are not liable for a wrongful or negligent act in the performance of the contract, if what was agreed to be done was lawful, and does not constitute a nuisance, or is not intrinsically dangerous": Dillon on Municipal Corporations, sec. 1029; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; 6 Am. St. Rep. 348.

GROTTON v. GLIDDEN.

[84 MAINE, 589.]

FIGHTING, LIABILITY FOR INJURIES INFLICTED IN. — If two persons voluntarily engage in a fight, either may maintain an action against the other to recover damages for injuries received. The fact that the fight was voluntary is admissible only in mitigation of damages.

H. Bliss, Jr., and W. A. Fogler, for the plaintiff.

L. M. Staples, for the defendant.

WALTON, J. This is an action to recover damages for an assault and battery. The plaintiff has obtained a verdict for fifty dollars, and the case is before the law court on motion and exceptions by the defendant.

The evidence satisfies us that the plaintiff's injuries were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense. But the evidence satisfies us that the fight was voluntary on the part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally. And it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of the punitive damages, but not to reduce the actual damages.

In *Boulter v. Clark*, cited in Bull. N. P. 16, the court held

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IN RE HESS WILL.

[48 MINNESOTA, 504.]

Undue influence.

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ALTOONA SEC. NAT. BK. *v.* DUNN.

[151 PENNSYLVANIA, 928.]

Accommodation Notes.

a fraudulent disposition of property, must show that he was a creditor at the time that the act was done, and that it was in fraud of his rights: *Stone v. Myers*, 9 Minn. 303; 86 Am. Dec. 104, and note; *Reid v. Gray*, 37 Pa. St. 508; 78 Am. Dec. 444. A conveyance is not void as against subsequent creditors unless fraudulent in fact, — that is, made with a view to future debts: *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569, and note; *Inhabitants of Pelham v. Aldrich*, 8 Gray, 515; 69 Am. Dec. 266, and note; *Bullitt v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412, and note; *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 381, and note; *Bewick v. Muir*, 83 Cal. 368. See also *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 380; 20 Am. St. Rep. 427.

IN RE HESS'S WILL.

[48 MINNESOTA, 504.]

WILLS — UNDUE INFLUENCE. — CIRCUMSTANCES RELIED UPON TO PROVE UNDUE INFLUENCE must be such as, taken together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that his will is that of the latter, and not of the former.

WILLS. — BURDEN OF PROVING FRAUD OR UNDUE INFLUENCE rests upon the contestants of the will.

WILLS — UNDUE INFLUENCE. — While evidence of declarations of a testator, made subsequent to the execution of his will, may be received for the purpose of showing the extent and effect of the undue influence claimed to have been exercised over him, yet if the evidence, independent and exclusive of his declarations, does not satisfy the jury that undue influence was used in procuring the will, they must answer the question of undue influence in the negative. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after the will was made.

WILLS. — UNDUE INFLUENCE IS NOT ESTABLISHED by the fact that there were motive and opportunity. It must further appear that the influence was exercised, and that its effect was to destroy the free agency of the testator, and to control the disposition of his property under the will.

WILLS — UNDUE INFLUENCE. — THE INFLUENCES RESULTING IN FAVOR OF PERSONS WHO ARE NEAREST the testator in respect and affection, or by reason of intimate social or domestic relations, cannot be regarded as undue.

WILLS. — UNDUE INFLUENCE CANNOT BE PRESUMED from the mere fact that the provisions of the will are much more favorable to some of the beneficiaries than to others.

Lloyd Barber, for the proponents.

Keyes and Brown, for the contestants.

VANDEBURGH, J. Timothy Hess, late of Winona County, died testate, in December, 1889, leaving him surviving five children, James Hess, Mrs. Ella Dearborn, Mrs. Mary Foster,

Mrs. Emma Ryan, and Cornelius Hess. He was upwards of seventy years old. His will was executed September 24, 1888. In this will, James Hess and Mrs. Ella Dearborn were named executors, and legacies of fifty dollars each, only, were left to Mrs. Foster, Mrs. Ryan, and Cornelius Hess, a legacy of five hundred dollars to George Ford, a son of Mrs. Dearborn, and all the rest and residue of the estate of the deceased was given and devised to the executors, James Hess and Mrs. Dearborn, share and share alike. The estimated value of the estate was about five thousand dollars. The validity of this will is contested by Mrs. Foster and Mrs. Ryan and Cornelius Hess, who alleged that the same was procured to be executed through the fraud of James Hess and Mrs. Dearborn, and constraint and undue influence by them executed and exercised over the mind of the testator at the time of the execution thereof. On appeal from the order and judgment of the probate court, the issue of fraud and undue influence was tried by jury in the district court of Winona County, and a verdict thereon rendered in favor of the contestants.

One of the principal assignments of error is, that the finding and verdict of the jury are not justified by the evidence. It is contended by the proponents that there was no evidence of fraud or undue influence in the case warranting the submission of the question to the jury. It is not necessary, in considering this assignment of error, to review the evidence *in extenso*, or to make special reference to the testimony of the several witnesses. It will be sufficient to refer to such parts of it as may be necessary to show the basis of our conclusions upon this question. What is and is not undue influence has been considered and declared in our former decisions, and we need do little more than refer to them here: *In re Storer's Will*, 28 Minn. 11; *Nelson's Will*, 39 Minn. 205-208; *Mitchell v. Mitchell*, 43 Minn. 73. It is said, in *In re Storer's Will*, 28 Minn. 11, "From the nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it can be directly proved. But the circumstances relied on to show it must be such as, taken together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter, and not of the former." But the burden of proof rests upon the contestants to establish the existence of fraud or undue influence; and

that, we are obliged to hold, after a very careful and thorough consideration of the evidence in this case, they failed to do.

Evidence was received, on the trial, of the declarations of the testator subsequent to the execution of the will, for the purpose of showing the extent and effect of the undue influence claimed to have been exercised over him when the will was made; but the court correctly charged the jury that if the evidence, independent and exclusive of the testator's declarations, did not satisfy them that undue influence was used in procuring the making of the will, they must answer the question of undue influence in the negative. And this must, of course, be so; otherwise the fact would be permitted to be proved by such declarations, though not part of the *res gestæ*. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after a will is made. And in this case the evidence fails to show, apart from such declarations, that there had been either such pressing solicitations or fraudulent practices on the part of the proponents as to amount to moral coercion of the testator, not only affecting his judgment, but overriding his free agency also. Indeed, with the exception of the testimony of the witnesses to the will of what transpired at the time it was drawn and executed, there is no evidence of any importance on the main issue. It is not enough that there be motive and opportunity, as the evidence undoubtedly tends to show there were in this case, but the influence must be exercised and take effect so as to destroy the free agency of the testator, and control the disposition of the property under the will when it is made. Unless the influence of these beneficiaries was unfairly and unlawfully executed, so as to dominate his will at the time, it is not material that they were interested in the will, or had better opportunities for solicitation or persuasion than the contestants. Nor is it surprising that a testator should favor those who are nearest to him in respect and affection, or by reason of intimate social or domestic relations. The influences growing out of such causes must be allowed to have their natural and legitimate effect upon the mind of the testator, so that, if he chooses to make unwise and apparently unjust discrimination among those who are the natural objects of his bounty, he is at liberty to do so; for when he comes to make his will, he is entitled to distribute his property as he pleases, provided only that, in the exercise of this right, his mind is under no such constraint or moral coercion as to interfere with his free

agency: *Mitchell v. Mitchell*, 43 Minn. 73. The principal actors in this contest are Mrs. Dearborn and Mrs. Foster, who is the chief contestant. The record shows, we think, quite clearly that the testator was previously dissatisfied with the conduct and social relations of Mrs. Ryan and Mrs. Foster. And though he had not forgotten that Mrs. Foster had, years before, rendered him valuable service in his household after the decease of his wife, yet he was displeased at her marriage, and feared and believed that any property which she might receive would be squandered. And we gather from the record sufficient evidence, we think, to warrant the belief that there were grounds for such dissatisfaction on the part of the testator.

As respects the specific charge of fraud growing out of the alleged representations of Mrs. Dearborn, we dismiss it by saying that it is not sustained by the evidence; nor does the record present a much stronger case of undue influence. The testator had made his home with his son, James, on the farm of the latter, in Winona County, for several years before his death. Mrs. Dearborn lived in Chicago. A few days before the will was executed, Mrs. Dearborn came on a visit to her father, and remained till after its execution, when her father went with her to Chicago, but afterwards returned to Minnesota, and, before his death, visited Mrs. Foster in Wisconsin. As respects James, the evidence shows that he brought his father and sister to the magistrate when the will was made. His father also left with him the key to his box in a safety-vault, where the testator had deposited it before he went to Chicago. A witness also testifies that Mrs. Dearborn said, in presence of the magistrate and her father, that James did not want the contestants to be allowed any more than a nominal sum each, in the will, — “just enough to prevent breaking the will.” There is no other evidence connecting him with the will. But Mrs. Dearborn was present when the will was made, and talked with other persons present, including the testator, about its provisions. The testator was of sound mind, and unquestionably competent to make a will, and a man of resolute and determined purpose. Searl (who drew the will) and his wife were the principal witnesses in the case. Searl swears that Mrs. Dearborn said, when they came in, that her father had come to have a will made, and she came to tell him how they wanted it made, or how their father wanted it made. Then he says the testator said he “wanted to make

his will, and told him how he wanted it made." Searl was greatly surprised at the inequality of the bequests in the will, and so expressed himself. This led to more or less conversation, particularly in respect to further provision for Mrs. Foster. It seems that the testator was not very communicative, but said, in substance, in reference to Mrs. Foster, that he would like to give her more, but her husband would squander it. The witness stated that the testator was not satisfied, and was uneasy and restless; but it distinctly appears that after all the suggestions were made, and notwithstanding all that was said, he firmly adhered to his purpose to make his will as he had at first indicated. The witness Searl states, on his cross-examination: "Mrs. Dearborn did not dictate the will to me. I drew the will as he dictated it. Q. And drew it just as he told you, I suppose? A. Yes, sir. Q. Now, then, you state that Mr. Hess appeared to be thoughtful, very silent, peculiar in his manner, do you? A. I did not see anything peculiar about him at that time. I may have expressed it in that way. I don't remember. Q. Do you now state that when you were talking over the will, he was decided in making it as he dictated it? A. Yes, sir; he was decided. Q. That the will should be as he dictated? A. Yes, sir; he did not want it changed, as he had arranged it in his mind." So that it is quite apparent that the testator was not influenced to change the nature of the bequests or the frame of the will by anything that occurred at the office of the magistrate, where it was drawn and executed. It was already "arranged in his mind." And there is nothing to show either that in forming his purpose or in adhering to it he was unduly influenced, or that the instrument was not his will, as he understood and declared it to be. The witness further states that "after it was completed, he said it might not amount to anything." He knew that he could alter it afterwards if he desired to do so, and he was advised by some of the witnesses to do so, but did not. He visited his daughter Mrs. Foster during the summer before he died, and it appears that she understood that he had made his will, and knew that she was not favored, and she endeavored afterwards to induce him to change it, but could not prevail on him to do so.

The more closely the case is examined in the light of all the testimony, the more clearly it appears that there is no sufficient proof of facts from which undue influence can be inferred. The testator was a man of strongly marked charac-

teristics, of sound mind and determined will, abundantly able to protect himself, — a matter not to be overlooked in considering a case of this kind; and as long as the law permits a disposition of property by will different from that which the statute makes in case of intestacy, the mere fact that the testator makes an unequal, partial, or seemingly unjust division of his property is no ground for setting it aside. The provisions of the will may be considered, in connection with other evidence, in trying the question of undue influence, but is not itself evidence of such influence; and the court cannot assume to judge of the justice of the provisions of the will, or to question the motives of the testator in making it: *Cudney v. Cudney*, 68 N. Y. 152; *Nelson's Will*, 39 Minn. 205; *Latham v. Udell*, 38 Mich. 238.

Order reversed.

Undue Influence as Affecting the Validity of Wills.*

No Precise Test Possible. — That undue influence exercised over a testator will invalidate a will executed by him as the result of its domination is everywhere conceded, and it is therefore of the utmost importance that some test be formulated, by the application of which to established facts a correct conclusion may be reached as to whether or not a will is incurably tainted by this vice. We must, however, confess at the outset that such a test has not been, and cannot be, prescribed, and that each case must be left to be decided in the light of its attendant circumstances: *Elkinton v. Brick*, 44 N. J. Eq. 154; *Waddington v. Buzby*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Hartman v. Strickler*, 82 Va. 225. It is not the means employed, so much as the effect produced, which must be considered in determining whether undue influence has contributed to the making of a will; for no matter what means have been employed for influencing the judgment or overcoming the will of the testator, yet if he was able to resist them, and, notwithstanding their existence, to make a disposition of his property according to his own desires, that disposition must stand, because the influences were unavailing. Though, on the other hand, the influence exerted over the testator was such as if applied under ordinary circumstances, or exercised over persons of ordinary powers of resistance, would be regarded as innocent, yet if, in the particular case, it resulted in a disposition of property contrary to the testator's desire, the influence was undue: *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

General Definitions. — Though no precise or absolute test of undue influence has been or can be formulated, equally applicable to all cases, still, many general definitions have been given of sufficient accuracy to be of value in considering this topic. "Undue influence, legally speaking, must be such as, in some measure, destroys the free agency of the testator; it must

* REFERENCE TO MONOGRAPHIC NOTES.

Declarations of a testator as evidence of undue influence or of imposition: 3 Am. Dec. 395-399.

Influence or importunity sufficient to invalidate a will: 16 Am. Dec. 257-263.

Presumptions of undue influence: 21 Am. St. Rep. 94-104.

be sufficient to prevent the exercise of that discretion which the law requires in relation to every testamentary disposition. It is not enough that the testator is dissuaded by solicitations or argument from disposing of his property as he had previously intended; he may yield to the persuasions of affection or attachment, and allow their suggestion to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion, — it must constrain its subject to do what is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist; and when this is so, the act which is the result of that influence is vitiated": *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Dunlap v. Robinson*, 28 Ala. 100; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Hall's Heirs v. Hall's Ex'rs*, 38 Ala. 131; *O'Neill v. Farr*, 1 Rich. 80. "On this subject, as on that with regard to capacity, no precise and distinct line can be drawn. Suffice it to say, that the influence exercised must be an unlawful importunity, on account of the manner or motive of its exertion, and by reason of which the testator's mind was so embarrassed and restrained in its operation that he was not master of his own opinions in respect to the disposition of his estate": *Potts v. House*, 6 Ga. 324, 359; 50 Am. Dec. 329. "The testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all direction and control. That degree, therefore, of importunity or undue influence which deprives the testator of his free agency, if it is such as he is too weak to resist, and will render the instrument not his free and unrestrained act, is sufficient to invalidate it": *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Wampler v. Wampler*, 9 Md. 540; *Grove v. Spiker*, 72 Md. 300; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276; *Latham v. Schaal*, 25 Neb. 535. "What constitutes undue influence can never be precisely defined. It must necessarily depend, in each case, on the means of coercion or influence possessed by one party over the other; upon the power, authority, or control of the one, the age, the sex, the temper, the mental and physical condition, and the dependence of the other. Whatever destroys the free agency of the testator constitutes undue influence. Whether that object be effected by physical force or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial. In considering the question of undue influence, therefore, it becomes essential to ascertain, as far as practicable, the power of coercion upon the one hand, the liability to its influence upon the other": *Moore's Ex'rs v. Blauvelt*, 15 N. J. Eq. 368; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Marshall v. Flinn*, 4 Jones, 199. "A learned text-writer on wills deduces the following rules or principles from adjudged cases, and that the influence to avoid a will must be such as, — 1. To destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than his own; 2. That it must be an influence specially directed towards the object of procuring a will in favor of particular parties; 3. If any degree of free agency or capacity remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty; and it must have proved successful, to some extent": *Gardiner v. Gardiner*, 34 N. Y. 161; citing *Redfield on Wills*, 524. "Undue influence is very nearly allied to fraud, yet they are not identical; whilst undue influence comprehends fraud, fraud does not embrace every species of undue influence. Undue influence exists where-

ever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will": *Herster v. Herster*, 122 Pa. St. 239; 9 Am. St. Rep. 95. "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasions, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, — these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; but his will must be the offspring of his own volition, and not the record of some one else's": *Hall v. Hall*, L. R. 1 Pro. & D. 481; *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712.

The means employed and the persons using them are immaterial, provided the result is undue influence. While the influence is usually exerted by some person directly or indirectly benefited by the will as it is finally executed, yet the effect upon the will is precisely the same, where the person influencing the testator receives no personal or other benefit from what he does: *In re Cahill*, 74 Cal. 52. So as to the means employed. They may be any of the infinite methods and forces by which one mind may obtain an ascendancy over another, so that what it did emanates from the former, and not from the latter: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712; *Carroll v. Hause*, 48 N. J. Eq. 269; 27 Am. St. Rep. 469. In England, however, it has been held that every undue influence which may vitiate a will must be in the nature of coercion or of fraud. Thus the lord chancellor, in *Boyse v. Rossborough*, 6 H. L. Cas. 2, 3 Jur., N. S., 373, said: "The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if, in these circumstances, the young man, influenced by his regard for the person who has thus led him astray, were to make a will, and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property, provided only that in making such a will the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly

enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your lordships have now to deal. In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror, and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion or fraud."

Free Agency must be Destroyed. — The theory upon which a will is set aside for undue influence is, that though it is in form the will of the testator, it is in fact the will of some other person. Hence, whatever may have been the influence exerted or attempted to be exerted by another, it cannot vitiate a will, unless in fact it overcame the will of the testator, so that, to some extent at least, he was not, in executing the will, a free agent. "Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which in fact substitutes the will of another for that of the testator. It may be exercised through threats, fraud, importunity, or by the silent, resistless power which the strong often exercise over the weak and infirm; but, however exercised, it must, in order to avoid the will, destroy the free agency of the testator at the time it was made, so that the instrument, in effect, expresses the mind and intent of some one else, and not his own": *Schmidt v. Schmidt*, 47 Minn. 451. As undue influence consists of the overcoming of the will of another, so as to produce a testamentary disposition of his property, it is manifest that it is rarely possible to determine whether such an influence has been exerted without taking into consideration the character and circumstances of the testator. Too many wills are executed after the testator has become enfeebled in mind or body, or both, by age or disease, and when he is more susceptible to the influence of others, and less able to resist their importunity or coercion than a person of robust health, in the maturity of his intellectual powers. Still, the law permits persons of extreme age, or those in the presence of impending death, and while tortured and enfeebled

by the progress of painful and fatal maladies, to dispose of their property by will. In this case, as well as in all others, the only question, when testamentary capacity exists, is, though the influence of others was brought to bear upon the testator, Was he able to resist such influence? and if the influence were removed, would it still receive his assent? If so, it is his will, and must be respected as such. But neither importunity, nor threats, nor persuasion, nor any other of the manifold forms in which influence may be brought to bear, can vitiate the will, if the testator was able to properly weigh or resist them, and ultimately made a disposition of his property which was the result of his mind and will, and not of the will of another: *Tobin v. Jenkins*, 29 Ark. 151; *Leeper v. Taylor*, 47 Ala. 221; *Tyson v. Tyson*, 37 Md. 567; *Brick v. Brick*, 66 N. Y. 144; *Barnes v. Barnes*, 66 Me. 286; *Marx v. McGlynn*, 88 N. Y. 357; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Small v. Small*, 4 Greenl. 223; 16 Am. Dec. 253; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Floyd v. Floyd*, 3 Strobl. 44; 49 Am. Dec. 626; *McCulloch v. Campbell*, 49 Ark. 367; *Waddington v. Buzly*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Allmon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Latham v. Udell*, 38 Mich. 238; *Layman v. Convey*, 60 Md. 286; *Stutz v. Schaeffle*, 16 Jur. 909; *Williams v. Goude*, 1 Hagg. Ecc. 577; *Forney v. Ferrell*, 4 W. Va. 729. Upon this subject the vice-chancellor of New Jersey, in *Haydock v. Haydock*, 33 N. J. Eq. 494, pertinently and forcibly said: "The determination of this question must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly or unfairly influenced. A mind naturally weak, and which has become impaired by age, disease, or grief is much more subject to any sort of control than one naturally strong and unimpaired. It is always, therefore, a matter of the first importance to the tribunal charged with the duty of deciding this question to know fully the situation and surroundings and the exact condition of mind and state of physical health of the person alleged to have been imposed upon. No definition of what the law denominates undue influence can be given which will furnish a safe and reliable test for every case. Each case must be decided on its own special facts. All that can be said in the way of formulating a general rule on that subject is, that whatever destroys free agency, and constrains the person whose act is brought into judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial; for the test always is, Was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another, rather than the expression of the will and mind of the actor? *Turner v. Cheesman*, 15 N. J. Eq. 243, 265; *Moore's Ex'rs v. Blauvelt*, 15 N. J. Eq. 367; *Lynch v. Clements*, 24 N. J. Eq. 431."

Must be Directed towards the Execution of the Will. — The general declaration is frequently made, that the undue influence which will vitiate a will must be specially directed towards that object; that it must be exercised with a view to procuring a will to be made in harmony with it: *McCulloch v. Campbell*, 49 Ark. 367; *Allmon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Roe v. Taylor*, 45 Ill. 491; *Brownfield v. Brownfield*, 43 Ill. 155; *Rutherford v. Morris*, 77 Ill. 397. We are not sure that this is always true. Doubtless, it would not be sufficient, to destroy a will, to prove that certain persons exercised a great and even an undue influence over the testator in many respects,

if it was clear that such influence was not exerted with respect to the will, and that the latter was entirely free of it. There may perhaps be instances in which persons exercise an influence over a testator to the extent of preventing him from disposing of his property as he otherwise would, without their knowing or caring whether that result was produced or not, as where, by misrepresentation or other means, a prejudice is generated against relatives, or devisees, or legatees, causing them to be disinherited or deprived of the benefits of a pre-existing will. If, in such a case, the mind and will of the testator were so influenced that he revoked his will, we doubt whether the effect of the undue influence upon the new will executed under its domination can be obliterated by proving that it was exercised for some other object than of producing the will which actually resulted from it.

Must Affect the Will. — It is true, beyond question, that no influence can vitiate a will which it did not affect. It is not material that the influence be exercised on the day or hour that the will was made, provided it was at that time a continuing influence: *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186; *Davis v. Culvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Hartman v. Strickler*, 82 Va. 225. Though an influence, undue and unlawful, was exerted over a testator, yet if it at no time affected or overcame his will, or if, though dominating his will at the time, its potency had ceased, so that when he came to make the will in question it was a correct expression of his desires, then the influence, because it has been harmless, should not be taken into consideration: *Monroe v. Barclay*, 17 Ohio St. 313; 93 Am. Dec. 620; *Eckert v. Florry*, 43 Pa. St. 46; *McMahon v. Ryan*, 20 Pa. St. 329; *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491; *Morris v. Stokes*, 21 Ga. 552; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *McCulloch v. Campbell*, 49 Ark. 367; *Jenckes v. Court of Probate*, 2 R. I. 255; *Button v. Watson*, 13 Ga. 63; 58 Am. Dec. 504.

Whether the Influence must be Unlawful. — That an influence, to be undue, must be unlawful, is often asserted: *Means v. Means*, 5 Strob. 167. In other cases it is said that the influence must be fraudulent and controlling: *Wright v. Howe*, 7 Jones, 412; and must be intended to mislead the testator "to the extent of making a will essentially contrary to his duty": *Jackman's Will*, 26 Wis. 104, 112; *Gardiner v. Gardiner*, 34 N. Y. 155. That an undue influence is often unlawful and fraudulent is no doubt true, and that fraud, where it results in undue influence, is fatal to a will, is equally beyond dispute: *Seguine v. Seguine*, 4 Abb. App. 191; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423. But we apprehend that it is not essential that an influence be either unlawful or fraudulent, unless it be true, as a matter of law, that every influence which deprives the testator of his free agency, and procures him to execute a will which is the will of another person, and not of himself, is fraudulent and unlawful: *Stewart v. Elliott*, 2 Mackey, 307; *Davis v. Culvert*, 5 Gill & J. 269; 25 Am. Dec. 282. Nor can we understand how any inquiry can be entertained for the purpose of determining whether a will was "essentially contrary to the testator's duty," unless, perhaps, when the fact that the will is an unnatural one is considered in connection with other circumstances, tending to prove that undue influence was exercised over him, and that he was unable to resist it. Surely, if the existence of an influence which overcame the testator's freedom of action is established, the will cannot be supported by proving that the testator wished and intended to make a will contrary to his duty, and that the influence was imposed only for the purpose of thwarting his evil design, and compelling him to do right, though it was his will to do wrong. If it be true

that an influence, to be undue, must, as many of the authorities declare, "be exerted *mala fide*, to produce a result which the party as a reasonable person was bound to know was unreasonable and unjust": Redfield on Wills, 527; *Jackman's Will*, 26 Wis. 114; *Woodward v. James*, 3 Strob. 552; 51 Am. Rep. 649; then, though the will in question was never freely assented to by the testator, it must be upheld, if it ought to have been assented to, and the fraud, force, deception, or coercion practiced upon and against him were employed in a worthy cause, or in favor of good or meritorious beneficiaries.

Influences Which are not Improper. — Of course, every intelligent devise or bequest is the result of some influence operating upon the mind and will of the testator, and in nearly every instance in which a testamentary disposition differs from that which the law itself would make of the testator's property, such disposition is the result of some influence exercised by some other person or persons, whether intentionally or consciously or not, over the testator. The vast majority of these influences are not undue, though but for them the testator would probably or certainly have made a different will.

Influences of Kinship or Companionship. — The most obvious and universal influences are those of kinship, of marriage, and of personal and social relations, and the testator who merely yields to them cannot be said to be unduly influenced, though he fails to provide for some or all of the natural objects of his bounty. Thus it has been said, without peril of successful contradiction, that an influence obtained by a wife through her fidelity and her virtue cannot possibly be undue: *Small v. Small*, 4 Greenl. 220; 16 Am. Dec. 253. This must be equally true of the other members of the testator's family, and if their demeanor towards him, or even the fact of their being constantly in his presence, engenders affection upon his part towards them, culminating in his preferring them in his will to others equally bound to him by the ties of consanguinity, this influence, though it has resulted to their advantage, is not undue: *Thompson v. Ish*, 99 Mo. 120; 17 Am. St. Rep. 552; *McCulloch v. Campbell*, 49 Ark. 367; *Elliott's Will*, 2 J. J. Marsh. 340; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620. Companionship with persons not at all related to the testator may produce the same effect, and if so, his will in their favor cannot for that reason be avoided: *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Higgins v. Carleton*, 28 Md. 115; 92 Am. Dec. 666; *Floyd v. Floyd*, 3 Strob. 44; 49 Am. Dec. 626.

The Influences of Kind Offices or of Good Deeds are certainly legitimate, and a will cannot be avoided because produced by them: *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 255; *Kerr v. Lunsford*, 31 W. Va. 680; *Williams's Estate*, 13 Phila. 302. If a will is but a recognition and reward of kind offices, there is no doubt that their influence cannot be regarded as undue. In many instances it may be insisted that while these offices have existed, and were entitled to recognition and recompense, yet that an undue ascendancy was, through them, obtained over the testator, and was exercised to the extent of overcoming his will, and obtaining a testamentary disposition which, under the circumstances in which he was placed by his benefactors, he was unable to deny. So, too, it may be urged that those offices were not incited by friendship or benevolence, but were part of a scheme devised for the purpose of weaning the testator away from his friends and kindred, and procuring a will in which their claims should be sacrificed in favor of those who, from selfish motives, had obtained possession of his person, and ministered to his wants or his whims, in his old age or in his last illness. Doubtless there may be instances in which the caring for a person in his declining years may be regarded with suspicion, and, in connection with other evi-

dence, may justify a finding of undue influence, but in the absence of such other evidence, this can rarely or never be so. To hold otherwise would be to discourage "that affectionate care and attention which the law upholds, rather than condemns": *Bush v. Lisle*, 89 Ky. 393; *White v. Starr*, 47 N. J. Eq. 244.

The Influence of Illicit Relations. — The social ties and kind offices of which we have hitherto spoken do not include relations or offices of an unlawful or immoral character, though it is by no means certain that the principles applicable to moral and praiseworthy relations are not equally applicable to those of a meretricious nature, provided it be clear that the testator retained his self-control, and his bounty was the result either of his affection or his pity. In a case arising in South Carolina, a will was sought to be set aside on the ground that a beneficiary was a woman of African descent with whom the testator had lived in disgraceful intimacy, and that she had interposed her influence in favor of another beneficiary. There being, however, no evidence that anything had been done to interfere with the free agency of the testator, the court said: "Not merely in the ordinary affairs of life, but in the disposition of his property, even the sternest man is sometimes influenced by the wishes of a friend, a wife, or even an unworthy mistress, who has usurped, both in his affections and at his table, the place of his lawful wife. It has happened, and will happen again, that a mistress may so captivate the affections of her paramour, that he shall give her his whole estate, to the exclusion of his lawful wife and children. Such an act all would condemn, and concur in denouncing as immoral and improper the influence which had produced it; but if it be done under the influence of affection merely, however unworthy the object may be, such wills have been, and must be, supported, so long as the law allows a man to dispose of the property according to his own wishes. It has never been supposed to be essential to a will or deed that the motive which led to the act should be virtuous, or that the object of the donor's bounty should be meritorious, but it is essential that it should be the free and voluntary act of a sane mind. If, in making it, he has been influenced by modest persuasion, by arguments addressed to his understanding, or by appeals to affection merely, the act is a valid one. If it be in conformity to his wishes, it is emphatically his will, and not the will of another, and we are bound to give it effect, without reference to the motive of the testator, or the unworthiness of the legatee, until the legislature, upon considerations of public policy, shall think proper further to abridge the right of an owner to dispose of his property": *O'Neill v. Farr*, 1 Rich. 80, 83; *Farr v. Thompson*, 1 Cheves, 37; *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620. As long as the absolute power of testamentary disposition is conceded, and the owner of property is allowed to dispose of it to whomsoever he pleases, and for such reasons as to him shall seem adequate, his right to make a bequest to one with whom his relations have been meretricious must be admitted, even though it be further conceded that the bequest was made because of those relations. Nor can the existence of those relations create a presumption of undue influence, and impose upon the beneficiary the burden of disproving the exercise of such influence: *In re Mondorf*, 110 N. Y. 450; *Wainwright's Appeal*, 89 Pa. St. 220; *Roe v. Taylor*, 45 Ill. 485; *McClure v. McClure*, 86 Tenn. 178; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 233; *Porschet v. Porschet*, 82 Ky. 93; 56 Am. Rep. 880. Nevertheless, it is true that when undue influence is charged, the fact that the person accused of exercising it lived in illicit relations with the testator or testatrix may prop-

erly be admitted in evidence, to be considered by the jury, in connection with circumstances tending to prove undue influence: *Main v. Ryder*, 84 Pa. St. 217; *Davis v. Culvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *McClure v. McClure*, 86 Tenn. 173; and it is probably true, in some states at least, that acts and conduct of a mistress may amount to undue influence when that effect would not be attributed to like acts or conduct on the part of a wife: *McClure v. McClure*, 86 Tenn. 173; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620. Thus in one case the court said: "We are of the opinion that there is a difference in the two cases, and that an influence when exercised by a wife might be lawful and legitimate, but which, if exercised by a woman occupying an adulterous relation to the testator, might be undue and illegitimate": *Kessinger v. Kessinger*, 37 Ind. 341. Possibly this is true; but no court has as yet pointed out any influence exercised by a wife to the extent of destroying the husband's free agency which will not vitiate his will, nor any influence of a mistress, leaving the testator free to exercise such agency, which will vitiate such will. Perhaps all that can be affirmed upon this subject with any degree of confidence is, that in the practical administration of the law both courts and juries, from their aversion to a mistress and their sympathy for a wife, will resolve all doubtful questions against the former and in favor of the latter, and thus it will occur that evidence sufficient to produce the conviction of the undue influence of the former will not accomplish that result if offered against the latter.

Argument, Persuasion, Importunity. — It is not influence over the testator, but undue influence, which may vitiate his will. It is not essential that his will be suggested wholly by himself, nor that, as ultimately executed, it be of the same purport as if no one had made any suggestion to him concerning it, or used argument, persuasion, or even earnest entreaty, with a view of affecting its provisions. These are not unlawful, and, though often indelicate, are not improper, provided the testator's mental and physical condition, and the circumstances under which he is placed, are such that he may deliberate upon and either grant or deny them, through the untrammelled operation of his own mind and will. Thus a suggestion to a testator that particular dispositions of his property would be just to the natural objects of his bounty: *Elkinton v. Brick*, 44 N. J. Eq. 154; or even a suggestion resulting in a legacy which otherwise might not have been made, do not of themselves support a charge of undue influence: *Lyons v. Campbell*, 88 Ala. 462; *Thornton v. Thornton*, 39 Vt. 122. There can be no doubt of the right of a wife not only to counsel with her husband respecting his will, but even to employ argument and entreaty for the purpose of affecting its provisions. That she urged upon him the propriety of leaving all his property to her, and that he acted accordingly, does not establish undue influence: *Hughes v. Murtha*, 32 N. J. Eq. 288. In many instances, what he is about to dispose of is the result of the labors of her lifetime as well as of his, and while the law, perhaps unwisely as well as unjustly, may give her no absolute right to control the disposition, yet it will not regard as improper any influence which she may exercise over him, short of coercion, or the substitution of her will for his. "We do not know of any rule of law or morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit, or for that of others, unless she acts fraudulently or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent. A faithful wife ought to have a very great influence over her husband, and it is one of the necessary results of proper marriage relations. It would be monstrous to deny to a woman, who is usually an

important agent in building up domestic prosperity, the right to express her wishes concerning its disposal. And there is no legal presumption against the validity of any provision which a husband may make in his wife's favor": *Latham v. Udell*, 38 Mich. 238, 240; *Pierce v. Pierce*, 38 Mich. 412; *Moritz v. Brough*, 16 Serg. & R. 403; *Pingree v. Jones*, 80 Ill. 177; *Lide v. Lide*, 2 Brev. 403. While the right of children may not stand on the same high footing as that of a wife to be heard respecting a will, still there is no doubt that they have the right to influence their parent by fair argument, or even by entreaty, to make disposition of his property in their favor: *Elliott's Will*, 2 J. J. Marsh. 340; *Miller v. Miller*, 3 Serg. & R. 267; 8 Am. Dec. 651; *Gilreath v. Gilreath*, 4 Jones Eq. 142. In truth, as the only question is whether or not the testator's free agency was destroyed, it is not material whence argument or even entreaty came, provided it left such agency untrammelled. The appeal may be to his affections, or his sense of gratitude for past services, or his sense of compassion for the destitution and want which may overcome the applicant in the future, unless some provision is made for him in the will: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712; *Hall v. Hall*, L. R. 1 Pro. & D. 481; *Harrison's Will*, 1 B. Mon. 351. So long as no fraud is practiced upon the testator, and no advantage taken of his weakness and his inability to resist, his bounty may be sought by every appeal to his intelligence or his emotions, which may lawfully influence his judgment or his affections. He may be flattered, persuaded, or entreated: *McDaniel v. Crosby*, 19 Ark. 533; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276; *Miller v. Miller*, 3 Serg. & R. 266; 8 Am. Dec. 651; *Hoge's Estate*, 2 Brewst. 450. The importunity may be such as no delicate mind could be guilty of: *Tuwney v. Long*, 76 Pa. St. 106; and yet if he yield intelligently, and from conviction, the influence thus operating is not undue: *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268. "Solicitations, however importunate, cannot of themselves constitute undue influence, for, though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate": *Trost v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593. In other words, while importunity is one of the means of obtaining and exercising undue influence, yet such influence does not always nor usually result, and, as already suggested, it is not the means employed, but the result accomplished, which vitiates a will. If the condition of the testator is such that he cannot resist the importunity, then whatever is obtained by it is the fruit of undue influence: *Elkinton v. Brick*, 44 N. J. Eq. 154. "Influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do what is against his will, what he is unable to resist, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another": *Wise v. Foote*, 81 Ky. 10; *Schofield v. Walker*, 58 Mich. 96; *Rabb v. Graham*, 43 Ind. 1; *Kinleside v. Harrison*, 2 Phill. 551; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *McDaniel v. Crosby*, 19 Ark. 533. Whenever we have spoken of argument, persuasion, or entreaty as not constituting undue influence, provided the free agency of the testator was not impaired by them, we have meant honest argument or persuasion, and not that which accomplished its result by resorting to fraud or falsehood. The effect of fraud and falsehood has not been so carefully con-

sidered by the courts as its importance deserves. It is not at all difficult to imagine a case in which a will expressed with perfect accuracy the wishes of the testator at the time it was made, so that it is impossible to say of it that the testator did not, in making it, act as a free agent, and yet his wishes as so expressed were produced by the artifices of another in creating in the mind of the testator a false belief as to the merits or demerits or the necessities of the objects of his bounty; and we apprehend that whenever a testator is controlled in making his will by a misrepresentation, whether expressed or implied, provided it be conscious and intentional, then such influence is undue, and the party guilty of it, or in whose behalf it was exercised by another, will not be permitted to take advantage of it: *In re Bullong's Will*, 126 N. Y. 423, 432; *Tyler v. Gardiner*, 35 N. Y. 559, 576, 593.

Prejudices and Aversions share with affections and preferences in producing the convictions and impulses under which wills are made, and the influences of the former are not necessarily undue, any more than are those of the latter, though they more often indicate an unbalanced mind or want of testamentary capacity, or the operation of malign artifices. The fact that the testator was prejudiced against or had an aversion for some of the natural objects of his bounty, and therefore disinherited them in favor of others, whether related to him or not, does not establish undue influence, though the will is clearly the fruit of his resentment and dislike: *Nicholas v. Kershner*, 20 W. Va. 256; *Kerr v. Lunsford*, 31 W. Va. 659; *Carter v. Dixon*, 69 Ga. 82. Nor, when family dissensions arise, will the fact that a child not only shared in the feelings of his parent respecting the conduct of another child, and perhaps kept alive and increased the parental resentment, constitute undue influence vitiating a will in favor of the former and against the latter: *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649.

Improper Influences. — All influences which are undue are improper, if by undue is meant the domination of the will of the testator to the extent of destroying his free agency; but whether an improper influence is also undue must depend upon its effect upon the will in question. We shall now speak of some influences of a character so obviously improper, and so likely to result in undue influence, that we apprehend it must, in many cases, be presumed from their existence, in the absence of all evidence tending to prove that the testator successfully resisted them. The chief among these influences is that of fear generated in the mind of an aged, feeble, or dependent person by one in whose power he is. Thus if it appears that a son has abused his aged father, who resides with him, even to the extent of threatening him with personal chastisement, and that the latter manifestly lived in fear that these threats might be executed, but nevertheless made his will in favor of such son, contrary to his previously expressed intentions, undue influence should be presumed: *Hartman v. Strickler*, 82 Va. 225. Nor need the fear be of personal violence; it may result from a threat that family discord and litigation will ensue. "Threats of personal estrangement and non-intercourse addressed by children to a dependent parent, or threats of litigation between children to influence a testamentary disposition of property by a parent, constitute undue influence": *Moore v. Blauvelt*, 15 N. J. Eq. 367.

Misrepresentation and Like Artifices. — The most potent influence which can be exercised over the testamentary disposition of property is to give the testator a false impression concerning persons in whose favor his bounty is sought, or against persons who may be disinherited by the exertion of his testamentary powers. The necessities and the claims upon his affection of different persons who are the natural objects of his bounty may be expressly or impliedly misrep-

resented, so that when he comes to make his will he acts upon unfounded beliefs, and gives or withholds his bounty in a manner entirely different from what his action would have been had it not been based upon beliefs and opinions deliberately instilled into his mind for the purpose of influencing his will. We have already expressed our regret that the adjudged cases have not more distinctly considered the effect of misrepresentation and fraud employed, not for the purpose of destroying the free agency of the testator, but for the purpose of causing such agency to be exercised upon what may, for want of a better expression, be styled false premises. Of course, a misrepresentation that does not influence a will cannot vitiate it: *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; and the fact that the beneficiary of a will has, in the presence of the testator, denounced one who is discriminated against by it does not establish undue influence, when the testator was under no restraint, and, being in the full maturity of his powers, was competent to determine for himself whether the denunciation was merited or not: *Dumont v. Dumont*, 46 N. J. Eq. 223. But a testator may not be in a position to judge for himself, either because from age or illness his mind and will can no longer deliberate or resist, or because the true facts are sedulously concealed. We apprehend whenever it can be shown that by intentional misrepresentation, expressed or implied, or by a course of treatment or concealment, that the testator has been led to disinherit an heir, or to revoke a devise or bequest because of his belief that such heir or beneficiary has become or is unworthy of his bounty, or that some other person is more worthy of it, then such misrepresentation, if exercised by or on behalf of the person in whose favor the testamentary disposition is finally secured, is an undue influence, for which the will must be set aside: *Tyler v. Gardiner*, 35 N. Y. 559, 576, 593; *In re Budlong's Will*, 126 N. Y. 423. Hence where a testator who had contracted a second marriage, disinherited the children of his first marriage, it was held that evidence should be received, giving an insight into the private family life and history, for the purpose of disclosing what means, if any, his second wife had employed to alienate his affection from such children: *Newton v. Carberry*, 5 Cranch C. C. 632; *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15.

Burden of Proof, and Presumptions. — He who contests the admission to probate of a will, or seeks to set aside such probate after it has been granted, on the ground that the will was procured by undue influence, must assume the burden of proof, and establish to the satisfaction of the court or jury the existence of such influence, and that the will is one of its fruits: *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *Webber v. Sullivan*, 58 Iowa, 260; *Davis v. Davis*, 123 Mass. 590; *Euen v. Perrine*, 5 Redf. 640. And when the testator is shown to have been of sound mind, no presumption of the exercise of undue influence over him can be indulged, even though the will is, in the opinion of the court or jury, unreasonable and unjust, and such as ought not to have been made. At least, such is the rule supported by a majority of the cases upon this subject. The evidence may, however, show certain relations between the testator and the beneficiaries, well calculated to give them an undue influence over him, or that his condition of mind or body was such as to make it probable that he was not able to resist the influence of others, or that the provisions of the will are unnatural and unreasonable, and contrary alike to his duty and his previously expressed intentions, and this evidence, without any other, may often create a presumption of undue influence, and cast upon the proponent of the will the burden of removing such presumption. In the note to *Rich-*

mond's Appeal, 21 Am. St. Rep. 94-104, we so recently considered the presumptions of undue influence that we shall here attempt no more than a brief synopsis of the law upon the subject. As to the relations of the testator and a beneficiary of his will, it is sufficient to remark that the existence of undue influence may be presumed from them, — 1. When those relations are of such special trust and confidence as of themselves to warrant the presumption that they have an undue influence over him; and 2. When they were such as to place him in the power of the beneficiaries or their emissaries at a time when he was too weak, mentally or physically, to resist. Chief among the relations of the first class are those of guardian and ward, attorney and client, priest, or other spiritual adviser, and persons looking to him for advice. Thus if a ward makes a testamentary disposition in favor of his guardian or of members of the guardian's family, under such circumstances that undue influence may have been employed, the burden of proof must be assumed by those claiming under the will, and they must establish that it did not result from the undue influence of the guardian: *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314; *Bridwell v. Swank*, 84 Mo. 455; *Breed v. Pratt*, 18 Pick. 115, 117; *Seiter v. Straud*, 1 Demarest, 264. So if the beneficiary was the attorney of the testator, undue influence is presumed, and this presumption will naturally be most potent when the testator was old and illiterate, or placed in such circumstances as not to have the advice of friends or relatives, and partly or wholly disinherits the natural objects of his bounty: *Post v. Mason*, 26 Hun, 157; 91 N. Y. 539; 43 Am. Rep. 689; *Grove v. Spiker*, 72 Md. 300; *Riddell v. Johnson*, 26 Gratt. 152; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. If the beneficiary is a priest, a spiritual adviser, or a spiritualistic medium, he must also show that he exercised no undue influence: *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84; *Leighton v. Orr*, 44 Iowa, 679; *Lyon v. Horne*, L. R. 6 Eq. 655; *Nottige v. Prince*, 2 Giff. 246; *Greenwood v. Cline*, 7 Or. 17; *Thompson v. Hawks*, 14 Fed. Rep. 902; *Marx v. McGlynn*, 88 N. Y. 357. In the cases to which we have referred, the presumption of undue influence arises from the fact that the relations spoken of are necessarily those of implicit trust and confidence, in which the temptation and opportunity for abuse would be too great if the beneficiary were not required to make affirmative proof that he did not betray the confidence placed in him, nor so use his influence as to coerce or mislead the testator, or otherwise obtain an undue ascendancy over him. And whenever the reason of the rule exists, the presence and applicability of the rule itself may generally be affirmed. Hence though the relation is not one of those already named, yet if it is one of such special trust and confidence that the testator apparently trusted the beneficiary as a client trusts an attorney, a patient his physician, or a ward his guardian, the absence of undue influence must be disproved: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85; *Moore v. Spier*, 80 Ala. 129; *Delafeld v. Parish*, 1 Redf. 1; *In re Walsh*, 1 Redf. 238; *Daniel v. Hill*, 52 Ala. 430; and this is more especially true when the relations of the testator and the confidential friend and adviser were such that undue influence could have been exercised without any direct evidence of such influence being possible: *Herster v. Herster*, 116 Pa. St. 612; *Waddington v. Buzby*, 43 N. J. Eq. 154; or the testator was feeble in mind or body, or in his dotage: *Waddington v. Buzby*, 43 N. J. Eq. 154; *Ray v. Ray*, 98 N. C. 566; or the will is in conflict with the intentions of the testator, as expressed in pre-existing wills or otherwise: *Wilson's Appeal*, 99 Pa. St. 545. The relation of members of the same family is ordinarily one

of extreme trust and confidence, and might very naturally lead to the presumption of undue influence, were it not for the fact that a testamentary disposition in favor of relatives by consanguinity is treated as natural and just. Though sometimes the effect of relationship has been regarded as a circumstance to be considered in connection with other evidence: *Gaither v. Gaither*, 20 Ga. 709; yet there has been no instance, so far as we are aware, in which undue influence has been presumed merely from the relation of parent and child, husband and wife, or any other relation, either of consanguinity or affinity: *Armstrong v. Armstrong*, 63 Wis. 162; *In re Martin*, 98 N. Y. 193; *Latham v. Udell*, 38 Mich. 235; *Rankin v. Rankin*, 61 Mo. 295; *Will of Nelson*, 39 Minn. 204; *Will of Andrews*, 33 N. J. Eq. 514. The fact that illicit relations existed between the testator and the beneficiary, and that they lived together as husband and wife, without being such, does not create any presumption of undue influence: *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Sunderland v. Hood*, 84 Mo. 293; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238; *Wainwright's Appeal*, 89 Pa. St. 220; *Main v. Ryder*, 84 Pa. St. 217; *Porschet v. Porschet*, 82 Ky. 93; 56 Am. Rep. 880; *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620. If a will is drafted by one to whom, or to whose family, or some member thereof, a bequest or devise is made, this is sometimes regarded as a suspicious circumstance: *Edmonds v. Lewer*, 11 Jur., N. S., 911. Perhaps it may require more clear and satisfactory evidence that the contents of the will were clearly disclosed to the testator, than if it were drawn by a disinterested person: *Beall v. Mann*, 5 Ga. 456; *Kelly v. Settegast*, 68 Tex. 13. However this may be, there is no presumption that it was procured by the undue influence of the draughtsman; though if there is other evidence of undue influence, then the fact that the will was prepared by an interested party may properly be considered by the court and jury as giving increased force and probability to such evidence: *Waddington v. Buzby*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Carter v. Dixon*, 69 Ga. 82; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Cheatham v. Hatcher*, 30 Gratt. 56; 32 Am. Rep. 650; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Montague v. Allen*, 78 Va. 592; 49 Am. Rep. 384; *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218. In some cases in which it appeared that the wills in question had been prepared by or at the instance of persons interested in them, expressions were made from which an inference might be drawn not in harmony with the rule as we have just stated it, but on examination of these cases we think nothing is necessarily affirmed by them, except that "it should be shown that the testator clearly understood the contents of the paper which he signed": *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Kelly v. Settegast*, 68 Tex. 13. "While the mere fact that a will is written by a party who takes a benefit under it does not invalidate it, yet if the benefit is large, and especially if the beneficiary is a stranger to the testator's blood, the instrument will be scrutinized with suspicion, and clear proof that the testator knew its contents will be required to admit it to probate. Proof of testamentary capacity and of formal execution are insufficient.* Because of its accuracy and guarded limitations, we quote the statement of the rule made by Baron Parke: 'If a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased: *Barry v. Butlin*, 1 Curt. 637.' Evidence in the shape

of instructions for the preparation of the will, or reading or hearing it read, is the most satisfactory, but not the only precise species of evidence of the testator's knowledge of the will, — circumstantial evidence may be sufficient; but the party claiming under the will, whatever mode of proof he may adopt, must satisfactorily establish that the testator knew the contents; *onus probandi* is on him": *Lyons v. Campbell*, 88 Ala. 462.

The relations of the second class, to wit, those in which it appears that the testator was placed in the power or under the control of the beneficiary, or of his emissaries, to an extent which justifies the inference, in the absence of countervailing evidence, that he was subjected to undue influence, are of great variety, but all resemble in the fact that the circumstances of the testator were such that his acting freely and intelligently was less probable than his acting in obedience to the will of another. Thus if a will is made in favor of a hospital in which the testator was at the time lying *in extremis*, and is drawn by its chaplain, and ignores the natural heir, slight circumstances will justify the jury in inferring undue influence: *Muller v. St. Louis Hospital Ass'n*, 5 Mo. App. 390. In truth, probably the majority of the courts would require additional evidence in support of the will, especially if it disregards the claims of kindred or conflicts with a pre-existing will. If a testator is helpless, either from illness or old age, and is in the house of another, on whom he necessarily depends for care, comfort, and attention, the probability of his being subjected to influences which he cannot resist is very great. "The rule to be deduced from the decisions on the subject is this: that where a person, enfeebled by old age or illness, makes a will in favor of another person, upon whom he is dependent, and that will is at variance with a former will made or intentions formed when his faculties were in full vigor, and is opposed to the dictates of natural justice, the presumption is, that such a will is the result of undue influence, unless that presumption is satisfactorily rebutted by other evidence in the case": *Demmert v. Schnell*, 4 Redf. 409; *Carroll v. Hause*, 48 N. J. Eq. 269; 27 Am. St. Rep. 469; *Suenarton v. Hancock*, 22 Hun, 38; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. Generally, whenever it is shown that when the will was executed the testator was *in extremis*, or seriously ill, or that he was of weak mind, either from dissipation, age, or natural infirmity of intellect, it is incumbent upon those claiming under the will to show what were the circumstances under which it was executed, and to rebut the presumption of undue influence which must be drawn in the absence of any explanatory testimony: *Boyd v. Boyd*, 66 Pa. St. 283; *Moore v. Moore*, 56 Cal. 89; *Allore v. Jewell*, 94 U. S. 506; *Fishburne v. Ferguson*, 84 Va. 87; *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

Secrecy in the Execution of a Will is not necessarily a badge of fraud, nor does it create a presumption of undue influence: *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Brick v. Brick*, 43 N. J. Eq. 167; nor can such presumption arise from the fact that when the will was executed the testator was surrounded by those of his children who were principally benefited by it, and the child who was disinherited was absent: *Bundy v. McKnight*, 48 Ind. 502. The fact that the execution of a will was kept secret from some of the children and heirs of the testator is often entitled to great consideration, in connection with evidence tending to show undue influence. Thus where a testatrix was old and feeble, with a mind so impaired that she was easily influenced by those possessing her confidence, and her will was executed in the presence of one of her children, who was greatly benefited by it, the court regarded the secrecy of its

execution as a circumstance tending to establish undue influence: *Greenwood v. Cline*, 7 Or. 17. If it appears that devices were resorted to for the purpose of keeping the testator's relatives away from him, or for preventing their being present when the will was made and knowing about its execution, and those devices were sanctioned by the persons who were made beneficiaries under the will, to the exclusion of other relatives, undue influence may be presumed, especially if the testator was in a helpless condition, or his intellect was impaired: *Byard v. Conover*, 39 N. J. Eq. 244; *Greenwood v. Cline*, 7 Or. 18. What, for want of a better term, are often styled unnatural, arbitrary, and unreasonable provisions in a will are frequently spoken of as requiring explanation, or as raising a presumption of undue influence. But the law accords testators the right to make unnatural and unreasonable provisions, and it does not confer upon judges or juries authority to determine for a testator what will he shall make, nor to disregard his preferences as arbitrary or unjust. Nor has any judge claimed the existence of this power, or desired to exercise it. But when it is alleged that a will has been procured by fraud or undue influence, or was executed while the testator was not of a disposing mind, the fact that its provisions are not in harmony with the ordinary desires of a free and rational mind must always lend probability to the allegation. It may happen, too, that the evidence discloses what were the affections and wishes of the testator but a short time before the will was made, and if so, and nothing has apparently occurred to change them or destroy their force, and his testament is at variance with them, such variance is often so unaccountable that it calls for explanation, and if such explanation is wanting, justifies the inference that what he did was not the act of his free and disposing mind. If the testator was of sound mind and health, and free from all constraint, the mere preference of one relative to another, or the preference of persons to whom he was not in any way related over his kinsmen, does not necessarily show undue influence: *Kitchell v. Beach*, 35 N. J. Eq. 446; *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Storer's Will*, 28 Minn. 9; *Hubbard v. Hubbard*, 7 Or. 42; *Turnure v. Turnure*, 35 N. J. Eq. 437; *Jenckes v. Court of Probate*, 2 R. I. 255. An eminent writer has said that "where the will is unreasonable in its provisions, and inconsistent with the duties of the testator with reference to his property and family, this, of itself, will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will," and that "gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will or otherwise, may change the burden, and require explanation, on the part of those who support the will, to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind": 1 Redfield on Wills, 516, 537; and this language has been quoted with apparent approval in some of the decisions: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. Nevertheless, we think that it does not correctly state the law upon this subject, at least when there is evidence that the testator was of sound and disposing mind. It is rarely possible to know what were the reasons influencing a testator, and even when they are known, there is no test by which to determine whether they are arbitrary, unnatural, or unjust. With some persons the ties of kindred are strong, and with others weak, and it would be difficult to establish that the latter are less sane or more subject to undue influence than the former. In every case coming within our observation in which the supposed unnaturalness or unjustness of a devise or bequest has been given any weight, there

were other circumstances indicating either undue influence or a defect in testamentary capacity, such as fear, dependence, feeble health, old age, and the like, and whenever any of these circumstances is shown, then no doubt the character of the will may be taken into consideration for the purpose of determining whether or not the probable undue influence was not in fact effective: *Harrel v. Harrel*, 1 Duvall, 203. That the beneficiaries had an opportunity or a motive for exercising undue influence over the testator cannot create any presumption that they exercised it, and that it was effective in producing the will: *Turnure v. Turnure*, 35 N. J. Eq. 437; *Hubbard v. Hubbard*, 7 Or. 42. The exceptions to this rule arise out of cases, to which we have already referred, in which the established relations of the parties were such that the law presumes that the one had an undue ascendancy over the other, or where it is proved by direct evidence that such ascendancy existed, and the will is contrary to the wishes of the testator as revealed when he was not subject to such ascendancy: *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402; *Lynch v. Clements*, 24 N. J. Eq. 431; *Banta v. Williams*, 6 Demarest, 84.

Evidence. — It is not possible to specify or describe all the evidence which may properly be received either to prove or disprove the existence of undue influence. Of course, every fact from which the inference might legitimately be drawn that such influence had or had not been exerted, or if exerted, that it had or had not been effective, is admissible, provided the time of its exertion is not so remote, either from the making of the will or from the death of the testator, that no effect can reasonably be attributed to it. On the one hand it may be conceded that it is not essential that the influence be employed at the time of the execution of the will, and on the other, that it must continue to be operative upon the mind and will of the testator when he executed his last testament, no matter when it was first exercised: *In re Shaw's Will*, 11 Phila. 51; *Davis v. Culvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Hurtman v. Strickler*, 82 Va. 225; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186. In other words, if any fraud, coercion, misrepresentation, or other means of undue influence are exercised over the testator, it is not necessary to prove that they were so exercised at the time the will was executed, but the probability of their being effective or influential must ordinarily diminish with the lapse of time, and the time may be so remote as to justify the exclusion of the evidence, and hence it was decided that evidence of the relations, some eight or ten years before the making of the will, between the testator and the persons claimed to have influenced him was too remote to be taken into consideration: *Batchelder v. Batchelder*, 139 Mass. 1; *Horah v. Knox*, 87 N. C. 483. Though the supposed influence was exerted at or about the time of the making of the will, the fact that the testator lived for a long period afterwards, and did not change his will in any respect, is entitled to great consideration. If it be conceded that the will was executed under the domination of undue influence, there is some difference of opinion as to whether it may be ratified by mere lapse of time, or by his retaining it in his custody after the influence has ceased to be operative, without revoking it, or indicating in any way his desire to do so. If he should execute a codicil to it, attested in the same manner as an original will is required to be attested, there can be no doubt that this would be an effective ratification of the will, if the undue influence was no longer controlling: *O'Neill v. Farr*, 1 Rich. 80. In other cases it has been said, in general terms, that a ratification of a will after the undue influence was withdrawn, and when the testator was certainly a free agent, would destroy the vitiating effect of the influence

under which the will was originally executed, but the court did not explain whether, by ratification, it meant merely retention and acquiescence, or some expression of desire made and attested in the same form and with the same solemnity as the original will: *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150. On the other hand, the position has been taken that if a will was originally tainted with undue influence to the extent that it was not then operative, it was, in legal contemplation, not the will of the testator at all, and therefore that he still remained intestate, and must so continue, either until he executes another paper, and thereby ratifies the will by some writing attested so as to amount to a new will: *Lamb v. Girtman*, 26 Ga. 625; *Chuddick v. Haley*, 81 Tex. 617. Very rarely does it occur that a will is conceded to have been the fruit of undue influence. Even if it be clear that there was an attempt to exert such influence, yet there is always doubt whether or not it was effective; for the will, though it accords with the desires of those guilty of attempting to unduly influence the testator, may nevertheless correctly express his testamentary desires, and be the result of them, and not of any extraneous influence. If, after a will is executed, the testator lives for a considerable time in the possession of his mental faculties, and apparently free from all undue influence, the presumption that the will never was tainted by any undue influence becomes very strong, if not absolutely irresistible: *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648; *Floyd v. Floyd*, 3 Stro. 44; 49 Am. Dec. 626; *Kelly v. Thewles*, 2 Ir. Ch. 510.

As to the Amount of Evidence required to support the allegation of undue influence, the decisions speak "a varied language." "In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with the contrary hypothesis": *Boyse v. Rosborough*, 6 H. L. Cas. 51. "Undue influence will not be presumed, but must be proved either by direct affirmative evidence, or by an array of circumstances making an inference of its exercise absolutely irresistible": *Whelpley v. Loder*, 1 Demarest, 512. There is nothing in reason nor in the authorities to justify this extreme and emphatic language. The existence of undue influence must be proved by the persons attacking the will. The burden is on them, and they do not sufficiently support it by establishing motive, or opportunity, or even the existence of circumstances which are as consistent with undue influence as with its absence: *La Bau v. Vanderbilt*, 3 Redf. 384; *Boyse v. Rosborough*, 6 H. L. Cas. 2. "To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive or the opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not really the will of the testator": *Cudney v. Cudney*, 68 N. Y. 152; *Woodward v. James*, 3 Stro. 552; 51 Am. Dec. 649. This affirmative evidence need not exclude every other hypothesis, nor satisfy the judge or jury beyond a reasonable doubt. It is sufficient that it preponderates over the evidence offered to rebut it. "The burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient that they barely show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an equipoise in the testimony, and the *onus* being on the party at-

tacking the will, he must go a step further, and show by any suitable evidence the inconsistency between circumstances of the execution of the will, and its being executed without the interposition of undue influence": *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. In fact, the question of the amount of evidence necessary to support the charge of undue influence must be determined by the jury, or the court sitting as the jury. The question is one of fact, and the jury may therefore properly reach the conclusion that the will is vitiated by undue influence, if any competent evidence is submitted to them tending to support that conclusion: *Monroe v. Barclay*, 17 Ohio St. 313; 93 Am. Dec. 620; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620. But the court ought not to submit the question, where the evidence is of so weak and inconclusive a character that any verdict based upon it must be set aside: *Herster v. Herster*, 122 Pa. St. 339; 9 Am. St. Rep. 95; *Murdy's Appeal*, 123 Pa. St. 464.

Inferred from Circumstances. — Evidence of undue influence is more often circumstantial than direct, and there is no doubt that circumstantial evidence is admissible, and that it is sufficient to support the allegation of undue influence: *Marvin v. Murrin*, 3 Abb. App. 192. The circumstances which are relied upon for this purpose must be such that the inference of undue influence may be legitimately and reasonably drawn from them, and it is not sufficient that they are consistent with the existence of such influence. Thus, for the purpose of establishing undue influence on the part of the testator's wife, it is not admissible to prove that in the ordinary affairs of life she exercised great control over him. Such control is not in itself inconsistent with her wifely position and duty; and if the fact of its existence established that it was undue, and was exercised over the testamentary act, the presumption of undue influence would be created from those happy marital relations in which there is the greatest probability that the testator was moved solely by his affection and his sense of justice: *Storer's Will*, 28 Minn. 9. It is generally proper to admit evidence tending to show the circumstances under which the will was made, and the relations of the testator to the beneficiary and others. For this purpose evidence may be received to prove who were the members of the testator's family, and what were the amount, situation, and character of his property. At least, such evidence must be proper when the other facts disclosed make it necessary to consider whether the will was that of a reasonable man acting without constraint: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. If the testator has contracted a second marriage, and has disinherited the children of his former marriage, and there is evidence to establish the undue influence of his second wife, it is competent to show that there was no reason for the exclusion of the children of his former marriage from the benefits of the will: *Mullen v. Helderman*, 87 N. C. 471; or that before the second marriage his relations with his children were kind and affectionate, but afterwards they were forbidden to enter his house, and that he was for a considerable time in feeble health, and under the apparent domination of his wife: *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15. "Upon the question of undue influence, we have no doubt the general condition and surroundings of the deceased, and his relations with his wife, — who is the only person supposed to have exercised any influence over him, — may be properly shown for any period which can reasonably be regarded as bearing on the act of the disposal of his property. But as the only important inquiry is concerning the pressure of undue influence at the very time of the will, the testimony, to show facts of an inferential nature, must be confined to what would be legitimately regarded as

his then present relations. No technical nicety as to a few days, or perhaps a few weeks, can be demanded. But certainly, so far as domestic relations have any pertinency whatever on such questions, it is quite clear that if such influence is to be inferred from them, the facts must be more readily shown by recent than by past relations, and the testimony of fresh events is less likely to be manufactured than that of transactions long past": *Pierce v. Pierce*, 38 Mich. 412. While in the case of a second marriage it is undoubtedly proper to receive sufficient evidence to show the relations between the testator and his second wife, and the other members of his family, for the purpose of assisting in reaching a correct conclusion as to her influence over him, and as to whether it has been exerted, and with success, for the purpose of unduly affecting his will, yet it is not proper to investigate old scandals antedating their marriage, with reference to his and her conduct before the marriage, and during the lifetime of his former spouse: *Webber v. Sullivan*, 58 Iowa, 260; *Pierce v. Pierce*, 38 Mich. 412. It is said that neither general good nor general bad treatment is evidence of undue influence: *McMahon v. Ryan*, 20 Pa. St. 329; *Twomey v. Long*, 76 Pa. St. 106. The latter part of the proposition seems unreasonable; for if fraud and coercion are, as it must be admitted, most potent means of undue influence, is it not more reasonable to believe in their presence and potency when the conduct of the accused is shown to have been harsh and cruel, than when it was characterized by kindness or even by indifference? If the testator wholly or partly disinherited some of his heirs, the inference that in doing so he was exercising his own free agency is more reasonable when some estrangement was known to exist. Hence, evidence of such estrangement is always admissible: *Mooney v. Olsen*, 22 Kan. 69; *Dale v. Dale*, 36 N. J. Eq. 269. Evidence that a recital in a will is false, it has been held, is not admissible to show undue influence. This cannot be true in all cases; for it often happens that an undue influence is acquired by a misrepresentation, and a false recital would, at least, be evidence of the testator's belief in, and his acting upon, the matters recited. When a beneficiary or other person alleged to have exercised an undue influence was present at the execution of the will, or procured it to be executed, and took possession of it, what he said and did is generally admissible as part of the *res gestæ*. Therefore it may be shown that he was officious; that he intermeddled with or hurried the execution of the will: *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Hollingsworth's Will*, 58 Iowa, 526; or after causing it to be prepared, concealed it from the relatives: *Byard v. Conover*, 39 N. J. Eq. 244. When a testator of great wealth contracts a marriage in old age, or while seriously or mortally ill, and in such circumstances that the object of the other contracting person is obviously mercenary, and the will is made in harmony with that object, all these facts are proper evidence for the consideration of the court or jury, and but slight evidence of undue influence will justify the denial of the probate of the will: *Primmer v. Primmer*, 75 Iowa, 415; *Wisener v. Maupin*, 2 Baxt. 342; *Potter's Appeal*, 53 Mich. 106. The mere fact that the will in question differs materially from a pre-existing will is not evidence of undue influence: *Horn v. Pullman*, 72 N. Y. 269; *Booth v. Kitchen*, 3 Redf. 52; *Wood v. Bishop*, 1 Demarest, 512; *Rankin v. Rankin*, 61 Mo. 295; *Nelson's Will*, 39 Minn. 204. Such a will is doubtless admissible for the purpose of showing what the testator's feelings and intentions were at the time it was executed, and if undue influence was attempted to be exercised over him, might justly lead to the conclusion that it had been effective. On the other hand, in so far as a former will agrees with a later one, it tends to

establish a fixed purpose on the part of the testator, and to support the inference that what he did was not the result of undue influence: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552. The fact that a will was retained by the testator for a considerable time after its execution, while he was under no constraint, tends to rebut the claim that it was the fruit of undue influence; but this is not true if, during such time, he was too ill and his intellect was too weak to consider the propriety of revoking the will: *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648.

In nearly every case in which the allegation of undue influence is made, it becomes necessary to consider the health of the testator, mentally and physically, at or about the time his will was executed, because, unless in exceptional circumstances, it is difficult to conceive of undue influence operating on a person of mental and physical vigor to the extent of destroying free agency. Not only is evidence always admissible to prove that the testator was weak in body or mind, or both, and therefore apparently not in a condition to resist, but where such weakness is satisfactorily established, evidence of undue influence may be treated as sufficient to justify the setting aside of the will, which, had it been employed against a person of vigorous mind and body, would have been scarcely worthy of consideration: *Edge v. Edge*, 38 N. J. Eq. 211; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186; *Martin v. Teague*, 2 Speers, 268; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Leverett v. Carlisle*, 19 Ala. 80; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Reichenbach v. Reichenbach*, 127 Pa. St. 564; *Hartman v. Strickler*, 82 Va. 225. Helplessness of mind and body may result from intoxication as well as from age and disease, and therefore it is competent to show that a testator executed his will while he was intoxicated: *In re Cunningham*, 52 Cal. 465.

The Declarations of a Testator are generally admissible on the trial of the issue of undue influence, and yet, when received, their reception is never for the purpose of proving that such influence was exercised. Hence a finding of fraud or undue influence must be supported by some other evidence than the statements of the testator; and if there is no evidence of an attempt to exercise such influence, his declarations should not be received: *Cudney v. Cudney*, 68 N. Y. 148; *La Bau v. Vanderbilt*, 3 Redf. 384; *Griffith v. Diffenderffer*, 50 Md. 466; *Barker v. Barker*, 36 N. J. Eq. 259; *Harring v. Allen*, 25 Mich. 505; *Storer's Will*, 28 Minn. 9; *Bush v. Bush*, 87 Mo. 480; *Rusling v. Rusling*, 35 N. J. Eq. 120; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Hayes v. West*, 37 Ind. 21. But if there is evidence of the exercise of undue influence, then the subsequent declarations of the testator are admissible for the purpose of showing the condition of his mind and the effect which the influence had upon him: *Marx v. McGlynn*, 88 N. Y. 358; *Griffith v. Diffenderffer*, 50 Md. 466; *Parsons v. Parsons*, 66 Iowa, 754; *Barker v. Barker*, 36 N. J. Eq. 259; *Reel v. Reel*, 1 Hawks, 248; 9 Am. Dec. 632; *Bates v. Bates*, 27 Iowa, 110; 1 Am. Rep. 260. While the courts profess to admit evidence of this character solely for the purpose of ascertaining the condition of the testator's mind, and the effect of the undue influence upon him, it is manifest that, when once admitted, its effect cannot be restricted to this purpose. If it be true, as it undoubtedly is, that it is competent to prove that a testator said, after making his will, that he had not made it as he wanted to, that he had done wrong, but could not help it: *Dennis v. Weekes*, 51 Ga. 24; or that, when in the presence of the person charged with exercising the influence, he could not resist her, and that he did not know but she had deceived him into dis-inheriting his son: *Potter v. Baldwin*, 133 Mass. 427; or that he knew noth-

ing about the will, and that they had got round him and "confuddled" him: *Stephenson v. Stephenson*, 62 Iowa, 163; then it is also equally true that jurors will not be able, if they give credence to these statements, to prevent their exercising a controlling influence upon the question of whether or not undue influence was exercised. Declarations made by a testator at the time of executing his will are admissible as parts of the *res gestæ*: *Nelson v. McClanahan*, 55 Cal. 308. Any evidence which tends to show that the disposition of his property by the testator was or might have been the result of his own desires or preferences, as well as of undue influence, or, on the contrary, that it must have been the result of undue influence rather than of his own desires or preferences, is admissible. His feelings are likely to find expression in words. Hence his declarations, whether made before or after the execution of his will, may be received for the purpose of showing what his desires or feelings were with respect to any particular person, whether this tends to support or to overthrow the will: *Canada's Appeal*, 47 Conn. 450; *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Stephenson v. Stephenson*, 62 Iowa, 163; *Neel v. Potter*, 40 Pa. St. 483; *Allen v. Public Administrator*, 1 Bradf. 378; *Griffith v. Diffenderffer*, 50 Md. 466; *Dye v. Young*, 55 Iowa, 433.

May Affect Part only of the Will. — Though undue influence has been effectively exercised, it does not always vitiate the whole will. It may have been restricted to procuring a devise or bequest in favor of a particular person or object, and the remainder of the will may be the result of the free agency of the testator, acting without even a suggestion from any other person. If a will consists of separable parts, and it is possible to affirm that some of them are not affected by any undue influence, and they may be permitted to stand alone without doing injustice to the testamentary intentions of the decedent, then those parts will remain in full force, and the will will be denied probate only as to the part or parts procured by the undue influence: *Baker's Will*, 2 Redf. 179; *Harrison's Appeal*, 48 Conn. 202; *Lyons v. Campbell*, 88 Ala. 462; *Lord Trimlestown v. D'Alton*, 1 Dow & C. 85; 1 Bligh, N. S., 427.

BROWNING v. HINKLE.

[48 MINNESOTA, 544.]

CORPORATIONS. — DECLARATIONS OF THE OFFICERS OF A CORPORATION bind it only when made in the course of the performance of their authorized duties, so that such declarations constitute part of the *res gestæ*.

CORPORATIONS. — ONE SUED FOR THE PRICE OF STOCK ISSUED TO HIM CANNOT escape his obligation to pay therefor by proving that certain officers of the corporation told him that such stock had been paid for by another person, unless he further proves that in making such declaration such officer was acting for the corporation and clothed with authority to speak for it.

Davis and Farnam, for the appellant.

Keith, Evans, Thompson, and Fairchild, for the respondent.

DICKINSON, J. This is an action by a receiver of an insolvent corporation, the Price-Condit Fence Company, to recover

fendant's second point, nor do we find substantial error in any of the other answers to points, or in those portions of the charge embraced in the respective specifications. The case was fairly submitted to the jury, and the verdict appears warranted by the testimony.

Judgment affirmed.

REWARDS, WHEN EARNED: See extended note to *Hayden v. Souger*, 26 Am. Rep. 7, 8. The cases of *Crawshaw v. City of Roxbury*, 7 Gray, 374, and *Louisville etc. R. R. Co. v. Goodnight*, 10 Bush, 552, 19 Am. Rep. 80, there cited, are in accord with the ruling of the principal case.

ALTOONA SECOND NATIONAL BANK v. DUNN. GARDNER v. DUNN.

[151 PENNSYLVANIA STATE, 228.]

NEGOTIABLE INSTRUMENTS — ACCOMMODATION NOTES WITH RESTRICTIONS.

— When the payee of a sealed accommodation note receives it subject to the restriction that it is to be used only in obtaining a loan, he cannot pledge it for an antecedent debt; but if he receives it without restriction as to its use, he may so pledge it.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION NOTES — DEFENSES AGAINST.

— Proof that an accommodation note was given subject to the restriction that it was only to be used in obtaining a loan is a perfect defense by the maker against it in the hands of a pledgee, to whom it has been given as security for an antecedent debt.

RULES to open judgments. Edward T. Dunn and Ellen Dunn, his mother, were indebted to the appellee bank, of which H. A. Gardner was cashier, in the sum of ten thousand dollars, and being called upon for security, said Edward obtained judgment notes aggregating ten thousand dollars from three of his brothers and sisters, and presented them to the bank. The bank accepted them as security, and entered up the judgments. The note in suit was given by Maggie Dunn to her brother, the said Edward, upon his representation that it would enable him to obtain a further loan from the bank, and it was given for this purpose. Edward Dunn seems to have received the other notes from his brothers and sisters upon the same representations; but after the bank had received all the notes from him, and entered up judgments thereon, it refused to make any further loans to him, and as his insolvency followed, the makers of the above notes were sought to be held responsible for his debt. The rules to open

the judgments entered up by the bank upon the above notes were discharged, and the makers thereof appealed. Other facts appear in the opinion.

John G. Johnson, Martin Bell, and John D. Blair, for the appellants.

A. S. Landis, Greevy and Patterson, and William S. Hammond, for the appellees.

HEYDRICK, J. Conceding that the learned court below was justified by the evidence in the finding that "there was no misrepresentation on the part of Gardner to obtain the notes," it does not follow that the appellant can be held beyond the amount, if any, which the bank advanced upon her credit. The plaintiff does not claim to have advanced more than about four hundred dollars upon the appellant's credit, and there is some doubt whether that sum was not advanced before the note in controversy was made, and without the knowledge or any promise upon the part of the appellant. While it is quite clear that two of the parties to the note, Edward T. Dunn and Ellen Dunn, were indebted to the bank in the sum of ten thousand dollars, for which it held the note of the latter, indorsed by the former, and that it was pressing for security for this indebtedness, it is not pretended that it accepted the note in suit in payment, or surrendered the note which it already held. The cashier says that when Edward handed it to him he told him that it was not what he had promised, and was not satisfactory, and insisted that he get the signatures of the other heirs of his father to it. And when Edward brought in three other judgment notes for \$3,333.33½ each, signed by three of his brothers and sisters, the appellants in three other cases argued herewith, it does not appear that all together were accepted in payment of the original debt. On the contrary, Mr. Gardner says: "Some time after that (the delivery of the last three notes), Mr. Dunn came in with a receipt drawn up, I do not remember the amount of 't exactly, but, substantially, it was an acknowledgment on our part that both these three notes and the one given by him a few days before for ten thousand dollars were to secure the note of his mother held by us, and not for twenty thousand dollars indebtedness, as the face of them would show. It appeared to me to be fair and right, and I signed and delivered it to Mr. Edward T. Dunn."

The bank, then, upon its own showing, held these notes as collateral security for an antecedent debt, and it did not even

give time upon the original debt, because the notes were payable one day after date, and the evidence shows that that time must have elapsed before they were accepted. It was not, therefore, a *bona fide* holder for value: *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728; *Lenheim v. Wilmarding*, 55 Pa. St. 73; *Pratt's Appeal*, 77 Pa. St. 378; *Royer v. Keystone National Bank*, 83 Pa. St. 248; *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170.

The next question is as to the character of the note. If it were an accommodation note, — that is to say, commercial paper given without value to enable the party to whom it was given to use it for his own benefit, without restriction as to the manner in which it should be used, — there is no question that it could have been pledged as collateral security for an antecedent debt. “He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way”: *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728. And since accommodation paper, strictly so called, in the hands of a pledgee for an antecedent debt is open to any defense, except want of consideration, that could be made to it in the hands of an original party (*Cummings v. Boyd*, 83 Pa. St. 372; *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170), it might be difficult to show why a sealed bill given for accommodation, and without restriction as to the manner of its use, might not be pledged in like manner as a negotiable note. But it is not necessary to decide this point. The note was not signed by the appellant without restriction as to the manner of its use, if she can be believed, and if it had been negotiable, the present defense would have been available: *Royer v. Keystone National Bank*, 83 Pa. St. 248. She testified that she signed it to enable her brother to obtain a loan; and in this she was not contradicted, nor did the learned court below find that she was unworthy of belief. The expression of this one purpose was the exclusion of every other, and a restriction upon the manner in which the note should be used. Being under no obligation to either her brother or the bank, she could withhold her signature, or give it upon her own terms; and because she had the right to impose terms arbitrarily, there can be no inquiry as to whether the use that was made of the note was

more disadvantageous to her than that stipulated would have been.

For these reasons, the decree of the court below is reversed and a *procedendo* is awarded.

Accommodation Paper — Rights and Liabilities of Makers and Indorsers.*

Nature of Contract. — An accommodation maker or indorser is a person who has signed a note without receiving value, and for the purpose of lending his name to some other person as a means of credit: Benjamin's Chalmers's Digest, art. 90; Randolph on Commercial Paper, sec. 472; *Miller v. Larned*, 103 Ill. 562. An accommodation note, in the strict sense, is a loan of the maker's credit without instructions as to the manner of its use: *Lenheim v. Wilharding*, 55 Pa. St. 73. The party accommodated impliedly agrees to take up the note at maturity, and to indemnify the accommodation maker or indorser against the consequences of non-payment: *Reynolds v. Doyle*, 1 Man. & G. 753; *Asprey v. Levy*, 16 Mees. & W. 851. As to third parties, the rights and liabilities of an accommodation party are, in general, the same as those of a party receiving valuable consideration for his signature; but between the accommodation party and the person accommodated, there is no such liability, and one who draws or indorses commercial paper for the accommodation of another is not liable on it to him, whatever their apparent relation upon the paper may be: *Miller v. Larned*, 103 Ill. 562.

Liability of Maker or Indorser. — The contract and liability of an accommodation party are, in general, those of a surety for the party accommodated: *Noll v. Oberhellmann*, 20 Mo. App. 336; *Child v. Eureka Powder Works*, 44 N. H. 354; *Connings v. Little*, 45 Me. 183; *Barron v. Cady*, 40 Mich. 259; *Blakeslee v. Hewitt*, 76 Wis. 341. And if he takes up the paper at maturity, the party accommodated will be liable for it as a principal is to a surety: *Burton v. Slaughter*, 26 Gratt. 914; *Lacy v. Lofton*, 26 Ind. 324. In some jurisdictions, however, an accommodation maker is held liable as a principal, and not as a mere surety, as to a *bona fide* holder for value, and without notice: *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157; 32 Am. Rep. 438; *First Nat. Bank v. Morgan*, 6 Hun. 346. The maker of an accommodation note delivered to the payee to be discounted for his benefit cannot set up want of consideration as a defense against the holder for value: *Waite v. Kalmisky*, 22 Ill. App. 382; *Miller v. Larned*, 103 Ill. 562; *Grant v. Ellicott*, 7 Wend. 227. The very purpose of making accommodation paper is that the party favored may dispose of it, and unless restricted, he may transfer it, either before or after maturity, and the maker or indorser will be equally bound. The only safe rule is, that when a note is given without restriction as to the time or mode of using it by the party accommodated, and it has been transferred in good faith and in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he may have had full knowledge that it was accommodation paper: *Winters v. Home Ins. Co.*, 30 Iowa, 172; *Jones v. Berryhill*, 25 Iowa, 289; *Thompson v. Shepherd*, 12 Met. 311; 46 Am. Dec. 676; *Thatcher v. West River Nat. Bank*, 19 Mich. 196; *Powell v. Waters*, 17 Johns. 176; *Miller v. Larned*, 103 Ill. 562; *First Nat. Bank v. Grant*, 71 Me. 374; 36 Am.

* REFERENCE TO MONOGRAPHIC NOTE.

Rep. 334; *Seyfert v. Edison*, 45 N. J. L. 393. When a note is made to enable the maker to raise money upon it, and it is indorsed by him for that purpose, the indorsee may recover upon it, not only as against the payee and indorser, but against all others who may have signed it: *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173; 22 Am. St. Rep. 868. A person who makes his negotiable note, and gives it to another to raise money on, is bound by the note to a third person, who takes it for value; and in this respect there is no difference between a promissory note and a bill of exchange: *Hawkins v. Neal*, 60 Miss. 256. When such a note is made for the accommodation of the payee, and is left with him to be used in the general transaction of his business, it has no vitality while it remains in his possession; but when negotiated by him, it stands on an equality with other commercial paper, and the maker is bound primarily and unconditionally for its payment. When such note is not made for any special purpose, and there is no restriction on its use by the payee, the title and rights of the holder, as against the maker, are not affected by the fact that he acquired it of the payee after maturity with knowledge of the relation existing between the payee and the maker: *Connerly v. Planters' etc. Ins. Co.*, 66 Ala. 432.

An accommodation note, indorsed by the payee, and delivered to one of the makers before due, to be negotiated, is not presumed to have been paid, and the person purchasing it in good faith and for value may recover thereon: *Morris v. Morton*, 14 Neb. 358. When the assignee of accommodation paper assigns it, before maturity, to an innocent purchaser for value, the latter takes it free of all equities between the first assignee and the payee: *Cook v. Norwood*, 106 Ill. 558. An accommodation indorser who signs a negotiable note, leaving the amount blank, and intrusts it to another with authority to fill the blank with an agreed sum, will, as to third persons having no knowledge of the limitations of such authority, be bound by the act of the person to whom the instrument is intrusted, although he fills the blank with a larger sum than that agreed upon: *Johnson Harvester Co. v. McLean*, 57 Wis. 258; 46 Am. Rep. 39. An accommodation indorser cannot set up, in a suit against him and his indorsee, that there was an agreement between them, at the time of putting their names on the paper, that such indorsement should constitute a joint, and not a successive, liability: *Johnson v. Ramsey*, 43 N. J. L. 279; 39 Am. Rep. 580. An accommodation indorser on a note may, by agreement between himself and a subsequent indorser, render himself liable to the latter as an actual indorser for value: *Leeke v. Hancock*, 76 Cal. 127.

Although there is some conflict of authority, the general rule seems to be well settled that several accommodation indorsers on a note are not co-sureties, in the absence of an agreement between them to that effect: *Mooly v. Findley*, 43 Ala. 167. Thus when several persons indorse their names on a note, in order to enable the maker to get it discounted, and some of them afterwards, on the failure of the maker, pay the note, they cannot maintain an action against the others for contribution, without proving that the relation between them was really that of co-sureties; but parol evidence is always admissible to show that such indorsers, by agreement between themselves, constituted themselves co-sureties: *Clapp v. Rice*, 13 Gray, 403; 74 Am. Dec. 639; *Easterly v. Barber*, 66 N. Y. 433. In the absence of such special agreement, an accommodation indorser who is obliged to pay it to a holder for value may maintain an action for the whole amount, as against a prior indorser: *Shaw v. Knox*, 98 Mass. 214; *McCarty v. Roots*, 21 How.

432; *McDonald v. McGruder*, 3 Pet. 470; *McCune v. Belt*, 45 Mo. 174; *Core v. Wilson*, 40 Ind. 204; *Phillips v. Plato*, 42 Hun, 189.

A subsequent accommodation indorser who pays the note may recover of a prior indorser the whole amount paid, and not merely a contribution, as in case of sureties. It makes no difference that the indorsers both knew that each was an accommodation indorser, so long as there is no actual agreement between them to share the liability, nor, in the absence of such agreement, that the object of the indorsements is to enable the maker to get a loan at a bank upon the note, and that they were to operate together as a security to the bank: *Kirschner v. Conklin*, 40 Conn. 77. When one of two accommodation signers executes a note as a joint maker with the principal debtor, and the other as payee and indorser, and there is no special agreement between them, the former cannot, after paying the note, call upon the latter for contribution: *Hillegas v. Stephenson*, 75 Mo. 118; 42 Am. Rep. 393. When the payee of an accommodation note indorses it in blank, after which it is indorsed in blank by two other persons, it will not be presumed that they are joint indorsers to the holder; but the presumption is, that they are successive indorsers, and the second indorser may be sued alone, without noticing the other indorser: *Givens v. Merchants' Nat. Bank*, 85 Ill. 442. In some jurisdictions the rule prevails that indorsers on accommodation paper for the benefit of third persons, when there is no special agreement between them, and when neither is benefited, are to be considered as co-sureties, and only entitled to contribution: *Daniel v. McRae*, 2 Hawks, 590; 11 Am. Dec. 787; *Dawson v. Pettway*, 4 Dev. & B. 396. So it was decided in *Douglas v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630, that accommodation indorsers of promissory notes are co-sureties, and that the last indorser cannot recover more than a contributive share against a previous indorser. This case is criticised, but adhered to, in *Barnet v. Young*, 29 Ohio St. 11, where the court said, quoting from the former case: "Where there are two or more upon an accommodation note, all of whom indorsed before the note became operative by being transferred to some person not a party, for value received, and all of whom are charged by notice of demand and non-payment, they shall be treated as co-sureties, and contribution shall be made between them as such. Although the doctrine thus laid down and applied to promissory notes is not in accord with the great weight of authority on the subject, yet the length of time that has elapsed since the decision was made, its having been subsequently recognized by this court without questioning its correctness, and the fact that the rule as this class of commercial paper is and has been long understood in the state, all unite in requiring the decision to remain undisturbed." The rule maintained by these Ohio cases also prevails in Vermont: *Pitkin v. Flanagan*, 23 Vt. 160; 56 Am. Dec. 61.

Pledge as Collateral Security or in Payment. — The rule is well settled that one not induced by fraud, who makes or indorses a note or bill for the accommodation of another, without restriction as to its use, is liable to a holder or indorsee who receives it in good faith, before due, as collateral security for an antecedent debt or in payment of a pre-existing or concurrent debt of such holder or indorsee, although there is no other consideration, as the existence of the debt is sufficient consideration for the transfer: *Schepp v. Carpenter*, 51 N. Y. 602; *Pitts v. Foglesing*, 37 Ohio St. 676; 41 Am. Rep. 540; *Washington Bank v. Krum*, 15 Iowa, 53; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251; 7 Am. Rep. 225; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Miller v. Larned*, 103 Ill. 562; *Quinn v. Hard*, 43 Vt. 373; 5 Am. Rep. 284; *Kimbrow v. Lytle*, 10 Yerg. 417; 31 Am. Dec. 585; *Dunn*

v. *Weston*, 71 Me. 270; 36 Am. Rep. 310; *Dawson v. Goodyear*, 43 Conn. 548; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620. Thus when an accommodation bill is paid by one of the indorsers, and there is no special agreement that they should be bound to pay in equal proportions as co-sureties, the indorser who takes up the bill may assign it as collateral security for a pre-existing debt; and the assignee may recover of the original payee, who is also an indorser: *McCarty v. Roots*, 21 How. 432. One who takes accommodation paper as collateral for a precedent debt, and surrenders other security for it, is entitled to recover upon it as a holder for value: *Depeau v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216. When a note with an accommodation indorsement is pledged to one who afterwards becomes a purchaser of it, he is entitled to recover against the accommodation indorser, even though he knew of the accommodation at the time he took the note: *Ranson v. Turley*, 50 Ind. 273. When such paper has been pledged as collateral, only the amount which is actually due and secured by it can be recovered from the accommodation maker or indorser: *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; *Buchanan v. International Bank*, 78 Ill. 500. This is also true when it has been transferred as collateral for advances made at the time, or afterward: *Gordon v. Boppe*, 55 N. Y. 665. In Alabama and in Pennsylvania, a creditor who receives accommodation paper as collateral security for the payment of a pre-existing debt is not regarded as having acquired it for a valuable consideration in the due course of business, and is not entitled to protection against equities or defenses on the part of the maker or indorser, of which he has no notice. This, however, is contrary to the great weight of authority: *Boykin v. Bank of Mobile*, 72 Ala. 262; 47 Am. Rep. 408; *Marks v. First Nat. Bank*, 79 Ala. 550; 58 Am. Rep. 620; *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248; *Carpenter v. National Bank*, 106 Pa. St. 170. Even here, however, it is maintained that if a creditor takes the note in payment of a precedent debt, he becomes a purchaser for value in due course of business, equally as if he had advanced money on the faith of the note: *Marks v. First Nat. Bank*, 79 Ala. 550; 58 Am. Rep. 620.

Misappropriation. — When accommodation paper is made or indorsed for a restricted or special purpose, and has been fraudulently diverted from the purpose for which it was intended by the payee or indorsee in the payment of a debt, or as collateral security for a precedent debt or otherwise, a holder with knowledge of the purpose for which the paper was made is not a purchaser for value, even if he acquires the paper before maturity, so as to free it of all defenses and equities which exist in favor of the maker or indorser. When such paper has effected the substantial purpose for which it was designed by the parties, the accommodation maker or indorser cannot object that it was not effected in the precise manner contemplated at the time of its creation; but when the paper is diverted from its original destination, and fraudulently put in circulation by the payee or his agent, the holder cannot recover upon it against the accommodation maker or indorser, unless he received it in good faith in the ordinary course of trade, without notice and for value: *Wardell v. Howell*, 9 Wend. 170; *Small v. Smith*, 1 Denio, 583; *Moore v. Ryder*, 65 N. Y. 438; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Thompson v. Poston*, 1 Duvall, 389; *Daggett v. Whiting*, 35 Conn. 366; *Duncan v. Gilbert*, 29 N. J. L. 521.

Fraudulent Diversion of Accommodation Paper from the purpose for which it was drawn, by pledging it as collateral security for a precedent debt or otherwise, is no defense to an action by a *bona fide* holder for value and with-

out notice, before maturity: *First Nat. Bank v. Hall*, 44 N. Y. 395; 4 Am. Rep. 698; *Petters v. Muncie Nat. Bank*, 34 Ind. 251; 7 Am. Rep. 225; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620. Thus when accommodation paper is fraudulently diverted from the purpose for which it was made, and a banker, who, without notice of such diversion, takes it from his payee as collateral for a previous loan not yet due, and in lieu and upon surrender of collateral notes of other parties then past due, and protested for non-payment, which had previously been deposited as collateral to such loan, he is a *bona fide* purchaser, and entitled to recover against the accommodation maker, notwithstanding the diversion, and although the parties liable on the protested notes, for which this accommodation paper was substituted, were insolvent and the notes worthless: *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573. An accommodation indorser of a note, which is diverted from the purpose for which it was made and indorsed, and is transferred by the maker as security for a precedent debt, cannot avail himself of the defense of the misappropriation of the note as against one who has received it from the original transferee in the usual course of business, for value, before maturity, without notice of such defense. The latter is within the protection accorded by the law merchant to all *bona fide* holders for value; and when, in such case, the original transferee of the note receives it without any knowledge of a restriction upon the rights of the makers in its use, and transfers it to a bank of which he is a director, the fact that he took it for a precedent debt does not affect the title of the bank: *Merchants' Bank v. Comstock*, 55 N. Y. 24; 14 Am. Rep. 168.

One who takes a note in good faith, for value, before its maturity, without knowledge of the death of the maker, or that it is accommodation paper, may recover on it against the estate of the maker, even though the indorser, for whose accommodation it was made, put it in circulation fraudulently as against the maker: *Clark v. Thayer*, 105 Mass. 216; 7 Am. Rep. 511. When a bill of exchange is drawn and indorsed for the accommodation of the acceptors, upon condition that it shall be discounted at a particular bank, a purchaser of the bill before maturity, without notice of the secret agreement, is not affected by it, though he may have taken the bill in payment of a pre-existing debt: *Frank v. Quist*, 86 Ky. 649. When a note is made or indorsed as accommodation paper with the understanding that it is to be discounted at a certain bank, or that money is to be obtained upon it in a particular manner, it is not a fraudulent misappropriation to discount it at a different bank, or to obtain money or credit upon it in a different way from what was intended. If the note effects the substantial purpose for which it was designed, it is not material that it was not effected in the precise manner contemplated, unless there is fraud, or the interest of the maker or indorser is prejudiced. In such case it is not a misappropriation to deposit the note as collateral security for letters of credit thus obtained, unless such act is a fraud upon the maker or indorser, or in some way injuriously affects his interest: *Duncan v. Gilbert*, 29 N. J. L. 521. If an accommodation note is given with an agreement that the payee is to deposit it temporarily as collateral security for a loan to be made to him, but instead of obtaining a new loan, with the note as collateral, he deposits it with a bank as security for money already owing by him to it, this is not a misappropriation, because the paper effects the substantial purpose for which it was designed, though the result is not produced in the precise mode contemplated; and in order to constitute a misappropriation, the misuse must be tainted with fraud: *Jackson v. First Nat. Bank*, 42 N. J. L. 177. When a note is drawn, payable at a certain

bank, and is indorsed for the accommodation of the maker, to enable him to raise money with which to purchase barley, and he then applies the note to the payment of a debt which he and another owe at a different bank, this is not such a diversion of the paper as will discharge the indorser, it not appearing that at the time of indorsing that the use to which it might be applied was at all important to him: *Mohawk Bank v. Corey*, 1 Hill, 513. When a note is indorsed by the payee to enable the maker to discount it at a bank for his accommodation, and the maker, upon being refused by the bank, discounts it to a third person, with knowledge of the circumstances, this does not amount to a fraud which can affect the rights of the holder against the indorser: *Powell v. Waters*, 17 Johns. 176; *Bank of Chenango v. Hyde*, 4 Cow. 567.

If an accommodation note is made payable to the accommodation indorser, to be discounted at a particular bank, but instead is sold to a private person, the indorsers thereon are liable, although the sale is made without their knowledge: *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235. When a note is indorsed for the accommodation of the maker, to be discounted at a certain bank, it is not a fraudulent misapplication of the note to discount it at another bank, or to use it in the payment of a debt, or in any other way for the credit of the maker: *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235. When an accommodation indorser agrees with the maker of a note that it is to be used only at a certain bank, and such bank, with notice of the agreement, advances money upon the note, and retains it as collateral security, it may then dispose of its claim against the maker, and transfer the note as collateral security therefor, and such transfer will not constitute a misappropriation as against the accommodation indorser: *Proctor v. Whitcomb*, 137 Mass. 303. When the maker of a note, indorsed for his accommodation for a special purpose, misapplied it, and transferred it before maturity as collateral security for a debt, part of which he afterwards paid, it was decided that the holder, taking it without notice of its misapplication, might recover of the indorser the unpaid balance of the debt for which it was pledged as security, but no more: *Stoddard v. Kimball*, 6 Cush. 469; *Duncan v. Gilbert*, 29 N. J. L. 521. The fact that accommodation paper is made payable to a particular person or at a particular place does not, without more, prevent the person to whom it is intrusted, and for whose accommodation it is made, from obtaining the money from another. Unless the makers or indorsers have some interest beyond the mere accommodation of their principal, any person may assume that it is an accommodation to advance the amount of money the paper calls for. Thus when mere accommodation makers, having no interest beyond the accommodation of their principal, either in the mode of raising the money, or in the manner in which it is to be applied, sign a note made payable to a named person, the fact that without their consent the note is delivered to another without any alteration, who advances the money upon it, is not such a perversion of the paper as will defeat it in the hands of a holder for value: *Meeker v. Shanks*, 112 Ind. 207. It is not a good defense to an action by the payee against the makers of a note that such makers are sureties for the principal maker, and that after signing it they intrusted it to him upon the condition that he procure the signature of a designated person as an additional surety, and that he delivered the note to the payee without their knowledge or consent, and without complying with the condition. In such case it must also be averred and proved that the payee, before the delivery to him, had notice of the condition: *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294.

In order that misappropriation of the paper may be set up as a defense by the accommodation maker or indorser, it is generally necessary that the party acquiring it have notice of the restricted indorsement, and that the condition has not been complied with, and also that the perversion of the paper from the purpose intended by the parties has injuriously interfered with the interest of the maker or indorser. When this condition exists, the holder is not considered a purchaser for value, and cannot recover of the maker or indorser against whom the paper has thus been fraudulently diverted. Thus when a bill of exchange, indorsed for accommodation, and delivered to the maker on the express condition that if it is not that day discounted by a particular bank, it is to be returned to the indorser or destroyed, and after the bank has refused to discount the bill, it is passed to another, with notice, to pay an existing debt, this is such a perversion and misappropriation of the paper as releases the indorser: *Hickerson v. Raiguel*, 2 Heisk. 329. When a note is signed by a number of persons, it having a condition attached to it, in writing, that before its delivery ten solvent persons should sign it, and it is delivered after the condition has been complied with, and detached from the note, the party taking it with knowledge of the condition also takes the risk of the solvency of such signers, and cannot hold the indorser, unless the condition has been complied with: *Campbell Printing Press etc. Co. v. Powell*, 78 Tex. 53. When a note is indorsed in blank, and left with a third person to be signed by the maker and used for a particular purpose, and the maker takes it from the depositary without his knowledge, fills it up, and gives it to third parties with notice of the condition, this is such a fraud on the indorser as will release him: *Lenheim v. Wilmarling*, 55 Pa. St. 73. When an accommodation note is designed to be discounted for the purpose of taking up other paper of the person giving the accommodation, or is otherwise intended for his benefit, a failure to have it thus used is a misappropriation. Thus when a note is indorsed for the accommodation of the maker, and delivered to him to be used in renewal of another note indorsed by the same party, and about to fall due, and it is transferred by the maker in payment of another debt existing against him, it cannot be enforced against such indorser by the creditor taking it with notice of the condition: *Wardell v. Howell*, 9 Wend. 170; *Kasson v. Smith*, 8 Wend. 436. If the holder of such paper misappropriates it with notice, he will be bound to reimburse the party whose name is misused for any resulting loss: *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 112. When a pledgee of a note is made a garnishee, he cannot defend on the ground that the note is accommodation paper, pledged for a specific purpose, and not to be enforced against the maker for any other purpose, as such defense can be resorted to by the drawer only when sued upon the note: *Kirkpatrick v. Oldham*, 38 La. Ann. 553. When the payment of accommodation paper is resisted on the ground that it has been misappropriated, and diverted from the purpose for which it was intended, the burden of proof is generally upon the maker or indorser to show such misappropriation, because the holder is presumed to be a *bona fide* purchaser for value: *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 291; *Hull v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513; *Gray v. Bank of Kentucky*, 29 Pa. St. 365. After such diversion is shown, however, the burden of proof is then upon the holder to establish that he is, or has succeeded to rights of, a *bona fide* holder for value and without notice: *Farmers' Nat. Bank v. Nixon*, 45 N. Y. 762; *Schepp v. Carpenter*, 51 N. Y. 602-601.

Rights of Accommodation Makers and Indorsers. — As has been elsewhere stated in this note, accommodation indorsers of negotiable instruments are not co-sureties as between themselves, nor liable to contribution, in the absence of an understanding between them to that effect before or at the time of the indorsements. A subsequent understanding, in the absence of a new consideration, will not support an action for contribution by a prior against a subsequent indorser: *Druhe v. Christy*, 10 Mo. App. 567; *McGurk v. Huggett*, 56 Mich. 187. When the last indorser has to pay the note, he can recover the whole amount from his predecessors, and from the maker: *McGurk v. Huggett*, 56 Mich. 187. When two indorsers on a note become such for the accommodation of the maker, the first indorser is liable to the second, and when the latter pays and takes up the note, he becomes a holder for value, and entitled to indemnity from the former: *Kelly v. Burroughs*, 102 N. Y. 93. An accommodation indorser is not a surety in such sense as to enable him to discharge himself from liability on a note by proving a request to the holder to enforce payment of the maker, the neglect of the holder to do so, the solvency of the maker when such request was made, and his subsequent insolvency: *Converse v. Cook*, 25 Hun, 44. One who indorses a note before delivery, with the intention of assuming the liability of an indorser, in order to give the principal in the note credit with a bank, is liable as an indorser, and not as a surety, and the failure of the bank to give notice of the dishonor of the note results in the discharge of such indorser. In such case it is not material that the bank and the maker of the note intended that the indorser should be bound as surety, unless there was an agreement to that effect with the indorser: *De Pauw v. Bank of Salem*, 126 Ind. 553. When the holder of accommodation paper has recovered judgment thereon against the maker, and holds sufficient of the property of the latter under levy to satisfy the note, but releases the levy without applying such property to the satisfaction of his judgment, an accommodation indorser on such paper is thereby released from liability: *Priest v. Watson*, 75 Mo. 310; 42 Am. Rep. 409; *Capital Savings Bank v. Reel*, 62 Cal. 419. Indulgence by the holder of accommodation paper to the payee thereof, without the consent of the indorser, granted for a consideration, will discharge the latter: *Hall v. Capital Bank*, 71 Ga. 715. One who is liable on a note cannot, after paying it, recover the sum so paid from one who has indorsed the note for his accommodation: *Grabbe v. Bosse*, 10 Mo. App. 492. When the payee of accommodation paper, or a person discounting it with knowledge of the purpose for which it was made, has been guilty of usury, this defense is open to the accommodation maker or indorser: *Tufts v. Shepherd*, 49 Me. 312; *Keim v. Bank of Penn Township*, 1 Pa. St. 36.

Accommodation bills and notes are subject to the general rule that one taking overdue negotiable paper takes it subject to all equities: *Bacon v. Harris*, 15 R. I. 599. An accommodation indorser of a note, who takes it up at maturity without notice of any infirmity, and in discharge of his own debt to the holder, or in consideration of his own note given therefor, may recover the amount of the note taken up from the maker thereof: *Breckinridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 353. An accommodation indorser may withdraw his indorsement at any time before the note is discounted, unless rights for a valuable consideration have in the mean time attached in others: *Second Nat. Bank v. Howe*, 40 Minn. 390; 12 Am. St. Rep. 744; and after it has been negotiated, such indorser's liability is limited to the amount advanced in good faith by the holder: *Berkeley v. Tinsley*, 88 Va. 1001. An accommodation indorser of a note, transferred to a bank as collateral security for rent due

and to become due, cannot be held liable for rent subsequently accruing under a new lease, when the bank has notice of the nature of the transaction and of the intention of the parties: *Continental Nat. Bank v. Bell*, 125 N. Y. 33. An accommodation indorser who receives no benefit therefrom may defend against a *bona fide* holder of the indorsed note on the ground that he was *non compos mentis* at the time of the indorsement, although the holder had no notice of the indorser's lunacy at the time of the transfer: *Wirebach v. First Nat. Bank*, 97 Pa. St. 543; 39 Am. Rep. 821. One who has discounted negotiable paper for the maker cannot be compelled by the accommodation indorser to resort to collaterals belonging to the maker in his hands before resorting to him, although the indorser relied upon the collaterals in making such indorsement, although the holder knew of his reliance, and that the indorsement was for accommodation, and the proceeds were applied by the holder to payment of other paper of the maker, and other parties are in the same situation with the indorser. The remedy of the indorser is to pay the paper and demand and enforce the security: *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66. An accommodation indorser of a note is entitled to be subrogated to all the rights and remedies of the maker, if the note was given in payment of a machine warranted to accomplish certain purposes, which warranty has wholly failed, if the holder of the note acquired it after maturity, with notice of the warranty and of its breach, and the maker is insolvent: *McDonald Mfg. Co. v. Moran*, 52 Wis. 203.

By Corporations.—The indorsement of negotiable paper for accommodation is not a necessary incident to the business of a corporation, and unless such transaction is authorized by its charter, such indorsement is unlawful and *ultra vires*, and the corporation is not liable thereon: *National Bank v. Wells*, 79 N. Y. 498; *Bank of Genessee v. Patchin Bank*, 13 N. Y. 308; *Morford v. Farmers' Bank*, 26 Barb. 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421; *Savage Mfg. Co. v. Worthington*, 1 Gill, 284. Unless express power is granted, a corporation cannot execute accommodation paper; and such paper, if executed, is void in the hands of the assignee: *Smead v. Indianapolis etc. R. R. Co.*, 11 Ind. 105; or payee; and the corporation cannot ratify such note after execution by its officers, so as to create any liability in the hands of the payee against the corporation: *Hall v. Auburn Turnpike Co.*, 27 Cal. 256; 87 Am. Dec. 75. A banking corporation, whether state or national, has no authority to make an accommodation indorsement, in the absence of express power granted in its charter to that effect: *Bank of Genessee v. Patchin Bank*, 13 N. Y. 308; *National Bank v. Wells*, 79 N. Y. 499. The general powers of a manufacturing corporation give it no authority to indorse accommodation paper: *Lafayette Savings Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299. An accommodation indorsement made by a corporation is not binding upon it, unless the note has been discounted in good faith by the party holding it, in consequence of representations made by the corporation that it was its own note: *Morford v. Farmers' Bank*, 26 Barb. 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421. When a corporation is authorized to make notes in its business, but exceeds its power in making an accommodation note, such note will be good in the hands of a *bona fide* holder, on the principle that otherwise the general power of making and transferring notes thus abused would leave a *bona fide* holder without means of information as to such abuse. Thus the accommodation note of such corporation, in the hands of a holder in good faith, for value, who takes it before maturity, and without knowledge that the maker has not received full consideration, can be enforced against the

corporation: *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Bird v. Daygett*, 97 Mass. 494. When the corporation has exceeded its power by making an accommodation note, this defense is admissible under the general issue, and need not be specially pleaded: *Hall v. Auburn Turnpike Co.*, 27 Cal. 255; 87 Am. Dec. 75. But the burden of proof to show that such paper was taken with notice that the corporation had no authority to make or indorse it lies on the defendant in a suit on the note: *Lafayette Savings Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299.

By Agent. — A general power given an agent to make or indorse notes or bills on behalf of his principal will not warrant the agent in putting the name of his principal to paper for the accommodation of the agent or a third person, and the principal will not be bound, in the absence of express authority in the agent to make or indorse accommodation paper in the name of his principal: *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Ætna Nat. Bank v. Winchester*, 43 Conn. 391; *Stainer v. Tysen*, 3 Hill, 279; *Bank of Hamburg v. Johnson*, 3 Rich. 42; *Wallace v. Branch Bank of Mobile*, 1 Ala. 565; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728. In the case last cited, Depue, J., in delivering the opinion of the court, said: "I take the rule to be well settled, that the authority to sign accommodation paper, or as security for a third person, must be specially given, unless the authority of the agent is one of universal agency, and will not flow from any general authority to transact business for the principal. The making of accommodation paper, or the loan of one's name as security for another, does not fall within the ordinary business in which persons engage. The authority to use a principal's name for that purpose is not established by proof of an agency, however general, in the transaction of the principal's business, even though in connection with such business it be shown that the agent was authorized to make notes in the name of his principal. To validate such paper, it must be shown that the agent was authorized to make use of his principal's name for that purpose, and his authority must either be express, or implied from proof that he was accustomed, with the principal's consent, to use his name for the accommodation of others. An agent who is authorized to draw and indorse notes, and to draw, indorse, and accept bills of exchange, can act under such authority only to the extent of his principal's business, and is not authorized to draw, indorse, or accept them for the accommodation of mere strangers": *Gulick v. Grover*, 33 N. J. L. 467; 97 Am. Dec. 728. Yet when a note or bill is made or indorsed by an agent in the name of the principal for the accommodation of such agent or a third person, with the consent of the principal, or with his subsequent ratification, the principal is liable: *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Gulick v. Grover*, 33 N. J. L. 467; 97 Am. Dec. 728. Thus when a note is made or indorsed by an agent with the consent of his principal for the purpose of taking up paper upon which the latter is already liable as an accommodation indorser or maker, the principal is bound: *German Nat. Bank v. Studley*, 1 Mo. App. 260.

By Partners. — The power of partners to bind one another by commercial paper does not extend to indorsements or other contracts for the accommodation of a third person. Hence the rule is well settled that when one member of a partnership becomes an accommodation maker or indorser, for the benefit of a third person, in the name of the firm, without the assent, express or implied, or the subsequent ratification of his copartners, such paper cannot be enforced against them or the firm by a holder who takes it with knowledge of its accommodation character: *Austin v. Vandermark*, 4

Hill, 259; *Laverty v. Burr*, 1 Wend. 529; *Bank of Rochester v. Bowen*, 7 Wend. 159; *Boyd v. Plumb*, 7 Wend. 309; *Tyree v. Lyon*, 67 Ala. 1; *Foot v. Sabin*, 19 Johns. 154; 10 Am. Dec. 208; *Bank of Fort Madison v. Alden*, 129 U. S. 372; *National Bank v. Law*, 127 Mass. 72; *National Security Bank v. McDonald*, 127 Mass. 82; *Tompkins v. Woodyard*, 5 W. Va. 216; *Ileffron v. Hamaford*, 40 Mich. 305; *Wilson v. Williams*, 14 Wend. 146; 28 Am. Dec. 518; *Stall v. Catskill Bank*, 18 Wend. 466; *Lang v. Waring*, 17 Ala. 145; *Chazournes v. Edwards*, 3 Pick. 5; *Vredenburg v. Lagan*, 28 La. Ann. 941; *Bank of Tennessee v. Saffurrans*, 3 Humph. 597; *Long v. Carter*, 3 Ired. 238; *Whaley v. Moody*, 2 Humph. 495; *Chenowith v. Chamberlain*, 6 B. Mon. 60; 43 Am. Dec. 145; *Rollins v. Stevens*, 31 Me. 454; *Andrews v. Planders' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300. One partner cannot, by his individual act, bind the firm as a guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety of another, without authority specially given him for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties, unless the act of such partner is afterwards ratified by his copartners: *Sweetzer v. French*, 2 Cush. 309; 48 Am. Dec. 666. So an accommodation acceptance by one member of a firm, in the partnership name, without the authority or consent of his copartner, is not binding on the latter, in the hands of a holder who takes it with notice that it is purely an accommodation acceptance, and not given in the course of the business of the firm, but for the private use of a stranger, the drawer of the bill: *Bloom v. Helm*, 53 Miss. 21. The holder of accommodation paper made or indorsed by one partner in the firm name is generally chargeable with notice of its accommodation character, and such paper carries with it the presumption that the partner making or indorsing it is not authorized to do so: *Tanner v. Hall*, 1 Pa. St. 417. Hence in an action against a firm as the guarantor of the debt of another, or as a party to a bill or note made or indorsed for the accommodation or as the surety of another, when the contract is the act of an individual, the burden of proof is on the holder to show that such partner was authorized so to bind the firm by the others, that such act is done with their consent, or that it was subsequently ratified by them: *Sweetzer v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Tompkins v. Woodyard*, 5 W. Va. 216; *National Security Bank v. McDonald*, 127 Mass. 82; *Chazournes v. Edwards*, 3 Pick. 5; *Foot v. Sabin*, 19 Johns. 155; 10 Am. Dec. 208; *Bank of Vergennes v. Cameron*, 7 Barb. 144.

The rule is thus clearly laid down in *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251: When one of two partners indorses a note in the name of the firm for the accommodation of a third person, without the authority or consent of the other partner, the latter is not bound by the indorsement as to any person taking the note with notice that the indorsement was made in the character of surety; and in such case the burden of proving the authority or consent of the copartner rests on the party holding the note; and if he takes it from the hands of the maker, this is notice that the firm indorsement was for the accommodation of the maker. A third party taking from a partner the signature of his firm upon his individual transaction cannot hold the firm, without proof of authority, adoption, or ratification. The holder of the note under such circumstances must prove the assent of the other partners, for, *prima facie*, such transaction is a fraud, both on the part of the debtor and of the creditor: *Tompkins v. Woodyard*, 5 W. Va. 216. If the holder knows, at the time that he takes the paper, that one of the partners has indorsed the partnership name on it as security for the maker, it is incumbent

upon him to rebut the presumption that he received the firm name as surety for another, in fraud of the partnership: *Darling v. March*, 22 Me. 184. When it is sought to charge the firm with the payment of a note or bill made or indorsed in the name of the firm by a copartner alone for the accommodation of himself or another, on the ground of implied authority or subsequent assent or ratification by the firm, the evidence must be strong, clear, and satisfactory, and slight and inconclusive circumstances will not be sufficient: *Wilson v. Williams*, 14 Wend. 146; 28 Am. Dec. 518. Such precedent authority may be implied from strong circumstances, from the common course of the business of the firm, or from the previous course of dealings between the parties, without direct proof: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Butler v. Stocking*, 8 N. Y. 408; *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300; *Darling v. March*, 22 Me. 184; *Wait v. Thayer*, 118 Mass. 473; *First Nat. Bank v. Breese*, 39 Iowa, 640. In *Early v. Reed*, 6 Hill, 12, it was decided that evidence that two partners had repeatedly, with the knowledge and consent of each other, indorsed accommodation paper, was not sufficient to show authority in one of them to sign the firm name as maker or surety, so as to bind the firm.

A subsequent ratification of such act on the part of an individual in signing accommodation paper in the name of the firm may be inferred from the acts or omissions of the other partners, after they know, or have means of knowing, of such act on the part of the individual partner: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; or it may be proved by other circumstantial evidence: *First Nat. Bank v. Breese*, 39 Iowa, 640. Of course, accommodation paper made or indorsed by one member of the firm in the firm name is binding on the firm, when it is shown that the firm authorized, consented to, or recognized the act of the individual member in contracting the liability and in making the note: *Bloom v. Stern*, 23 La. Ann. 747; *Star Wagon Co. v. Swezey*, 52 Iowa, 391; 59 Iowa, 609. And it is also bound on a note given by him in renewal of such note: *Dundass v. Gallagher*, 4 Pa. St. 205.

When accommodation paper is made or indorsed by an individual partner in the name of the firm, without the knowledge or consent of his copartners, such paper is binding against the firm, when in the hands of a holder or indorsee, who, in good faith, for an adequate consideration, purchases the same, before maturity, in the usual course of business, and without knowledge of any of the circumstances affecting its validity. Hence all the members of a partnership are bound by a note made by one member in the firm name, and transferred for his sole benefit in the partnership name, when it falls into the hands of a *bona fide* purchaser or indorsee for value, without notice and before maturity: *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566; *Wells v. Evans*, 20 Wend. 251; *Reddon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345; *Beach v. State Bank*, 2 Ind. 488; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Austin v. Vandermark*, 4 Hill, 259; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Whaley v. Moody*, 2 Humph. 495. When the name of a firm is affixed to negotiable paper by one of the partners for his individual accommodation, and the note is discounted at a bank in the usual manner, without knowledge of such fact, the firm is bound, although the note is made out of the course of the partnership business, and without the knowledge or consent of the other partners: *Waldo Bank v. Lambert*, 16 Me. 416; *Catskill Bank v. Stall*, 15 Wend. 364. In such case the form of the paper is not notice to the bank that it was given for the accommodation of the maker and

in fraud of the firm: *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345; *Wait v. Thayer*, 118 Mass. 474.

Whether or not a firm can be held liable to a *bona fide* holder without notice, upon a note indorsed in its name by an individual member for his own accommodation, depends upon the nature of the business, the usual course of dealing of that firm, and the circumstances surrounding each particular case: *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Roth v. Colvin*, 32 Vt. 125. And after proof of the manner in which the paper was created and put in circulation, the burden of proof is upon the holder to show that he received it *bona fide* and for a valuable consideration: *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566; *Bank of Vergennes v. Cameron*, 7 Barb. 143.

A member of a partnership, who, without authority from the firm, signs the firm name to a note as maker or indorser, for his own accommodation or that of a third person, is liable upon the note in the same manner and to the same extent as if he had signed his individual name thereto: *Silvers v. Foster*, 9 Kan. 56; *First Nat. Bank v. Carpenter*, 34 Iowa, 433.

be reversed, and the executors required to account for the interest of the testator in the bond and mortgage; but as the question is new, and it is apparent that the executors have acted in good faith, the costs of both parties should be paid out of the estate. All concur.

Judgment reversed.

TENANCY BY ENTIRETIES: See notes to *Den v. Hardenburgh*, 18 Am. Dec. 377-389; *Hulett v. Inlow*, 26 Am. Rep. 65-68.

HUSBAND AND WIFE — WHAT CONSTITUTES PART OF THE WIFE'S SEPARATE ESTATE. — The point raised by the circumstances of the principal case may be illustrated by the decisions regarding community property, which have established the rule that property exchanged for or purchased with the separate estate of the wife belongs to her separate estate: See cases cited in the monographic note to *Cooke v. Bremond*, 86 Am. Dec. 633, 634. Under the provisions of the constitution of North Carolina relating to the property of married women, it has been held that the title of the wife to the purchase-money of her land is not divested where the bonds and mortgages have been executed to the husband without the knowledge or consent of the wife by the mistake and ignorance of the husband: *Rodman v. Harvey*, 102 N. C. 1.

GRIGGS v. DAY.

[136 NEW YORK, 152.]

COLLATERAL SECURITIES — SURRENDER OF — LIABILITY FOR. — If a holder of collateral securities surrenders them to the makers thereof without the previous consent or subsequent ratification of his debtor, the latter does not thereupon become entitled to a credit of the face value of such securities. His credit cannot exceed their actual value, and if they are worthless he is entitled to no credit at all.

NOVATION IS A TRANSACTION WHEREBY a debtor is discharged from liability to his original creditor by contracting a new obligation in favor of a new creditor by order of the original creditor.

COLLATERAL SECURITIES. — IF A HOLDER OF COLLATERAL SECURITIES WRONGFULLY SURRENDERS them without the consent of his debtor, he makes himself liable for their conversion.

MEASURE OF DAMAGES FOR THE CONVERSION OF COLLATERAL SECURITIES by the holder thereof cannot exceed the value of the property so converted.

Melville C. Day and Esek Cowen, for the appellants.

John H. Post, for the respondent.

EARL, C. J. This action was brought against Cornelius K. Garrison, since deceased, for an accounting. It was referred to a referee and he ordered judgment in favor of the plaintiff for upwards of one hundred and eighty-eight thousand dollars.

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GRIGGS *v.* DAY.

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Collateral Securities.

The record is very voluminous, and in the briefs submitted and the arguments of counsel many questions of law and fact were presented for our consideration. A careful study of the record has satisfied me that the judgment appealed from is both illegal and unjust.

In September, 1879, the plaintiff entered into a contract with the Wheeling and Lake Erie Railroad Company, an Ohio corporation, for the construction and equipment of its line of railroad in that state, according to the specifications and upon the terms and conditions mentioned in the contract. By one of the provisions of the contract the railroad company was "to furnish the contractor available subscriptions or proceeds thereof and aid to the amount of four thousand dollars per mile of main track, branches and sidings, or so much as may be necessary to furnish right of way, grade, bridge, and tie said railroad between Hudson and Martins Ferry," a distance of 143 miles, and "to use its best endeavors to secure for the contractor available subscriptions and to aid to the extent of four thousand dollars per mile, or so much as may be necessary," for a similar purpose as to the balance of the road, a distance of fifty-eight miles. For the performance of this contract, besides the aid to be furnished as above stated, the plaintiff was to receive bonds and stock of the company. He was without financial ability, and he applied to Garrison for financial aid to enable him to perform his contract; and upon his application Garrison, from time to time, advanced him large sums of money, amounting in all, besides interest, to nearly \$4,500,000. For the money so advanced the plaintiff assigned and delivered to Garrison as collateral security his construction contract and bonds and stock of the company, and some of it was repaid by the sales to him of bonds and stock. In 1882 the plaintiff received from the company for extra work claimed to have been done by him, and on account of its failure to perform the portions of the contract above quoted, its promissory notes, amounting to \$1,949,710.72, and they were delivered by him to Garrison for moneys advanced and to be advanced by him for the construction of the road. Garrison held these notes until May, 1883, when there was due to him for moneys advanced to the plaintiff for the construction of the road nearly two million five hundred thousand dollars. He then received from the company 2,280 of its second-mortgage bonds of the denomination of one thousand dollars, at seventy-five cents on the dollar, amounting, with some interest, to \$1,736,600, to

apply upon his claims, and he then surrendered to it all of the above-mentioned promissory notes, and they were canceled. On the same day he caused an original entry to be made in his journal, one of his account-books, as follows: "This amount of notes and interest, \$2,062,643.13, taken from contractor at 75 per cent, \$1,546,982.35." He then charged the company in his books of account with the whole amount of the notes and interest, and gave it credit for \$1,736,600, the price, including interest, at which he took the second-mortgage bonds, and he credited the plaintiff with the sum of \$1,546,982.35. The difference between the total amount due upon the notes and the amount allowed by him for the second-mortgage bonds was \$326,043.13; and thus he had in his hands not used for the payment of the bonds the notes to that amount, which he then surrendered to the company without any consideration whatever; and, as the referee found, he elected to look to the company as his debtor on open account for that amount. The referee also found that by reason of the surrender of the notes in consideration of the purchase of the bonds, and by reason of the surrender of the balance of the notes, and by reason of the election before mentioned, Garrison discharged the indebtedness of the plaintiff to him to the amount of the face value of the notes at the time of the surrender. He also found that the plaintiff's rights as pledgor in the construction contract and in the bonds, stock, and other property transferred to Garrison as collateral security were never cut off by foreclosure of his rights, or in any other way.

These facts having been found by the referee, he found, among other conclusions of law, that the legal effect of the surrender by Garrison to the railroad company of the promissory notes held by him as collateral security for moneys advanced to the plaintiff, and of the charge by him against the railroad company of the full amount of the notes and interest, was to relieve the plaintiff from any liability to him for the amount thereof; and in the accounting he charged Garrison with the full amount of the notes, with interest. The only question which I deem it important now to consider, is whether the learned referee was right in making that charge.

The further fact must be taken into consideration that the notes surrendered were of no value as against the company. It was utterly insolvent, with property no more than sufficient to pay its first mortgage bonds. The second mortgage

bonds were absolutely of no intrinsic value. The referee held these facts to be immaterial, and that under the circumstances, Garrison had made himself chargeable with the full amount of the notes, without reference to their value. Such a conclusion is somewhat startling, and should not be sanctioned, unless it has support in well recognized principles of law, or authorities which we feel constrained to follow.

The entries in Garrison's books of account in reference to these notes, have very little bearing upon the controversy between these parties. They were private entries made by Garrison, undisclosed to the plaintiff, and without his authority. They were important simply as evidence, and are entitled to no more weight than would have been the oral declarations or admissions of Garrison made to any third party. They show what use he made of the notes, and about that there is no dispute. They did not bind the plaintiff, and he has never, so far as appears, assented to them. They show that Garrison intended to take the notes at seventy-five cents on the dollar, and that he was willing to allow the plaintiff that sum for them; but there was no actual purchase of them. If that entry had come to the knowledge of the plaintiff, and he had adopted it, and so notified Garrison, he could probably have held him to a purchase of the notes for that sum; but he repudiates that entry, and refuses to let Garrison have the notes for that sum. He cannot use that entry to fasten upon him a purchase of the notes at their face value. The minds of the parties never met upon such a contract. Garrison either purchased the notes used in exchange for the bonds at seventy-five per cent of their face value, or he did not purchase them at all. Therefore, as the plaintiff repudiates the purchase at the price named, there was no contract of purchase, and as to these notes, pledged for collateral security, Garrison must be held to have wrongfully converted them to his own use. It would make no difference whether we consider these notes as having been exchanged for the bonds, or as having been used in payment for the bonds. In either view Garrison was at most guilty of a conversion of them.

As to the balance of the notes which were surrendered to the company without any consideration, there was simply a wrongful conversion of them. They had no value as obligations against the company and it is preposterous to suppose that Garrison intended, by the surrender, to charge himself

for their full face value against an indebtedness of the plaintiff to him for money actually loaned. By the surrender he did not intend to release the company from its indebtedness evidenced by the notes; but he intended and elected still to hold the indebtedness evidenced by his charge in open account upon his books. The obligation of the company was not impaired or lessened by the transaction, and it owed just as much after it as before. Even if he made the notes his own by surrendering them, there was simply a conversion of them. It is true that he elected to hold the company as his debtor upon open account, just as it was his debtor before for the same amount evidenced by the notes. He did not take a new debtor, but he retained, and intended to retain, the same debtor. Here there was no novation, and nothing resembling it. It usually, if not always, takes three parties to make a novation, and they must all concur upon sufficient consideration in making a new contract to take the place of another contract, and in substituting a new debtor in the place of another debtor. Novation is thus briefly defined: A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor: 1 Parsons on Contracts, 217. Here there was no element answering to this definition. There was no intention to make a novation, no consideration for a new contract, no concurrence of the three or even of the two parties.

So we reach the conclusion, as to all the notes, that Garrison, by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong; and the question is, what were such damages? The answer must be, the value of the notes converted. There can be no other measure, as that measures the entire damage of the plaintiff absolutely.

As to the notes surrendered for the bonds, the plaintiff could have elected to take the bonds or their value, but this he refuses to do, as the bonds have no value, and thus he is confined absolutely to the value of the notes.

Now how does the case stand upon authority? In *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294, the plaintiff deposited with the defendant a promissory note of a third person as collateral security for a debt, and the defendant without the knowledge or consent of the plaintiff compromised with

the maker of the note and surrendered the note to him upon payment of one half of the face thereof. It was found that the maker was at the time of the compromise abundantly able to pay the full amount of the note; and under such circumstances it was properly held that the pledgee was liable for the balance unpaid upon the note. In *Hawks v. Hinchcliff*, 17 Barb. 492, the plaintiff sued the defendant upon an account for merchandise delivered, and the defendant showed that the plaintiff took two notes for the amount of the account as collateral security for the payment thereof; that he transferred one of the notes to a person who recovered judgment thereon against the makers, and afterward assigned the judgment to one Prindle; that he recovered judgment upon the other note and assigned that to Prindle; and it appeared that the defendants in those judgments had never paid the notes or the judgments. It was held that the plaintiff, the pledgee, could not recover upon his account. It was not shown upon what consideration the notes and the judgments were transferred by the pledgee, or that at the time of the transfer the makers of the notes were not perfectly solvent. The plaintiff there relied upon the simple fact that the notes and judgments were not paid. Upon this state of the facts the court held that the presumption, nothing appearing to the contrary, was that the note and judgments were transferred by the plaintiff for the full amount appearing to be due upon them, and hence he was charged with the full amount. There are some broad expressions contained in the opinion which when isolated from the facts of the case tend to give some countenance to the plaintiff's contention here. In *Vose v. Florida R. R. Co.*, 50 N. Y. 369, it was held that a wrongful sale by a creditor of collateral securities placed in his hands by the principal debtor, does not *per se*, discharge even a surety for the debt (much less the principal debtor), *in toto*, but that by such sale the creditor makes the securities his own to the extent of discharging the surety only to an amount equal to their actual value. In *Potter v. Merchants' Bank*, 28 N. Y. 641; 86 Am. Dec. 273; *Booth v. Powers*, 56 N. Y. 22; and *Thayer v. Manley*, 73 N. Y. 305, it was held that in an action to recover damages for the conversion of a promissory note, the amount appearing to be unpaid thereon at the time of the conversion with interest, is *prima facie* the measure of damages, but that the defendant has the right to show in reduction of dam-

ages the insolvency or inability of the maker, or any other fact impugning the value of the note.

In the *Exeter Bank v. Gordon*, 8 N. H. 66, where the bank had received a note as collateral security and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon compromise upon proof that the compromise was advantageous and that the maker was insolvent and unable to pay the balance, and the general rule was laid down which was announced in the cases last above cited.

If the pledgee of the note of an insolvent maker may surrender it upon a compromise for one dollar without being made liable for more than he receives, upon what conceivable principle can a pledgee be held for the face value of a worthless note by surrendering it without any consideration whatever? If one intrusted with a note as agent, or holding it as pledgee, loses it by his carelessness, or even willfully destroys it, he can, in an action against him by the principal or pledgor, be held liable only for the value of the note. If Garrison had broken into the plaintiff's safe and taken these notes without any right whatever, in an action for their conversion the plaintiff could have recovered against him as damages only the actual, not the face value of the notes.

I need go no further. Other illustrations are not needed. Our attention has been called to no case in law or equity which upholds the plaintiff's contention as to these notes. I should be greatly surprised to find any and do not believe there are any.

I have assumed, without a careful examination of the defendants' objections to the notes, that they were valid and properly issued by the company for their full amount. I have also assumed without examining the matter that upon this record we must hold against the contention of the defendants that the second mortgage bonds took the place of the notes given for them and were held in their stead as collateral security.

Statements made upon the argument by the counsel for the appellants rendered it unnecessary for us to consider any other objections to the judgment, and for the reasons stated the judgment should be reversed and a new trial granted, costs to abide the event.

All concur; GRAY, J., in result.

DEBTOR AND CREDITOR. — NOVATION, DEFINITION OF: See note to *Hobson v. Davidson's Syndic*, 13 Am. Dec. 294. To entitle the creditor to recover against the substituted debtor, it must appear that the creditor assented to the arrangement, and that the original debt was extinguished: *Butterfield v. Hartshorn*, 7 N. H. 345; 26 Am. Dec. 741; *Bonnemer v. Negrete*, 16 La. 474; 35 Am. Dec. 217. Whether a transaction amounts to a novation is a question of intention, to be decided from all the circumstances of the case: *Fidelity Ins. etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858. For cases in which there was held to be a novation, see *Heaton v. Angier*, 7 N. H. 397; 28 Am. Dec. 353; *Sterling v. Ryan*, 72 Wis. 36; 7 Am. St. Rep. 818.

Collateral Securities.

Definition. — "The use of the term 'collateral security,' when the debtor transfers to his creditor an article of value or an evidence of debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the principal which it is given to secure. It is subsidiary to the principal debt; running parallel with it, collateral to it; and when collected is to go to the credit of the principal debt, or if the principal debt be paid off, the debtor is entitled to the restoration of the collateral security": *Munn v. McDonald*, 10 Watts, 270, 273; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120, 127. Though perhaps it is true, as indicated in the definition just quoted, that every transfer of an article of value for the purpose of securing the payment of an obligation due to the transferee may entitle such article to be called a collateral security, yet the term as generally used, and as used in this note, is much more limited in its signification.

The Usual Subjects of Transfer as Collateral Securities are choses in action, whether negotiable or not, certificates of stock in private corporations, bills of lading, and warehouse receipts. These, even when not in all respects negotiable, are transferrable by indorsement and delivery, and when indorsed and delivered vest in the indorsee all the rights in the property possessed by the transferer, so far at least as may be necessary to accomplish the purposes of the transfer, and constitute the most convenient as well as the most usual form of collateral security: *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Douglas v. People's Bank*, 86 Ky. 176; 9 Am. St. Rep. 276. Our inquiries will therefore be limited to collateral securities belonging to the classes just mentioned.

The Means by Which a Security may be Made Collateral to the satisfaction of an obligation will not be considered here for want of adequate time and space. We shall assume in what we shall hereafter state that the alleged collateral security in question has been indorsed and delivered, or otherwise transferred as completely as it was possible for the holder or transferer to transfer it, and shall then proceed to inquire what are the rights, duties, liabilities, and remedies of the transferee thereof.

The Title of the Holder. — In considering the rights of the holder of collateral securities we shall treat: 1. Of his title, for the purpose of showing to what extent it is subject to attack; 2. What he may lawfully do by virtue of his qualified ownership; and 3. Of the purposes for which he may hold the property or to which he may apply its proceeds. It may be that the person who transferred the security as collateral did not have the title thereto, or having title held it in trust, or for some special purpose not authorizing him

to transfer it as he did. If such be the case, the validity of his transfer as collateral security must be determined by the rules applicable to absolute transfers. If the title to the property was so apparently vested in him that he had transferred it to an absolute purchaser in good faith such transfer must have been sustained, then also must the transfer as collateral security be upheld. Hence, if a holder of securities payable to bearer, or otherwise transferable by mere delivery, or of securities transferable by indorsement to whom they have been indorsed, transfers them as collateral security to a person acting in good faith, such transfer must be held good, though the person making it had no title to the property whatever, or held it as a bailee merely, or in trust for some special purpose: *Bealle v. Southern Bank*, 57 Ga. 274; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; *Coit v. Humbert*, 5 Cal. 260; 63 Am. Dec. 128; *Gottberg v. United States Nat. Bank*, 131 N. Y. 595; *Ambrose v. Evans*, 66 Cal. 74; *Arnold v. Johnson*, 66 Cal. 402; *Texas Banking etc. Co. v. Turnley*, 61 Tex. 365; *Wood's Appeal*, 92 Pa. St. 379; 37 Am. Rep. 694; *Burton's Appeal*, 93 Pa. St. 214. On the other hand, if the circumstances were such as to put the purchaser upon inquiry or charge him with notice of the true title of the owner, then they are potent to the same extent as against a transferee for collateral security: *Leiper's Appeal*, 103 Pa. St. 377. So if a paper was non-negotiable or dishonored, a transferee for collateral security cannot enforce it under circumstances precluding its enforcement by an absolute purchaser: *Jenness v. Bean*, 10 N. H. 266; 34 Am. Dec. 152; *In re Sime*, 3 Saw. 305. If acts are required in order to protect an absolute purchaser against the claims of creditors or others, they are equally necessary for the protection of a transferee as collateral security, and his rights may be lost through his non-observance of those acts: *Atkinson v. Foster*, 134 Ill. 472.

Holder is Ranked as a Purchaser. — The holder of collateral security is, at least to the extent to which he has a right to its proceeds, to be regarded as a purchaser entitled to the same immunity against secret equities and unknown defenses as a purchaser would be, who acquired absolute title to the property under like circumstances. Therefore, if he acquires a note or other security in good faith and for value, before its maturity, no defense can be asserted against him arising out of want of consideration: *Stoddard v. Kimball*, 6 Cush. 469; *Pitts v. Foglesong*, 37 Ohio St. 676; 41 Am. Rep. 540; *Fisher v. Fisher*, 98 Mass. 303; or out of any other matter or equity of which he had no notice when he acquired the security: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341; *Chicopee Bank v. Chapin*, 8 Met. 40; *Lehman v. Tallahassee M. Co.*, 64 Ala. 567; *Stotts v. Byers*, 17 Iowa, 303; *State Sav. Inst. v. Hunt*, 17 Kan. 532; *Logan v. Smith*, 62 Mo. 455; *New Orleans Banking Assn. v. Wiltz*, 4 Wood, 43; *Kisterbock's Appeal*, 127 Pa. St. 601; 14 Am. St. Rep. 868. The title of the holder of a collateral security is, on the other hand, no better than if he were an absolute purchaser, and he is affected with notice of any conditions or infirmities attached to the paper to the same extent that an absolute purchaser would be, and hence he must take notice of by-laws printed upon certificates of stock transferred to him as collateral: *State Saving Assn. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642.

Taken to Secure Pre-existing Debt. — Whether one who acquires property in payment of a pre-existing indebtedness should be treated and protected as a purchaser thereof in good faith and for value, so as to protect him against defects in his title of which he had no notice, and against secret defenses and equities, is a question which has been much discussed and over which great diversity of judicial opinion still exists. On the one side it is claimed that

only when some new consideration is advanced on the faith of a transfer, can the transferee properly be deemed a purchaser, and therefore if he merely accepts property in payment of his pre-existing obligation, he is not entitled to the same consideration as if he had paid out moneys at the time of the transfer. The leading case maintaining this view is *Bay v. Coddington*, 5 Johns. Ch. 54; 9 Am. Dec. 268, which has been followed by many subsequent decisions in the same state and in others: *Stalker v. McDonald*, 6 Hill, 93; 40 Am. Dec. 389; *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142; *Lawrence v. Clark*, 36 N. Y. 128; *Weacer v. Barden*, 49 N. Y. 286; *Bramhall v. Beckett*, 31 Me. 205; *Bowman v. Van Kuren*, 29 Wis. 209; 9 Am. Rep. 554; *Royce v. Keystone Bank*, 83 Pa. St. 248; *Fenouilli v. Hamilton*, 35 Ala. 319; *Lee's Adm'r v. Smead*, 1 Met. (Ky.) 628; 71 Am. Dec. 494; *Prentice v. Zane*, 2 Gratt. 262; *First Nat. Bank v. Strauss*, 66 Miss. 479; 14 Am. St. Rep. 579; *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17. It did not, however, meet with the approval of the supreme court of the United States, and is, in our judgment, now in conflict with the decided weight of authority upon the subject: *Swift v. Tyson*, 16 Pet. 1; *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; *Mitchell v. Citizen's Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Mix v. National Bank*, 91 Ill. 20; 33 Am. Rep. 44; *Herman v. Gunter*, 83 Tex. 66; 29 Am. St. Rep. 632; *Tabor v. Merchant's Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375. A corresponding difference of opinion has arisen with respect to collateral securities when the debt secured by them was not created in reliance upon them, but was a pre-existing debt. There are authorities which hold that when the collateral is taken to secure such pre-existing debt, the holder is not entitled to protection as a holder *bona fide* and that there may be asserted against him all defenses existing against the transferor at the time the transfer was made: *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464; *Ruddick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Depeau v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216; *Cul-um v. Branch Bank* 4 Ala. 21; 37 Am. Dec. 725; *Richardson v. Rice*, 9 Baxt. 290; 40 Am. Rep. 92; *Craighead v. Wells*, 8 Baxt. 38; 35 Am. Rep. 685; *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342; but these decisions are also contrary to the weight of authority upon the subject, and the holder of a collateral security taken to secure a pre-existing debt is now generally entitled to be treated as a purchaser to the same extent as if the taking of the security had been coincident with the creation of the debt it was given to secure: *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; *Smith v. Jennings*, 74 Ga. 551; *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; 24 Am. St. Rep. 189; *Atkinson v. Brooks*, 26 Vt. 569; 62 Am. Dec. 592; *Pitts v. Fogleson*, 37 Ohio St. 676; 41 Am. Rep. 510; *Railroad Co. v. National Bank*, 102 U. S. 14; *Fair v. Howard*, 6 Nev. 310; *Spencer v. Slom*, 108 Ind. 183; 53 Am. Rep. 35; *Stranahan v. Fairchild*, 80 Ind. 598; *Citizens' Bank v. Payne*, 18 La. Ann. 222; 89 Am. Dec. 650; *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250; *Fisher v. Fisher*, 98 Mass. 303; *Allaire v. Hartshorne*, 21 N. J. L. 665; 47 Am. Dec. 175; *Bank of Republic v. Carrington*, 5 R. I. 515; 73 Am. Dec. 83; *Payne v. Bensley*, 8 Cal. 260; 68 Am. Dec. 318. Even in those states in which one taking a collateral for an antecedent debt is not protected as a purchaser for value, there is, to some extent, an exception in the case of accommodation paper, for the maker of such paper cannot, as against one to whom it has been transferred as collateral security, successfully resist its enforcement because of its want of consideration. "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequences:

Walker v. Bank of Montgomery, 12 Serg. & R. 382; and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way": *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Kimbro v. Lytle*, 10 Yerg. 417; 31 Am. Dec. 585; *Appleton v. Donaldson*, 3 Pa. St. 381; note to *Altoona S. Nat. Bank v. Dunn*, 31 Am. St. Rep. 747, 748. He may, however, in those states interpose as against such paper every defense except want of consideration: *Cummings v. Boyd*, 83 Pa. St. 372; *Carpenter v. National Bank*, 106 Pa. St. 170; as that the note was given subject to the restriction that it should be used for a specified purpose only, which purpose did not include the right to pledge it except for a subsequent loan: *Altoona S. Nat. Bank v. Dunn*, 151 Pa. St. 223; 31 Am. St. Rep. 742.

Rights of Holder are Restricted to his Interests.—A holder of collateral security is in no instance entitled to be protected as a purchaser thereof except in so far as may be necessary to enforce payment of the obligation to secure which it was given. If the title of the transferor was imperfect or fraudulent and his transfer was in derogation of the title or interest of some other person, the latter, though he may be required to recognize the transfer and permit it to stand for the purpose for which it was given, may, in all other respects, assert his rights and compel payment to himself of any surplus remaining after the satisfaction of the obligation for which his property stood as collateral security: *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Kellogg v. Thompson*, 142 Mass. 76; *In re Bonner*, 8 Daly, 75. So where the maker has a defense as against the original payee of a negotiable instrument transferred as collateral security, the holder is in no event entitled to enforce such instrument, except to the amount of the debt which it was pledged to secure, as where the instrument was an accommodation paper: *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; 11 Am. Rep. 219; *Chicopee Bank v. Chapin*, 8 Met. 40; *Farwell v. Importers' Nat. Bank*, 90 N. Y. 483; *Stoddard v. Kimball*, 6 Cush. 469; or defenses, *Farmers' etc. Bank v. Blevins*, 46 Kan. 536, or offsets, *Second Nat. Bank v. Hemingway*, 34 Ohio St. 381, exist in favor of the maker.

The Rights of the Holder of a Collateral Security must necessarily be commensurate with his title. In other words, he must be allowed to possess, enforce, and enjoy the security and the profits and accumulations thereof, so far as may be necessary to the discharge of his debt. "A bond or chose which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it": *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120. "A creditor who holds collateral security for the protection of his debt stands in a different relation to the assignor of the collateral, though the latter be his debtor. By the assignment a privity is created or established which invests the assignee with the ownership of the collateral for all purposes of dominion over the debt assigned. He is alone empowered to receive the money to be paid upon it and to control it in order to protect his right under the assignment." *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. The assignor, therefore, loses all control over the paper, his dominion, if not entirely and finally extinguished, is at least suspended until by the payment of the obligation the title and rights of the holder of the collateral are terminated; and therefore, the assignor, if the collateral be a note or other instrument for the payment of money, has no power to forbid or excuse such payment nor to attach conditions thereto: *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180; and no payments made to him can discharge the obligation to the prejudice of one holding it as collateral security: *Blake v. Buchanan*, 22 Vt. 548.

Rights of Holder of Stocks.—If the property held as collateral security consists of the stock of a corporation, the holder is, for the time being, entitled to all the rights and privileges of a stockholder. His right to any dividends which may be declared is paramount to that of his pledgor, and he may recover them of the corporation if they remain unpaid, or of the pledgor if they have been wrongfully received by him: *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Gaty v. Holliday*, 8 Mo. App. 118; *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412, 416. There is certainly a want of harmony in the views expressed by text writers and in some of the decisions respecting the right of the holder of stock for collateral security to vote it at those elections of the corporation in which its stockholders are entitled to participate. Sometimes it is said that the pledgee has no right to vote, although the stock stands in his name on the books of the corporation, and at other times the view has been expressed that equity may, at the instance of the pledgor, compel the re-assignment of the stock to him for the purpose of voting, or may otherwise prevent its being used or voted to his injury by the pledgee. We doubt the correctness of either of these views. The title or interest of the holder of stock for collateral security is certainly paramount to that of the pledgor thereof. Therefore, there is no reason why the latter, rather than the former, should be permitted to participate in corporate elections. At all events, we think it well settled now that if the stock, though in fact held as security, has been so transferred upon the books of the corporation that its holder as collateral there appears to be the owner thereof, he has the same right to vote as if his ownership were absolute instead of conditional or qualified: *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594; *Vail v. Hamilton*, 85 N. Y. 453; and it may be said generally that the holder of stock as collateral security has the same rights as an absolute owner thereof, including the right to protect it from waste and diminution: *Baldwin v. Canfield*, 26 Minn. 43; to hold it free from all liens and claims of the corporation not assertable against it were he its absolute owner: *New Orleans etc. Co. v. Wiltz*, 10 Fed. Rep. 330; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; and also against the claims of all creditors of the pledgor, whether by attachment or otherwise, whose liens do not antedate the transfer to him: *Merchants' etc. Bank v. Richards*, 6 Mo. App. 454; 74 Mo. 77; *Moore v. Bank*, 52 Mo. 379; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369; *Nabring v. Bank of Mobile*, 58 Ala. 204; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Early's Appeal*, 89 Pa. St. 411; *Eby v. Guest*, 94 Pa. St. 160; *Fraser v. Charleston*, 11 S. C. 487-519; *Cornick v. Richards*, 3 Lea, 1; *Beckwith v. Burrough*, 13 R. I. 294; *Cheever v. Meyer*, 52 Vt. 66; *Coll v. Ives*, 31 Conn. 25; 81 Am. Dec. 161. These rules are equally applicable to the transfer of warehouse receipts or of bills of lading as collateral security. The transferee becomes to the extent of his debt the owner of the property represented by such receipt or bill, and entitled to protect and vindicate his rights in the same manner and to the same extent as if the transfer to him were absolute: *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647; *Cartwright v. Wilmerding*, 24 N. Y. 521; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399, 411; *Fourth Nat. Bank v. St. Louis Cotton Co.*, 11 Mo. App. 333, 341; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104; *Whitney v. Tibbitts*, 17 Wis. 359; *Gibson v. Stevens*, 8 How. 384; *First Nat. Bank v. Bates*, 1 Fed. Rep. 702.

The Creditors of the Pledgor have no legal right to object to the pledge where the circumstances attending it are not such as to make it fraudulent as

against them if it were an absolute transfer: *Lane v. Sleeper*, 18 N. H. 209; nor after it is made, have they any right to insist upon its retention by the pledgee. He may, therefore, if he sees proper, return it to his debtor, relinquishing all rights thereunder and electing to proceed upon the principal obligation alone, without giving the other creditors any just cause of complaint or interference: *In re Dyott*, 2 Watts & S. 463.

As the pledgee has the right to retain possession of the property pledged until his debt is paid, such possession should certainly be deemed to be held in subordination to the rights of the pledgor, and perhaps it is impossible for it to be adverse so as to confer upon the pledgee any prescriptive title to it, as against the pledgor or his successors in interest: *Cross v. Eureka etc. Canal Co.*, 73 Cal. 302; 2 Am. St. Rep. 803. There is, however, no objection to the pledgee's acquiring the title of the pledgor in any manner not inconsistent with the pledge, and therefore the former may purchase and acquire the title of the latter at an execution sale: *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 230.

Where a collateral security is in the hands of a creditor, the right to prosecute an action upon his original debt may terminate through the operation of the statute of limitations. Two strange and equally incorrect views respecting his rights have been expressed, one being that his right to the collateral security thereupon becomes absolute, and that he is exonerated from accounting to his debtor for it or its proceeds, and the other, that he loses all right to it, and can no longer enforce it for any purpose whatever: *Russell v. La Rouge* 13 Ala. 149; *Van Eaton, v. Napier*, 63 Miss. 220. In one state, on the other hand, the continued existence of the collateral security has been held to suspend the running of the statute of limitations and to prevent its operating against the maintenance of any action on the original debt: *Blanc v. Hertzog*, 23 La. Ann. 199; *Police Jury v. Duralde*, 22 La. Ann. 107; *Citizen's Bank v. Knapp*, 22 La. Ann. 117. But assuming the statute to run against the original debt, this certainly has no effect on the collateral. The operation of this statute, in the absence of any statute giving it a different effect, is merely to destroy the remedy without affecting the right. It does not cancel the debt nor bar any proceeding other than the action, the right to maintain which has been lost by the statute: *Belknap v. Gleason*, 11 Conn. 160; 27 Am. Dec. 721; *Ludlow v. Van Camp*, 7 N. J. L. 113; 11 Am. Dec. 529; *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22; 72 Am. Dec. 770. Therefore, if the creditor held the collateral security before the statutory bar against the original debt was perfected, he may continue to hold it afterwards, and may bring any appropriate action thereon as long as such collateral itself is not barred; and has the right to apply the proceeds of such action, or of any proper disposition he may make of his collateral, to the satisfaction of the original debt: *Hancock v. Franklin Ins. Co.*; 114 Mass. 155; *Choteau v. Allen*, 70 Mo. 290, 341; *Roots v. Mason City etc. Co.*, 27 W. Va. 483.

Purpose for which Collateral May be Held. — We have already had occasion to state incidentally that the title and rights of the holder of collateral securities were restricted to the principal debt. It follows from this that when such debt is paid the pledgor of the collateral security becomes entitled to it, or so much of it as remains after such payment. Whenever the collateral was given for any specific purpose, the holder has no right to retain it, or any of its proceeds, after that purpose has been accomplished. Though the pledgor may be indebted to the holder of the security upon other obligations, the latter has no right to retain it or its proceeds for the

purpose of securing or satisfying such other liabilities: *Phillips v. Thompson*, 2 Johns. Ch. 418; 7 Am. Dec. 535; *Masonic Savings Bank v. Bangs*, 84 Ky. 135; 4 Am. St. Rep. 197; *Schiffer v. Feagin*, 51 Ala. 335; *Trentonia Nat. Bank v. Loeb*, 27 La. Ann. 110; *Talmage v. Third Nat. Bank*, 91 N. Y. 531; *Wyckoff v. Anthony*, 9 Daly, 417; *Duncan v. Brennan*, 83 N. Y. 487; *Lloyd v. Lynchburg Nat. Bank*, 86 Va. 690; *San Antonio Nat. Bank v. Blocker*, 77 Tex. 73. If the purpose for which the collateral security was given is expressed in writing, such writing is not subject to be varied or contradicted by parol evidence for the purpose of showing that the collateral may be held to secure some other indebtedness not mentioned in the writing: *Hardie v. Wright*, 83 Tex. 345; *Roosevelt v. Mark*, 6 Johns. Ch. 266. If the purpose of giving the security does not clearly appear but there is no doubt that but one indebtedness existed against the pledgor and in favor of the pledgee at the time the security was given, it will be presumed to have been made for the purpose of securing that indebtedness only, and its application to subsequently accruing indebtedness will not be permitted without the assent of the pledgor: *Buckley v. Garrett*, 60 Pa. St. 333; 100 Am. Dec. 564.

The rule that a collateral security can be held or applied only upon the obligation which it was given to secure does not prevent its retention for and application to the satisfaction of that obligation in any changed form. Thus though the principal debt is prosecuted to, and merged in, a judgment, the right to hold the security is not lost. It may be held for and applied to the satisfaction of the judgment: *Smith v. Strout*, 63 Me. 205; *Charles v. Coker*, 2 S. C. 122; *King v. Hutchins*, 28 N. H. 561; *Fisher v. Fisher*, 98 Mass. 303. The renewal of a note is not as between the parties presumed to discharge or satisfy the pre-existing debt but merely to extend the time for its payment. It is at most a change in the evidence of the debt and not in the debt itself. Therefore every collateral security given for the original evidence of the debt stands equally good for the new evidence. Hence such collateral may be held for the satisfaction of a note given as a mere renewal of a pre-existing note for the payment of which such collateral was originally pledged: *Shrewsbury Savings Institution's Appeal*, 94 Pa. St. 309; *Merchants' Bank v. Hall*, 83 N. Y. 338; 38 Am. Rep. 434; *Collins v. Dawley*, 4 Col. 138; 34 Am. Rep. 72; *Pinney v. Kinton*, 46 Vt. 83; *Williams v. National Bank*, 72 Md. 441; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Lancaster Nat. Bank's Appeal*, 122 Pa. St. 31. If, however, the collateral security does not belong to the maker of the principal debt, and its owner stands therefore in the position of a guarantor rather than in that of a principal debtor, then there is no presumed power of the debtor to extend the time of payment or to give renewals which will bind his guarantor, and the collateral security given by the latter cannot be held for a renewal given without his assent: *Burnup v. Potsdam Bank*, 96 N. Y. 125; *Talmage v. Third Nat. Bank*, 91 N. Y. 531.

What we have said about the right of the holder of a collateral security being limited to the obligation to secure which it was taken should not be understood as implying that it may not be given as security for several obligations or for all obligations existing, or to exist in the future, against the pledgor and in favor of the pledgee. The terms of the agreement under which the collateral is taken may authorize it to be held for the satisfaction of all debts which may accrue against the pledgor, and if so, it may be applied to the satisfaction of any debt upon which he at any time becomes liable to the pledgee, whether as an individual: *Moors v. Washburn*, 147 Mass. 344; *Eichelberger v. Murdock*, 10 Md. 373; 69 Am. Dec. 140; or as

a member of a partnership: *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359.

Duties of Holder of Collateral. — As the holder of collateral security is entitled to its possession and to the extent of his interest is substantially the owner thereof, he must, to a certain extent at least, assume the duties of ownership, and furthermore must protect the interests of his pledgor as well as his own, because the latter, by giving the collateral security, has parted with the power to protect himself. "The contract carries with it the implication that the security shall be made available to discharge the obligation"; *Wheeler v. Newbould*, 16 N. Y. 396. We apprehend that it carries with it the further implication that the property, no matter what its character, shall not be lost through the negligence or inattention of the pledgee. The duty of a pledgee to his pledgor has been called into question with respect to choses in action more frequently than to any other form of collateral security. In a case arising in Minnesota it appeared that one to whom a note had been transferred as collateral security failed to take any measures for its collection, though requested to do so by the pledgor, who also offered to indemnify the pledgee for the costs of proceeding to such collection, and that through the inaction of the pledgee the debt had been lost. In discussing the law applicable to this subject, the court said: "In this case there is no express agreement with reference to the pledge; the rights and obligations of the parties, therefore, are such only as arise from the indorsement and delivery of a negotiable promissory note of a third person by the principal debtor as security for his debt. No question as to the rights or obligations of a surety is involved, the question presented being between the immediate parties to the contract, — the principal debtor as pledgor, and the creditor as pledgee. So far as the authorities upon this subject are concerned, there is no doubt that the pledgee of negotiable paper as collateral security is bound to ordinary diligence in preserving the legal validity of the pledge, and answerable for a loss through a corresponding degree of negligence to the extent of such loss: 2 *Parsons on Contracts*, 5th ed., 511; *Jennison v. Parker*, 7 Mich. 355; and we think, as between the principal debtor and the creditor in a pledge of a similar character of negotiable promissory notes, for the payment of which third parties are responsible, the authorities both in England and in this country impose upon the pledgee ordinary diligence to preserve the pecuniary value of the pledge, requiring, when necessary, active measures to prevent a loss by the insolvency of third parties who are liable for their payment: *Ex parte More*, 2 Cox, 63; *Williams v. Price*, 2 Sim. & St. 582; *Parsons on Contracts*, 5th ed., 110, note citing *Noland v. Clark*, 10 B. Mon. 239; *Beale v. Farmers' etc. Bank*, 5 Watts, 529; 3 Lead. Cas. Eq., 3d Am. ed. 552, 556; *Lyon v. Huntingdon Bank*, 12 Serg. & R. 61. The same doctrine is recognized in *Bank of United States v. Peabody*, 20 Pa. St. 457; *Bitner v. Brough*, 11 Pa. St. 127"; *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301. So where it was alleged that the holder of a judgment as collateral failed to renew it and allowed the lien thereof to expire, and the debt to be lost through his supineness, the court said, "Where a debtor assigns a judgment as collateral security to his creditor, he parts with his authority over it, and the assignee has the right and power to let the lien die or keep it alive, and must abide the consequences of his own will or negligence: *Collingwood v. Irwin*, 3 Watts, 306. The debtor is entitled to a credit for a loss upon a judgment assigned as collateral to his creditor, when the loss is occasioned by the supine negligence of the assignee: *Beale v. Farmers' etc. Bank*, 5 Watts, 529. A bond or chose

which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it. His duties in respect to it are active. He is to employ reasonable diligence in collecting the money on the security and applying it to the principal debt, and a conversion of it into a less security is such misuse as makes him accountable to the debtor: *Muirhead v. Kirkpatrick*, 21 Pa. St. 237. A creditor who holds a collateral security for his debt stands in a different relation to the assignor from that of a creditor to the surety for his debtor. By the contract the assignee is invested with the ownership of the collateral for all purposes of dominion over it. When the collateral is lost by the supine negligence of the assignee, he must account for the loss to his own debtor: *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. The plaintiff parted with all his right of control over the collaterals, and the appellant was bound to employ reasonable diligence in their collection: *McQueen's Appeal*, 104 Pa. St. 595; 49 Am. Rep. 592.

If the collateral security is a negotiable instrument, and measures are necessary to charge any party thereon, then there is no doubt that the holder of such security owes to the pledgor the duty of taking the measures necessary to preserve the liability of all the parties to the instrument: *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20; *Pickens v. Yarborough*, 26 Ala. 417; 62 Am. Dec. 728; *May v. Sharp*, 49 Ala. 140; *Douglass v. Mundine*, 57 Tex. 344; *Lee v. Baldwin*, 10 Ga. 208; *Barrow v. Rhinelander*, 3 Johns. Ch. 614. If a demand for payment and notice of dishonor are required to charge any party to the instrument, and the holder neglects to make such demand or to give such notice, whereby the debt is lost, he is liable to the pledgor for the damages resulting to him: *Note to Miller v. Gettysburg Bank*, 34 Am. Dec. 451, 452; *Peacock v. Pursell*, 14 Com. B., N. S., 728; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20; *Butterton v. Roope*, 3 Lea, 215; 31 Am. Rep. 633; *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; *Jennison v. Parker*, 7 Mich. 355; *Kennedy v. Rosier*, 71 Iowa, 671; *Whitten v. Wright*, 34 Mich. 92; *Pickens v. Yarborough*, 26 Ala. 417; 62 Am. Dec. 728; *Russell v. Hester*, 10 Ala. 535. Where it is apparent that the omission to do an act must release a party liable on the instrument, such omission is so clearly negligent, and so likely to result in injury to the pledgor, that there can be no doubt that the pledgee has failed in his duty, and ought to be held answerable for the consequences. So, if through the supineness of the pledgee a lien is lost or property within his reach is allowed to be removed or applied to other demands, his want of diligence and its injurious results are equally apparent. Hence holders of collateral security must be held remiss in their duties, and therefore liable to the pledgors when it appears that having judgments as collateral they failed to cause execution to issue and to be levied when they might have done so: *Harper v. Second Nat. Bank*, 12 Lea, 678; *Wood v. Morgan*, 5 Sneed, 78; or they allowed the lien of the judgment to expire when they might by proper measures have revived it and kept it alive: *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. So if collateral is secured by a lien which is lost through the pledgee's failure to prosecute proper proceedings to foreclose it: *Hazard v. Wells*, 2 Abb. N. C. 444; *Russell v. Weinberg*, 2 Abb. N. C. 422; *Northern Ins. Co. v. Wright*, 20 N. Y. Sup. Ct. 168; *Plymouth Co. Bank v. Gilman*, 6 Dak. 304; or the right to bring action on the collateral, whether secured by a lien or not, becomes barred by the statute of limitations because of the pledgee's inaction, there can be no doubt that he has not done his duty to the pledgor: *Semple etc. Mfg. Co. v. Detwiler*, 30 Kan. 386. In all these cases the want of diligence is so unquestionable, that the presump-

tion of negligence can scarcely be rebutted, though it is always open to the pledgee to show that no injury was suffered by the pledgor from the apparent want of diligence: *Steger v. Bush*, Smedes & M. Ch. 172. No extraordinary diligence is exacted of a pledgee in any event. All that the law requires is ordinary diligence, and whenever it is exercised, he is not liable, though it may appear that by greater diligence the collateral might have been collected and the pledgor saved from loss: *Miller v. Gettysburg Bank*, 8 Watts, 192; 34 Am. Dec. 449, and note; *Chaffe v. Purdy*, 43 La. Ann. 389; *Cardin v. Jones*, 23 Ga. 175; *Lamberton v. Windom*, 18 Minn. 506; *Slevin v. Morrow*, 4 Ind. 425; *Wells v. Wells*, 53 Vt. 1; *Reeves v. Plough*, 41 Ind. 204. Where promissory notes secured by mortgages were transferred as collateral, and the mortgages contained powers of sale under which the holder of the notes might, at any time when interest was due and unpaid, have had the mortgaged property sold, and thus compelled payment, the failure to exercise such powers resulting in loss of interest through depreciation in the property, the holder of the collateral was held liable for such loss. The court in its opinion said: "It is undoubtedly the law that the pledgee of a chose in action who receives it as collateral security is bound to use, not extraordinary care, as the master seems to have supposed, but ordinary or reasonable care or diligence to secure its payment when due: 1 Am. Lead. Cas. 402, 403; *Lawrence v. McCalmont*, 2 How. 426; *Kiser v. Ruddick*, 8 Blackf. 382. The law implies on the part of the pledgee, from the nature of the transaction, an agreement to use such care to protect the pledgor's interest and make the pledge available. Accordingly, if the pledge consists of indorsed negotiable paper, the pledgee must present it for payment at maturity, and, if it is not paid, must give notice to charge the indorser, or, if loss ensues, he will be liable to make it good: 1 Am. Lead. Cas. 123, 124; *McLaughan v. Bovard*, 4 Watts, 308; *Ormsby v. Fortune*, 16 Serg. & R. 302; and there are cases which go so far as to hold that the pledgee will be liable for neglecting to put the collateral in suit, when a prudent man would do it, if any loss results from the neglect: *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301; *Wakeman v. Gowdy*, 10 Bosw. 208; *Slevin v. Morrow*, 4 Ind. 425; *Ex parte Mure*, 2 Cox, 63; *Williams v. Price*, 1 Sim. & St. 581; *Lyon v. Huntingdon Bank*, 12 Serg. & R. 61; *Hoard v. Garner*, 10 N. Y. 261; but see 1 Am. Lead. Cas. 404. This being the law, we do not see how defendant can justify her neglect to collect the installments of interest as they accrued, especially when we consider how cheap and expeditious a means she had of enforcing payment in the powers of sale contained in the mortgages. We have no hesitation, therefore, in holding that, having neglected to enforce the payment of the interest when she could so easily have done so, she must herself be held responsible for it": *Whitin v. Paul*, 13 R. I. 42. The cases in which the holder of collateral has been held answerable for loss of the debt, through his failure to prosecute an action thereon, where the statute of limitation has not interposed through his inaction, are very infrequent, and we do not know of any in which his liability has been enforced, except when he was asked by the pledgor to take action and refused, or circumstances were called to his attention making it manifest to a man of ordinary intelligence that inaction must almost certainly result in loss. If it appears that the maker of the collateral was insolvent when it was transferred to the pledgee, and so continued, no laches will be imputed to the latter: *Powell v. Henry*, 27 Ala. 612. When the principal debt is paid, then the only duty of the holder of the collateral is to keep it safely until he can return it to the pledgor, and

he does not owe any duty to the latter, after such payment, to take steps for the collection of the collateral: *Overlock v. Hills*, 8 Me. 383.

The holder of negotiable securities, whether they consist of negotiable instruments or not, must exercise at least ordinary care in keeping them safely and thus preserving them from loss: *Petty v. Overall*, 42 Ala. 145; 94 Am. Dec. 634; Jones on Pledges, sec. 403-405, 410, and this duty does not terminate on the payment of the principal debt if the securities have not been surrendered to the pledgor. Thus where a bank received as collateral security certain bonds, coupons, and stocks, the title to which was transferable by delivery, and which, after the payment of the principal debt, were stolen from the custody of the bank through its failure to exercise ordinary care, it was held to be answerable for the loss: *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; but something more than the loss of the securities is required to make the holder answerable. Such loss must have resulted from his failure to exercise ordinary care: *Mills v. Gillbreth*, 47 Me. 320; 74 Am. Dec. 787; Jones on Pledges, secs. 510, 511. Therefore if they are lost by burglary or larceny without there being any want of ordinary care on the part of the holder, he is not answerable: *Winthrop Sav. Bank v. Jackson*, 67 Me. 590; 24 Am. Rep. 56; *Jenkins v. National etc. Bank*, 58 Me. 275; *Dearborn v. Union Nat. Bank*, 61 Me. 369. The duty of the pledgee is not to be measured, or necessarily to be judged, by the manner in which he takes care of his own property. It is merely to exercise ordinary care, and is not increased by the fact that he exercises unusual care and diligence in his own affairs and in the protection of his own interests, nor is it diminished by the fact that he is negligent and inattentive to his own interests as well as to those of others committed to his care. In all instances there must be exercised such care and diligence in the custody of collaterals as persons of common prudence would exercise under like circumstances in keeping similar property: *Third Nat. Bank of Baltimore v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Scott v. Crews*, 2 S. C. 522, 535.

If the property taken does not consist of choses in action to be collected by suit, but of stocks or other property which the creditor is given power to sell and to apply the proceeds to the payment of his debt, he may, by not acting promptly suffer the property to remain in his hands unsold until it is wholly or partly lost or destroyed, or has depreciated in value, so that it clearly appears that it would have been better for the pledgor if the pledgee had promptly exercised his power to sell; and then the question presenting itself for decision is, which of the parties must bear the loss of the creditor's inaction. If the pledgor has not demanded that the power to sell be exercised and the property disposed of, the authorities agree that the pledgee does not owe to him the duty of selling upon default in the payment of the principal debt, nor at any other particular time: *Colquitt v. Stultz*, 65 Ga. 305; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Richardson v. Insurance Co.*, 27 Gratt. 749; *Rozet v. McClellan*, 48 Ill. 345; 95 Am. Dec. 551; *Howard v. Brigham*, 98 Mass. 133; *O'Neill v. Whighman*, 87 Pa. St. 394; *Granite Bank v. Richardson*, 7 Met. 407. Whether the pledgor may, by notice to the pledgee, require him to sell and hold him answerable for such loss as may result from a delay in selling, is by no means well settled. It appears clear that he cannot insist upon a sale immediately. Some of the decisions proceed upon the theory that it is the duty of the pledgee not to be negligent in respect to the making of the sale, and that the fact that the pledgor had in vain requested a sale, may at least tend to prove negligence on the part of the pledgee in not making it: *Goodall v. Richardson*, 14 N. H. 572; *Franklin*

Sav. Inst. v. Preetorius, 6 Mo. App. 473. In one case it was proved that the pledgor of stocks as collateral told the pledgee that he wanted them sold if the principal debt was not paid when it fell due; that the debt became due in December, 1875; that the stocks about three months after that date were worth thirty dollars per share, and the pledgee sold them two years later for twenty-eight dollars per share. The trial court instructed the jury that if the pledgor gave notice of his wish that the stock be sold at the maturity of the note, then that it was the pledgee's duty to make such sale within a reasonable time, and that if he did not so sell, he was liable for the subsequent depreciation of the stock. This instruction was held to be erroneous. "The property," said the court, "as such, is still that of the pledgor, and of this the pledgee assumes the custody and care. The pledgee has *jus in re aliena*, a special right in the pledgee's property for the purpose of compelling the pledgor to pay the debt. The pledgee stands to a certain extent in a fiduciary relation, and therefore cannot ordinarily purchase the property when sold. The pledgor retains a double interest in having his debt paid and in the possible surplus; but as the pledgee has taken possession the pledgor can make the sale only through the pledgee; but if the pledgee has the right to make his claim out of the property and it has been put into his hands for this purpose, how can it be said there is a right in the pledgor to require the sale at a given time? This virtually asserts in him a right he has surrendered with the pledge. To say that the debtor has an absolute right to require the sale at a given time is to say that the creditor is not to exercise his judgment and skill in the management of his own special property. On the other hand, so far as the pledgor's interest is involved, the pledgee ought only to be responsible for negligence, not for failure which may be consistent with diligence, and even indicate vigilance and skill in calculating the chances of the market. Refusal to sell upon the request of the debtor may, on the other hand, tend to show negligence or want of reasonable care, it being merely a fact to be considered with other facts": *Franklin Sav. Inst. v. Preetorius*, 6 Mo. App. 473.

In a case in which it was claimed that the mode of selling property had not been such as was for the best interest of the pledgor, and had resulted in his loss, the trial court instructed the jury that the pledgee "was bound to use due diligence and care in the sale of the stock to protect the rights of the plaintiff; that he must use the same care, diligence, and prudence in the sale that a prudent man would in the sale of his own property." The course which the plaintiff contended had been injurious to him was the selling of a certificate of stock without dividing it into small lots. The instruction given by the trial court was pronounced erroneous, because by it "the jury may have been misled into the belief that the duty of the defendant was to exercise the same prudence and diligence which a prudent owner would exercise in determining the time when he would sell his own stock, and whether he would sell each certificate as a whole or in parcels"; and because the only duty of the defendant after he had determined to sell the stock "was to exercise reasonable care and diligence to obtain whatever the stocks were worth at the time he sold them": *Newsome v. Davis*, 133 Mass. 343. There is no doubt that it is the duty of the holder of collateral not to act under the influence of motives injurious to the pledgor, and the latter may recover damages for an injury resulting in a delay to make a sale of stock pledged as collateral, if the purpose of such delay was to enable the pledgee to perfect a scheme which it and its officers then entertained of depreciating

the stocks before offering them for sale: *Napier v. Central etc. Bank*, 68 Ga. 637.

The Liabilities of the holder of collateral securities may best be understood by considering his rights and duties, of which we have already treated; because he is for some purposes at least regarded as the owner of the property, he must be subject to some extent to the liabilities of an absolute owner. Thus, if stock has been transferred to him as collateral, so that he appears on the books of the corporation as a stockholder, he is liable to the same extent as an absolute stockholder in an action by creditors of the corporation to compel the payment of unpaid subscriptions: *Pullman v. Upton*, 96 U. S. 328; and also to actions to enforce the personal liability of stockholders in those states whose statutes or constitution impose a personal liability upon stockholders for the corporate debts or some portion thereof: *Bowden v. Farmers' Bank*, 1 Hughes, 307; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 137; *Magruder v. Colston*, 44 Md. 349; 22 Am. Rep. 47; *Crease v. Babcock*, 10 Met. 524, 545; *First Nat. Bank v. Higham Mfg. Co.*, 127 Mass. 563; *Rosevelt v. Brown*, 11 N. Y. 148; *Aultman's Appeal*, 98 Pa. St. 505; *Erskine v. Louvenstein*, 82 Mo. 301. In several of the states statutes have been enacted relieving holders of stock as collateral of this liability; and where such statutes are in force, it is competent to prove by parol evidence that though stock stood on the books of a corporation in the name of a person, yet that he in fact merely held them as collateral, and such proof being made, he is not answerable for the debts of the corporation: *McMahon v. Macy*, 51 N. Y. 155; *Burgess v. Seligman*, 107 U. S. 20; *Union Savings Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. The decisions maintaining the liability of the holders of stock as collateral for the debts of the corporation or for unpaid subscriptions proceed, we apprehend, upon the ground that the statutes imposing personal liability upon stockholders had intended to make answerable all persons who on the books of the corporation appear to be the owners of stock, and on whose financial responsibility the creditors have therefore probably relied. Hence, if a holder of stock as collateral does not appear on the books to be the owner of the stock, he is not personally answerable to the creditors of the corporation: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. Except in the case of corporate stocks, we have not met with any decision holding the owner of collateral security liable for anything except his violation of his duties to his pledgor. We have already referred to the duties of the pledgee to exercise ordinary care in the custody and preservation of the property, and his consequent liability for the non-observance of such duty. The interest which the pledgee has in the pledged property does not ordinarily entitle him to use it for his own purposes, if such use can diminish its value, or otherwise injure the pledgor: *McArthur v. Hewett*, 72 Ill. 358; *Thompson v. Patrick*, 4 Watts, 414; *Lawrence v. Maxwell*, 53 N. Y. 19; note to *Lucketts v. Townsend*, 49 Am. Dec. 736. "Where a pledge is made by a debtor to his creditor to secure his debt for a certain term, the law requires that the latter shall safely keep it without using it, so as to cause any detriment thereto; but if detriment happens within the term appointed, it must be set over against the debt according to the damage sustained": *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248. For a misuse or abuse of the property pledged, the pledgee is answerable to the pledgor, and the latter may, at his election, treat it as a conversion of the property, and recover damages accordingly: *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *De Tollenere v. Fuller*, 1 Mill. Const. 117; 12 Am. Dec. 616, and note. If the property

pledged is of such a character that use will not injure it, nor expose it to peril of loss, the pledgee does not incur liability by using it; and if it is of such a character that use is necessary in properly caring for it, then it becomes his duty to so use it that it will not suffer from its disuse: *Jones on Pledges*, sec. 394. If from the use of the property pledged profits are derived, the pledgee must account therefor to the pledgor, and apply the net proceeds of such use to the extinction of the debt: *Geron v. Geron*, 15 Ala. 558; 50 Am. Dec. 143; *Houton v. Holliday*, 2 Murph. 111; 5 Am. Dec. 522; *Woodard v. Fitzpatrick*, 9 Dana, 117. So if any profits accrue from property held as collateral, such profits, while they may be collected and retained by the pledgee, must be credited to the pledgor, or applied to the sum due from him, as where dividends accrue on pledged stock, or interest is collected on a security held as collateral: *Jones on Pledges*, secs. 398, 399. If property held as collateral consists of negotiable instruments, demand for and notice of non-payment of which is essential to preserve the liability of parties thereto, or of some of them, or action upon which is necessary to preserve some lien, or to prevent the operation of the statute of limitations, it is, as we have already shown, the duty of the holder to make such demand or give such notice, or to take such action as will prevent the loss of the lien or the right of action on the debt, and the failure to discharge either of these duties renders him liable to the extent of the loss sustained by the pledgor. A holder of collateral also becomes liable to the pledgor for any violation on the part of the former of the express or implied contract between them, and for the doing of acts inconsistent with such contract. On the payment of the debt and demand for a return of the property, the holder becomes liable for all damages resulting from his refusal to restore it: *Cuss v. Hygenbotam*, 100 N. Y. 248; *Farwell v. Importers' etc. Bank*, 90 N. Y. 483; *Merchants' etc. Bank v. Masonic Hall Trustees*, 62 Ga. 271. The pledgee is also answerable for any misappropriation of the collateral, whether made by himself or his agent: *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678; as well as for any surplus which may remain in his hands after the satisfaction of the principal debt: *Hunt v. Nevers*, 15 Pick. 500; 26 Am. Dec. 616; *Union Nat. Bank v. Roberts*, 45 Wis. 373; or such part of the principal debt as the collateral was given to secure: *Fridley v. Bowen*, 103 Ill. 633.

For an Unlawful or Unauthorized Use of Collateral the holder is generally, at the election of the pledgee, liable as for its conversion, as where the pledgee transfers or pledges the property without authority to do so: *Fay v. Gray*, 124 Mass. 500; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69. If, however, the pledge or transfer is not such as could injure the pledgor, nor in any way or to any extent inconsistent with his rights, and his property remains in such a condition that it could be delivered to him at any time when he should become entitled thereto, there is no conversion and therefore no liability: *Day v. Holmes*, 103 Mass. 306; *Heath v. Griswold*, 5 Fed. Rep. 573. So if the property held as collateral consists of a certificate of stock in a private corporation, the fact that it is sold or pledged without the consent of the pledgor, does not constitute a conversion if the pledgee retains in his possession ready for delivery an amount of stock equal to that held by him as collateral: *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282; *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311, and note. This rule is probably equally applicable to municipal and governmental bonds: *Stuart v. Bigler*, 98 Pa. St. 80. If, through the payment of the principal debt or otherwise, the right to hold the collateral terminates, and the pledgee refuses to deliver it on demand to the pledgor, the latter may sustain an action for its conversion:

Flowers v. Sproule, 2 A. K. Marsh, 54; *Lawrence v. Maxwell*, 53 N. Y. 19; *Decker v. Mathews*, 12 N. Y. 313; *McCalla v. Clark*, 55 Ga. 53; *Kullman v. Greenebaum*, 92 Cal. 403; 27 Am. St. Rep. 150. The same result follows when the pledgee, though he does not refuse to return the property fails to do so because he has wrongfully sold or used it, or has otherwise rendered himself without power to comply with his duty: *Gay v. Moss*, 34 Cal. 125; *Wheeler v. Newbould*, 16 N. Y. 392; note to *Lucketts v. Townsend*, 49 Am. Dec. 735. If the holder of collateral sells it without authority to do so, or, having authority to sell, does not pursue such authority so as to make the sale valid, the sale, at the election of the pledgor, may be regarded as a conversion of the collateral and the pledgee held liable therefor in an action of trover: *Nabring v. Bank of Mobile*, 58 Ala. 204; *Rosenzweig v. Frazer*, 82 Ind. 342; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779, or in any other appropriate proceeding: *Fowle v. Ward*, 113 Mass. 548; 18 Am. Rep. 534. If the sale was to the pledgee himself when he was not authorized to purchase, it may be treated as valid or not as the pledgor may elect. If he elects to affirm the sale, then it is valid for all purposes, and the only liability of the pledgee is to credit the pledgor with the proceeds of the sale or to otherwise account to him therefor: *Killain v. Hoffman*, 6 Ill. App. 200. If on the other hand, the pledgee elects to disaffirm the sale, then it must be treated as never having taken place, and therefore as creating no liability against the pledgee. He holds the property as before the sale with the duty to keep it safely, and the right to apply it to the satisfaction of his debt: *Bryan v. Baldwin*, 52 N. Y. 232. Though the holder of collateral has attempted to sell it and the form of bidding it in has been gone through with, yet if the sale was unauthorized and the stock never went out of the possession of the pledgee, and he at all times had it on hand so that it could be delivered to the owner, no liability for its conversion exists: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87.

The Measure of Damages for the Conversion of a collateral security by the holder thereof must, upon principle, extend to and be limited by the actual injury suffered by the pledgor. If an unauthorized or invalid sale is made, the pledgee cannot relieve himself from liability merely by accounting for the proceeds of the sale. He must account for and pay the actual value of the property at the time of the conversion: *Jefferson Bank v. Ohio Falls etc. Works*, 20 Fed. Rep. 65; note to *Robinson v. Hurley*, 79 Am. Dec. 505; *Hazzard v. Duke*, 64 Ind. 220; *Succession of Liles*, 24 La. Ann. 550; *Kiser v. Ruddick*, 8 Blackf. 382; *Noland v. Clark*, 10 B. Mon. 239; *Word v. Morgan*, 5 Sneed, 79; *Newcomb v. Baskett*, 14 Bush, 658; *First Nat. Bank v. Boyce*, 78 Ky. 42; 39 Am. Rep. 198; *Cushing v. Seymour*, 30 Minn. 301; *Daygett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; *Rumsey v. Laidley*, 34 W. Va. 721; 26 Am. St. Rep. 935; and in some instances the highest market value up to the time of the trial: *Fowle v. Ward*, 113 Mass. 548; 18 Am. Rep. 534; *Sturgis v. Keith*, 57 Ill. 451; *Markham v. Jardon*, 51 N. Y. 235; *Romaine v. Van Allen*, 26 N. Y. 309. If the collateral consists of promissory notes or instruments for the payment of money, doubtless the amount recoverable thereon by their terms is presumed to be the measure of damages for their conversion: *Hazzard v. Duke*, 64 Ind. 220. Sometimes, as in the principal case, the holder of collateral has surrendered it to the maker without having any right to do so, or has transferred it without authority, and with respect to cases of this class it has been insisted that the pledgee should be treated as electing to accept the security so transferred or surrendered at its face value, to be applied in satisfaction of his debt, irrespective of its actual value or of the injury

suffered by the pledgor from the improper transfer or surrender: *Wood v. Matthews*, 73 Mo. 481; *Cocke v. Chaney*, 14 Ala. 65; *Hawks v. Hinchcliff*, 17 Barb. 492. There is no doubt that a holder of collateral securities has no right to make a compromise by which they are surrendered on the payment of a sum less than that actually due thereon, and that he must respond for any damages actually sustained by the pledgor from so doing: *Union Trust Co. v. Rigdon*, 93 Ill. 458, 470, which, if the makers were solvent, is necessarily the face value of the instrument surrendered: *Depuy v. Clark*, 12 Ind. 427; *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294; but undoubtedly, upon principle, there is no reason why a holder of collateral making a compromise or any other unauthorized disposition thereof should be required to respond for damages which the pledgor has not suffered. If the compromise was advantageous and the amount realized all that could have been obtained, the pledgor is not entitled to any credit beyond the amount resulting from the compromise: *Exeter Bank v. Gordon*, 8 N. H. 66; and so where a security is improperly surrendered or otherwise converted, the measure of damages is not necessarily the amount due but is the actual value of the property converted, which in the event of the maker being insolvent, is nothing: *Potter v. Merchants' Bank*, 28 N. Y. 641; 86 Am. Dec. 273; *Vose v. Florida R. R. Co.*, 50 N. Y. 369; *Griggs v. Day*, 136 N. Y. 152; 32 Am. St. Rep. 704.

Remedies against Third Persons. — Every bailee may maintain an action against a third person, who while such bailee is in possession or entitled to possession of the subject of the bailment, seizes or converts it or otherwise injures it or interferes with the rights of the bailee to his damage: *Ekins v. Boston M. R. R. Co.*, 19 N. H. 337; 51 Am. Dec. 184; *Little v. Fossett*, 34 Me. 545; 56 Am. Dec. 671; *Brewster v. Warner*, 136 Mass. 57; 49 Am. Rep. 5; *American Dist. Tel. Co. v. Walker*, 72 Md. 454; 20 Am. St. Rep. 479. If a collateral security, as in the case of a warehouse receipt or bill of lading, entitles the holder to the possession of the property, he may maintain an action against any third person who interferes with such possession or does any other act prejudicial to the holder of the security. If the collateral consists of promissory notes or other evidence of indebtedness, the holder may maintain an action of trover or replevin against any one who unlawfully seizes, retains, or converts them. The object of taking security of this class of collateral is to obtain the proceeds thereof either through the voluntary action of the makers or by compulsory proceedings against them. The holder of the collateral may therefore sue thereon with like effect as if he were the absolute owner and he need not make his pledgor a party to the action nor otherwise take any notice of the pledge. He is at all times entitled to demand and receive the money due upon such securities, and whenever they are not paid when due to enforce payment by proper action: *Dix v. Tully*, 14 La. Ann. 460; *Jones v. Hawkins*, 17 Ind. 550; *Rowe v. Haines*, 15 Ind. 445; 77 Am. Dec. 101; *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301; *Hunt v. Nevers*, 15 Pick. 500; 26 Am. Dec. 616; *Van Riper v. Baldwin*, 85 N. Y. 618; *Kinney v. Kruse*, 28 Wis. 183; *Tarbell v. Sturtevant*, 26 Vt. 513; *Haydon v. Nicoletti*, 18 Nev. 290; *Houser v. Houser*, 43 Ga. 415; *Hilton v. Waring*, 7 Wis. 492. His right of action cannot be lost by the death of his debtor: *Huyler v. Dahoney*, 48 Tex. 234; *Bennett v. Stoddard*, 58 Iowa, 654, nor is it dependent upon the principal debt being due: *Jones v. Hawkins*, 17 Ind. 550. The amount of his recovery is in ordinary cases the full amount due on the collateral: *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219; 98 Am. Dec. 368; but if there exists any defense which might be asserted against the pledgor were he the plaintiff in the action, then the

recovery of the holder of the collateral may be limited to the amount due him upon the principal debt: *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219; 98 Am. Dec. 368; *Steere v. Benson*, 2 Ill. App. 560; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Valette v. Mason*, 1 Ind. 238; *Mayo v. Moore*, 28 Ill. 428.

If several securities are held as collateral for one debt, the holder cannot be compelled to surrender either until his debt is fully paid, and he may maintain actions upon any or all of the securities either at the same time or at different times, and the recovery upon one cannot impair the right to recover upon another, unless it has produced the satisfaction of the principal debt in whole or in part: *Andrews v. Scotten*, 2 Bland. 629; *Union Bank v. Laird*, 2 Wheat. 390; *Elder v. Rouse*, 15 Wend. 218.

Remedy by Suit on the Principal Debt. — The holding of collateral securities does not suspend the right of action upon the principal debt. Whenever it is due, the creditor may enforce its payment by action without taking any notice of the collateral: *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Marschuetz v. Wright*, 50 Wis. 175; *Dugan v. Sprague*, 2 Ind. 600; *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243; *Bank of United States v. Peabody*, 20 Pa. St. 454. Nor will the recovery of judgment upon the collateral affect the right to recover upon the principal debt: *Burnheimer v. Hart*, 27 Iowa, 19; 99 Am. Dec. 641; 1 Am. Rep. 209. Such judgment merely takes the place of the securities on which it was recovered, and stands, as they stood, as collateral security for the payment of the principal debt: *Harding v. Hawkins*, 141 Ill. 579. No agreement is implied from the acceptance of collateral that the creditor will first seek to satisfy his demand by enforcing the collateral. Hence the giving of a collateral cannot suspend the cause of action upon the principal debt in the absence of an express agreement for such suspension: *Mills v. Gould*, 14 Ind. 278; *Dugan v. Sprague*, 2 Ind. 600; *De Cardova v. Barnum*, 130 N. Y. 615; 27 Am. St. Rep. 538; *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243; *Cary v. White*, 52 N. Y. 138. In truth, even though there is an express agreement not to sue until the securities are collected and accounted for, unless they should first be returned, the right of action on the principal debt does not appear to be suspended. The only remedy in the event of the creditor bringing action thereon is to sue him for the damages resulting from the breach of his agreement: *Foster v. Purdy*, 5 Met. 442.

If the maker of paper transferred as collateral should wrongfully obtain possession of it, or wrongfully detain it after having rightfully been in his possession, the pledgee may maintain an action against him for the conversion thereof: *Way v. Davidson*, 12 Gray, 465; 74 Am. Dec. 604.

While the mere giving of a collateral does not suspend the right of action upon the principal debt, it may often become a material subject of inquiry in such action, because if it has been disposed of, or proceeds from it have otherwise been realized, they should be credited on the principal debt, and an issue respecting them may be tendered by the answer, and the plaintiff required to account for the proceeds of the collateral. So, though nothing has been realized from the collateral, yet if the failure to realize has arisen from such want of diligence that the holder is answerable for the face value of the collateral, or to any other extent, he can recover on the principal debt only so much thereof as remains unpaid after charging him with the amount of the collateral for which he has become answerable through his negligence or want of diligence: *Reeves v. Plough*, 41 Ind. 204. If the principal debt is secured by an indorsement, or guaranty, or other contract of

suretyship, the creditor's right of action against the indorser, guarantor, or surety is not suspended by reason of the existence of the collateral security, nor can any of them, in the absence of an agreement to the contrary, insist that the collateral security shall be first exhausted or pursued before maintaining an action against him: *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66; *Ross v. Jones*, 22 Wall. 576, 592. One whose liability is in the nature of surety is, however, interested in the collateral securities; he has a right to be subrogated to them upon his payment of the principal debt: *Jones v. Tincher*, 15 Ind. 308; 77 Am. Dec. 92; *Pott v. Nathans*, 1 Watts & S. 155; 37 Am. Dec. 456; and therefore any release or surrender of such collaterals may prejudicially affect his interests, and wholly or partly release him from liability under his contract of suretyship: *Baker v. Briggs*, 8 Pick. 121; 19 Am. Dec. 311; *Hayes v. Ward*, 4 Johns. Ch. 129; 8 Am. Dec. 554; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685; *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 66; *Fitchburg Bank v. Torrey*, 134 Mass. 239. So if the surety has taken collateral securities for the payment of the principal debt, the creditor is interested in them, and may insist upon their application to the payment of his debt: *Maure v. Harrison*, 1 Eq. Cas. Abr.; Jones on Pledges, secs. 523, 525, 526; *Taylor v. Farmers' Bank*, 87 Ky. 398; *Klapworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69; *Green v. Dodge*, 6 Ohio, 80; 25 Am. Dec. 736; *King v. Harman's Heirs*, 6 La. 607; 26 Am. Dec. 485; *Morrill v. Morrill*, 53 Vt. 74; 38 Am. Rep. 659.

Remedies on Choses in Action. — If the collateral consists of choses in action collectible by suit, the holder's remedy upon them is generally restricted to such suit. He is not, unless express authority to that effect has been conferred upon him by the pledgor, entitled to sell them: *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Union T. Co. v. Rydon*, 93 Ill. 458; *Whitteker v. Charleston G. Co.*, 16 W. Va. 717; *Fletcher v. Dickinson*, 7 Allen, 23; *White v. Phelps*, 14 Minn. 27; 100 Am. Dec. 190; *Wheeler v. Newbould*, 16 N. Y. 392: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default in payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge occupies the relation of trustee for the owner, and, as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, property can only be applied as security through the process of sale. Not so with bonds, mortgages, or promissory notes: *Wheeler v. Newbould*, 16 N. Y. 392"; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 584; 25 Am. Rep. 341.

The reason why a holder of choses in action as collateral is ordinarily not allowed to sell them but is required to proceed to collect them by suit, if necessary, is that they are not presumed to be readily marketable or to have a market value, and their sale would probably expose the pledgor to needless loss, and for want of their ascertainable market value, it would rarely be possible to know whether they had sold for a fair price or not. With respect to choses in action having an ascertainable market value, the reason for the rule does not exist and the rule is therefore inapplicable. In New Jersey coupons and bonds of a private corporation having been transferred as collateral, the question arose as to whether they could be sold by the pledgee, or whether it was his duty to retain them until they could be collected by suit, and the court of errors and appeals in deciding

the question, said: "When bonds of such a character, having several years to run before they become due, are deposited as collateral security for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold after demand and due notice like goods, chattels, and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, and the like choses in action, which in the absence of an agreement to that effect, the creditor cannot expose for sale because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them": *Morris Cunl etc. Co. v. Lewis*, 12 N. J. Eq. 329. The fact that a bond or coupon will not fall due for a long period of time, and therefore cannot be collected by suit within the time in which the parties apparently contemplated that the principal debt should be paid, constitutes an unanswerable reason for deciding that the holder of it as collateral should be allowed to sell it where it has a market value, at any time after the maturity of the principal debt, and apply the proceeds to the extinction of that debt. We apprehend, however, that the existence of this reason is not indispensable to the authority to sell, and that if the security held as collateral is one of a class having a market value, and being sold from time to time in the market as the stocks of corporations are, then that the pledgee has an implied authority to sell it under the same circumstances as would authorize a sale of such stocks had they been pledged as collateral for the same debt: *Water Power Co. v. Brown*, 23 Kan. 676; *Alexander etc. R. R. Co. v. Burke*, 22 Gratt. 254.

Remedy by Foreclosure. — If the collateral is not made available by voluntary payment or by suit thereon, then the only mode which can be lawfully pursued by the holder is to sell either by judicial sale or by a sale which, though not judicial, is authorized either by an express agreement or by the agreement which is implied from the contract of pledge. Whether in the case of ordinary choses in action, collectible by suit, a court of chancery will at the instance of a holder as collateral, direct them to be sold, is a doubtful question, but upon principle, relief must be denied where the holder has an adequate remedy by action at law against the makers of the collateral: *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717. If, however, for some cause not attributable to the holder of the collateral, he cannot pursue his action thereon without great difficulty, chancery may grant him relief by directing a sale, as where the maker of the collateral is not within the state, and has no property therein, so that no action against him could be effective unless prosecuted in the courts of another state or nation: *Donohoe v. Gamble*, 33 Cal. 340; 99 Am. Dec. 399; *Carter v. Wake*, L. R. 4 Ch. Div. 605. Unless an exception exists in the case of choses in action having no readily ascertainable market value and collectible by suit against the makers thereof, there is no doubt that in every case a holder of collateral may resort to equity and there obtain a decree fixing the amount for which the property is liable to be sold, and directing a sale to be made by an officer of the court and the proceeds to be applied to the payment of the principal debt: *Sharpe v. National Bank*, 87 Ala. 645; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497, and note, p. 503. The advantages of proceeding in chancery are that the amount of the debt and the right to sell the property for its payment are established beyond any further controversy, and the holder of the collateral has the right to bid at the sale, and may thus prevent any sacrifice of his interest for want of

bidders: *Newport etc. Co. v. Douglass*, 12 Bush, 673; *Quincy v. White*, 63 N. Y. 376.

The parties may by their contract declare the circumstances under which the holder of the collateral is authorized to sell it, and provide what steps shall be taken by him before such sale, and such agreement, unless fraudulent or contrary to public policy, is binding upon both parties, and a sale pursuant to it is valid: *McDowell v. Chicago etc. Co.* 124 Ill. 491; 7 Am. St. Rep. 381; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624; *Union T. Co. v. Rigdon*, 93 Ill. 458; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Carson v. Iowa City etc. Co.*, 80 Iowa, 638. If by the contract, the loan for which collateral is given, is made payable on one day's notice, and the holder of the collateral is authorized to sell without further notice, all notice of the time and place of sale is dispensed with, and the only obligation of the holder of the collateral is to sell it publicly and fairly for the best price he can obtain: *Maryland etc. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779. So where stocks were pledged, and the pledgee, in the event that they were not redeemed before a day specified, was "authorized to give the stock to any broker to sell on such day," it was held that this authorized a sale by any broker by private sale or in any other way: *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69.

Pledgee's Remedy by Sale. — If the parties do not make any express agreement concerning the power of the pledgee to sell and the time and manner in which it may be exercised, then one is implied and is to the effect that at any time after default in the payment of the principal debt, the holder of the collateral may demand that it be paid, or, in other words, that the pledged property be redeemed, and such demand not being complied with, may sell the property at public auction after first giving the debtor reasonable notice of the time and place of the sale, and a sale in the absence of such demand and notice is invalid: *McDowell v. Chicago etc. Co.*, 124 Ill. 491; 7 Am. St. Rep. 381; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624; *King v. Insurance Co.*, 58 Tex. 669; *Wilson v. Brannan*, 27 Cal. 258; *Merchants' Nat. Bank v. Thompson*, 133 Mass. 482; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Locketts v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723; *Gay v. Moss*, 34 Cal. 125; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Brightman v. Reeves*, 21 Tex. 70; *Corynham's Appeal*, 57 Pa. St. 474. While there are many decisions declaring that the pledgor must have reasonable notice of the time and place of the sale in order that he may know when his opportunity to redeem will terminate, and may, if he can, procure persons to attend the sale and bid thereat, the authorities are singularly silent with respect to the giving of notice of the sale to the general public. Without some such notice it is clear that the property must ordinarily be sacrificed for want of bidders; for to bring out bidders persons interested in the class of property to be sold must in some way have their attention called to the sale. The authorities do, however, make it clear that in the absence of any controlling agreement to the contrary the sale shall be at public auction, and we infer from this that it must be preceded with such public notice as is ordinarily given for auction sales of like property in the same locality. If the agreement between the pledgor and the pledgee purports to authorize the latter, on default of the payment of the principal debt to make the money out of the pledged property in the best way he can and to sell the same for that purpose, it was held that the power should be construed to be such a power as exists in respect to pledges generally, and that it must be pursued in the same way, and therefore can

be exercised only upon reasonable notice to the debtor to redeem and of the time and place of sale: *Goldsmidt v. First M. E. Church Trustees*, 25 Minn. 202. In one instance in which the contract expressly stipulated for notice to the debtor, it was held that a sale without such notice should be sustained where it had become impossible to give it: *City Bank v. Babcock*, 1 Holmes, 181. The better opinion appears to be, that in the event of the making demand for payment and the giving notice of the sale to the debtor becoming impossible, the creditor cannot proceed without them, but must resort to a suit in equity to foreclose the pledge: *Strong v. National etc. Ass'n*, 45 N. Y. 718; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Garlick v. James*, 12 Johns. 150; 7 Am. Dec. 294. There is no doubt that a debtor may waive the demand to redeem and the notice of the time and place of the sale: *Fitzgerald v. Blocher*, 32 Ark. 742; *Hamilton v. State Bank*, 22 Iowa, 306; and that actual notice of such time and place may render unnecessary formal notice from the pledgee: *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254. It appears to be possible by agreement between the parties to authorize the pledgee to purchase the pledged property at a sale made by himself: *Chouteau v. Allen*, 70 Mo. 290; *Appleton v. Turnbull*, 84 Me. 72. In the absence of such an agreement, a sale of the pledgee to himself, whether his name is used or the property is bid off in the name of another for his benefit, is void, and leaves him the owner of the pledge as before such sale: *Canfield v. Minneapolis etc. Ass'n*, 14 Fed. Rep. 801; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 8 Iowa, 277; 74 Am. Dec. 302; *Stokes v. Frazier*, 72 Ill. 428. If the sale as made was not authorized, the debtor may regard it as a conversion, and recover damages therefor: *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; or as having no effect upon his rights and as leaving him still the owner of the property subject to the pledge. The sale even when to the pledgee himself is not absolutely void, however irregular and unauthorized it may be. The debtor may elect to affirm it, and his election should be presumed and held to be irrevocable if he, with full knowledge of the facts rendering the sale invalid, delays for an unreasonable time to proceed against it, or to take any measures to set it aside and to recover the property: *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279; *Gilmer v. Morris*, 80 Ala. 78; 60 Am. Rep. 85; *Hayward v. National Bank*, 96 U. S. 611; *Lacombe v. Forstall*, 123 U. S. 562; *McDowell v. Chicago Steel Works*, 22 Ill. App. 405.

SOPER v. BROWN.

[136 NEW YORK, 244.]

WILLS—ISSUE, WHO ARE.—The word “issue,” when used in a will, without any qualifying words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as “descendants.” Hence, if a testator devises property to his daughter E. for life, and declares that upon her death it shall go, in fee-simple, as tenants in common, to her issue if more than one, and in default of such issue, to all the testator’s grandchildren who may be then living, and when the daughter E. dies her children are all dead, but children of theirs are living, such children are comprehended in the term “issue” and take the property in preference to the grandchildren of the testator.



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